Neutral Citation Number [2024] EWHC 51 (Ch)

CR 2022 000915

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (CHD)
IN THE MATTERS OF BRAMBER ROAD MANAGEMENT LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 18/01/2024

Before :

ICC JUDGE BARBER

- -

Between :

(1) JEREMY SINCLAIR CLARKE
(2) EUAN JOHN LAWSON

Claimants

- and –

(1) YASMIN AZIM LAKHA
(2) THE FORWARD PROJECT
(3) BRAMBER ROAD MANAGEMENT LIMITED

Defendants

- -

Ms Chantelle Staynings (instructed by **Keystone Law)** for the **Claimants**
Mr John Churchill (instructed by **Carbon Law Partners**) for the **First and Second Defendants**

Hearing dates 25, 26, 27 and 30 October 2023

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Approved Judgment

This judgment was handed down remotely by email and MS Teams. It will also be sent to The National Archives for publication. The date and time for hand-down is 9.30 a.m. on 18 January 2024.

ICC Judge Barber

1. This is a Part 8 claim relating to the affairs of Bramber Road Management Limited ('the Company') brought by two members of the Company.

Background

2. Bramber Court is a small development of 4 individual office units, formed around an inner courtyard ('the Courtyard'). The Courtyard is an amenity space for the occupiers of the 4 units. Each of the unit owners enjoys rights of access to and from Bramber Road over the driveway and the Courtyard.

3. The Company was incorporated on 16 June 1986. At all material times it has had an issued share capital of 4 Ordinary Shares of £1 each. It owns the freehold interest in the Courtyard. The Company's business is to manage and maintain the Courtyard.

The parties

4. The Claimants are civil partners and are the joint owners of freehold interests in Unit 3 and Unit 4 Bramber Court. Mr Lawson is a solicitor and the managing partner of Simkins, a media law firm. Mr Clarke is a former solicitor and now runs a small property investment and development business.

5. The Claimants purchased Unit 4 from Cavendish White (Holdings) Limited in 2003. They purchased Unit 3 in 2019 from Mr John Blake. Units 3 and 4 have been developed into office suites which the Claimants rent out to local small businesses with shared communal facilities including shared meeting rooms and catering facilities. Mr Clarke operates and manages his property business from an office within Unit 4.

6. The First Defendant, Mrs Lakha, has owned Unit 2 since 16 December 2013, She became the registered proprietor of Unit 2 as the executrix of the estate of her late husband Azim Lakha, who had purchased Unit 2 in 1997 from Freeholdings SA. Mrs Lakha occupies Unit 2 for the purposes of her business 'Elocute', which offers private elocution lessons to young children and others. Since 14 January 2022, Mrs Lakha has owned Unit 2 jointly with her daughters, Ms Shamim Lakha and Dr Parviz Lakha.

7. The Second Defendant ('TFP') is the owner of the freehold interest in Unit 1. TFP purchased Unit 1 in 2008 from Sand and Gravel Association Limited. TFP is a private company limited by guarantee. It is a registered charity whose objects include the preservation and safeguarding of mental health sufferers. Its current directors are Ms Hutchison and Mr Venis Olafisoye. It has four trustees, comprising Ms Hutchison, Mr Olafisoye, Mr Stephen Bashorun and Ms Vera Haywood.

8. The Third Defendant is simply a nominal party to the proceedings in order to be bound by any judgment.

9. Save where stated otherwise, references to 'the Defendants' in this judgment should be read as references to the First and Second Defendants.

The Company's members

10. The Company's articles envisage that each unit owner will hold one share in the Company. In practice however, whilst stock transfer forms may have been executed at the time of given unit transfers, the register of members, which is in evidence before me, has not been updated consistently to reflect changes in unit ownership.

11. According to the register of members, the current members are as follows:

(1) The Claimants are registered as joint holders of one share from 21 February 2003 (the date when Unit 4 was acquired and the date of the corresponding stock transfer form). Entries in the register of members confirm the date of the share transfer and the 'date of entry as a member' as 21 February 2003. The Claimants' entitlement to be registered as members in respect of this share is not disputed by the Defendants.

(2) The Claimants are also registered in the register of members as joint holders of 1 share from 9 May 2019 (the date that they acquired Unit 3). The stock transfer form in evidence before me bears the same date. Their entitlement to be entered on the register of members in respect of Unit 3, however, is contested by the Defendants.

(3) Sand and Gravel Association Limited is registered in the register of members as the holder of 1 share. This company was the first purchaser of Unit 1, which it purchased in 1985. It sold Unit 1 to TFP in 1998, but remains on the register of members.

(4) Flamecrest Limited is registered as the holder of 1 share from 31 January 1995. It purchased Unit 3 from the Ophthalmological Society in 1995. It has long since ceased to own that Unit, but remains on the register of members.

12. The Defendants do not appear on the register of members and have not sought to be entered on it. They have, however, always asserted an entitlement to exercise voting rights as members.

The Company's directors

13. It is common ground that the First Claimant, Mr Clarke, is a director of the Company and that he has been a director since 2003, following the purchase by the Claimants of Unit 4.

14. The Claimants contend that following the purchase of Unit 3 in 2019, the Second Claimant, Mr Lawson, was appointed a director of the Company. The Defendants dispute this.

15. The First Defendant, Mrs Lakha, claims to be a director of the Company.

16. Ms Hutchison, a director of TFP, also claims to be a director of the Company.

Overview

17. For many years the Company was run on a fairly informal basis and its books and records were not kept up to date. The Claimants contend that at all material times until the parties fell out, unit owners (including the Defendants) conducted themselves on

the basis that the rights of each unit owner were the same: to be entered on the register of members in respect of 1 share in the Company and to appoint a nominee director of the Company (with one vote per unit as either member or director).

18. This, the Claimants say, preserved the rights of all unit owners by ensuring that each had an equal say in the management of the Company and the expenses incurred by it. The Claimants maintain that as relations between the Claimants and Defendants have deteriorated, the Defendants have attempted to seize control of the Company for their own personal benefit at both shareholder and director level. The Defendants accept that the parties have fallen out but deny any improper conduct. They maintain that Mr Clarke's behaviour has become increasingly disruptive, an allegation which Mr Clarke in turn denies. The parties having been unable to resolve their differences, on 28 March 2022 the Claimants issued these proceedings.

The claim

19. The Claimants' claim is for the following relief:

(1) a declaration that each 'Unit owner' (as defined in the articles of association of the Company) is entitled to exercise the following rights on becoming a member of the Company (without limitation to any other rights contained in the Company's articles of association or elsewhere):

(a) the voting rights set out in Regulations 54 and 55 of Table A (as incorporated into the Company's articles of association) and/or section 284 Companies Act 2002, including the right to exercise one vote in respect of each ordinary share of £1.00 each ('the Ordinary Share') held by him on a vote on a written resolution or on a resolution on a poll taken at a meeting; and

(b) the right to appoint one director by notice to the Company, including the right to remove and/or replace any director so appointed by notice to the Company;

(2) a declaration that the following persons were and are entitled to be entered into the Company's register of members:

(a) with effect from 3 June 1998, the name of 'The Forward Project' as holder of 1 Ordinary Share in respect of Unit 1;

(b) with effect from 16 December 2013, the name of 'Yasmin Azim Lakha' as holder of 1 Ordinary Share in respect of Unit 2;

(c) with effect from 9 May 2019, the names of 'Euan John Lawson and Jeremy Sinclair Clarke' as joint holders of 1 Ordinary Share in respect of Unit 3; and

(d) with effect from 13 March 2003, the names of 'Jeremy Sinclair Clarke and Euan John Lawson' as joint holders of 1 Ordinary Share in respect of Unit 4;

(3) a declaration that the First Claimant was appointed company secretary of the Company by board resolution dated 28 November 2018 and remains company secretary at the date of this Order;

(4) a declaration that the Second Claimant was appointed a director of the Company on 9 May 2019 and remains a director at the date of this Order;

(5) a declaration that the First Defendant was removed as co-chairman of the board of directors of the Company by board resolution dated 18 November 2018 and no valid board resolution has been passed appointing any person (including the First Defendant) as chairman of the board of directors since the resignation of John Blake on 9 May 2019;

(6) a declaration that various filings on the register maintained by the Registrar of Companies are inaccurate and/or were made without the authority of the Company;

(7) a declaration that a purported resolution dated 23 June 2021 is invalid and of no effect;

(8) a declaration that a purported resolution dated 17 November 2021 is invalid and of no effect and/or is factually inaccurate;

(9) an order pursuant to section 125 CA 2006 that the First Claimant be authorised to make the appropriate entries in the Company's register of members to reflect the matters set out at (2) above and that such entries shall have retrospective effect from the dates set out at (2) above;

together with costs and attendant relief.

20. The Claim is opposed by the Defendants. By his skeleton argument, Mr Churchill described the Claim as 'ill-founded' and contended that it 'should not have been brought'.

Factual Context

21. I summarise below some of the key clash points between the parties. There were others, but in the interests of brevity I shall not recite them all. The following will suffice to give context to the Claim.

(1) Board meeting of 18 November 2018

22. On 14 November 2018, two directors of the Company, Mr Clarke and Mr Blake (by then owner of Unit 3) convened a board meeting for 28 November 2018. Mrs Lakha and Ms Hutchison of TFP instructed a firm of solicitors known as GPT Law Practice to write to Mr Clarke and Mr Blake on 22 November 2018 (purportedly on behalf of the Company) asserting (without giving reasons) that the meeting had 'not been called in accordance with the constitution of [the Company]'. The meeting went ahead and neither Mrs Lakha nor Ms Hutchison attended. At the meeting it was resolved (among other things):

(a) to appoint Mr Clarke as company secretary;

(b) to notify Companies House that the registered office was Unit 4;

(c) to appoint Mr Blake as chairman in place of Mrs Lakha.

23. The Defendants deny that the meeting was validly called or that these resolutions were validly passed.

(2) Entry of the names of the Claimants in the register of members on 9 May 2019 in respect of one share relating to Unit 3

(3) Appointment of Mr Lawson as nominee director in respect of Unit 3

24. From late 2018, the Claimants were negotiating with Mr Blake for the purchase of Unit 3. Mrs Lakha was opposed to the sale. On 17 December 2018, she wrote to Mr Clarke and Mr Blake, claiming that a planning restriction prevented the sale. She wrote again to Mr Blake (cc-ing Ms Hutchison) in connection with this on 16 February 2019.

25. The planning restriction relied upon was contained in a planning consent dated 27 April 1984. This provided (with emphasis added):

> 'The premises to be created by the change of use hereby permitted shall be divided and used as four separate self-contained Units, no one of which shall exceed 2500 sq ft *or be occupied* by any person (which such expression shall include a company, firm, or other organisation or body) who *occupies* any other such Unit.'

26. This restriction was at best a restriction on occupation. It was not the Claimants' intention to occupy two Units; simply to own two.

27. The Claimants checked the position with the London Borough of Hammersmith and Fulham ('the Council') prior to purchasing Unit 3. They specifically asked the Council to confirm that their purchase would not breach the planning restriction. On 2 April 2019, the Council wrote to confirm that:

> 'For clarification the condition relates to the occupation of more than one Unit in the development by the same firm or company. It does not relate to ownership.'

28. Mrs Lakha then attempted to persuade Mr Blake not to sell Unit 3 to the Claimants, offering to find him another purchaser. This was unsuccessful.

29. On 9 May 2019, the Claimants purchased Unit 3 from Mr Blake. At the same time, Mr Blake transferred his one share in the Company to the Claimants.

30. Mr Clarke entered his name and that of Mr Lawson in the register of members as the new joint owners of Mr Blake's share. The date of acquisition given in the register is 9 May 2019.

31. Mr Clarke maintains that he and Mr Lawson agreed between themselves that Mr Lawson should be the nominee director of the Company in respect of Unit 3. Shortly thereafter, he filed notice of Mr Lawson's appointment (and of Mr Blake's resignation) as of 9 May 2019 at Companies House.

32. By email sent on 18 May 2019, Mr Clarke wrote to Mrs Lakha and Ms Hutchison (among others) informing them of recent developments. He wrote:

> 'I am writing to let you know that CLP [Clarke Lawson partnership] has acquired Unit 3, Bramber Court from John Blake. My partner, Euan Lawson, has been appointed as a director of [the Company] as the owner of Unit 3 … Between myself and Mr Lawson, as the owner of two Units we also now hold 50% of the shares of [the Company].'

33. On 10 October 2019, Mr Lawson emailed Mrs Lakha and Ms Hutchison (among others) enclosing a copy of the TR1 dated 9 May 2019 relating to the Claimants' purchase of Unit 3 and a copy of the stock transfer form of the same date confirming the transfer of Mr Blake's one share in the Company to the Claimants.

34. Over two years later, in 2021, the Defendants denied that the Claimants were entitled to be entered in the register of members in respect of the one share transferred by Mr Blake in 2019.

35. Whilst they did not immediately do so, the Defendants now also deny that Mr Lawson was validly appointed as a director.

(4) The June 2021 resolution

36. On 9 June 2021, Mrs Lakha emailed the Claimants and Ms Hutchison attaching a proposed resolution (the 'June 2021 resolution'). This provided as follows:

> '1. Given that the intent of the Bramber Court Development at 2 Bramber Road London W14 9PA/B/W was to be as four different Units with four unconnected Units in the interests of equity as per initial planning documents from 1984, the intent of the structure of the management company as a reflection of the needs of members of Bramber Court would be the same.
>
> 2. Therefore, in the interests of equity in terms of the equitable running of [the Company] and its operational functions, in the instance that two Units are acquired by a connected members (family members, business partners etc), no two Directors or voting members of the board of [the Company] should be connected either as family members, business partners etc. However family members and business partners and associates can act as alternates subject to voting and can be invited by voting members of the board to be non-voting members of the board.
>
> 3. Each Voting Member and Director of the board has one vote.'

37. Mrs Lakha went on to state in her email that 'the current Voting Members and Directors of [the Company]' were Ms Hutchison, Mrs Lakha and Mr Clarke; and that the 'current non-voting members of [the Company]' were Mrs Lakha's daughter, Dr

Lakha (described as 'Also Alternate') and Stephen Bashorun. She invited votes on the resolution by email by a given date.

38. Ahead of the deadline, the Claimants wrote to dispute the validity of the proposed June 2021 resolution both through their solicitors and in their own right. They also confirmed that, without prejudice to their position, they voted against it. Notwithstanding their objections, the Defendants purported to pass it by emailed votes on 17 June 2021.

39. The Claimants maintain that the purported June 2021 resolution is invalid and of no effect.

(5) The November 2021 board meeting

40. On 29 September 2021, Mrs Lakha, without prior board agreement or approval, arranged the filing at Companies House of a CS01 confirmation statement stating that Mr Clarke, Mrs Lakha, John Blake and Ms Hutchison were members of the Company.

41. On 1 October 2021, the Claimants solicitors, Keystone Law, wrote to complain about the CS01 having been filed without any authority and stated:

> 'The shareholder information on the register [maintained by Companies House] needs to be corrected to reflect: the transfer of Shareholding 1 by John Blake to [the Claimants]. As regards Shareholding 2, the register also needs to be corrected to reflect our clients as the joint owner of one share. We attach extracts from the Register of Members as proof of their entitlement. We invite you to make the necessary filings within 7 days, failing hearing from you that you have done so, we shall assume that you have no objection to our clients taking that step on the company's behalf. Whilst disagreement remains between you and our clients on a number of matters, the fact that our clients jointly own two shares in the Company cannot be disputed and the directors have a duty to ensure that the records at Companies House are accurate.'

42. By her letter of reply dated 6 October 2021, Mrs Lakha suggested, for the first time, that the board of directors needed to consider whether to register the Claimants as members in respect of Unit 3. She also stated that:

> 'This is the first time that we as directors and the Company has seen or known of these Extracts from the Register of Members that you have sent and the first time such a request regarding shares has been made to the company by your clients.'

She went on to claim that the board of directors would need to consider the request to be registered as members.

43. The Claimants maintain that this was a clear mischaracterisation of the letter of 1 October 2021, as it was not a request to register the Claimants in the Company's register of members. Rather, it was a complaint about the unauthorised filing of an

inaccurate CS01 at Companies House. The Claimants contend that Mrs Lakha's mischaracterisation of Keystone Law's letter of 1 October 2021 was plainly intended to overcome the obvious difficulties posed by the two-month time limit in s771(1) CA 2006.

44. Shortly thereafter, on 3 November 2021, the Defendants purported to convene a board meeting for 17 November 2021 to consider, among other things, the issue of chairperson and the transfer of a share. Notice of the meeting was given to Ms Hutchison, Mr Clarke and Mrs Lakha and two 'non-voting members' (purportedly Dr Lakha and Mr Bashorun). No notice was given to Mr Lawson, who was not invited to attend.

45. Ahead of the meeting, by letter dated 15 November 2021, the Claimants by their solicitors wrote to Mrs Lakha (copied to Ms Hutchison), contending that, as a director of the Company, Mr Lawson was entitled to notice of the meeting of 17 November 2021. The letter warned that as the Defendants had failed to give Mr Lawson proper notice of the proposed meeting, any resolutions passed at the meeting would be invalid. The letter also warned that the Claimants intended to bring proceedings. The letter concluded by stating that Mr Clarke would attend the meeting but did not intend to participate in it, in light of its flawed basis.

46. The meeting went ahead. Mr Clarke attended in a 'non-participating' capacity and took notes. The minutes of the meeting prepared by the Defendants provided as follows:

(1) By paragraph 1:

> '… The Board Agreed that the meeting between John Blake and JC [Mr Clarke] held three years ago (28th November 2018) was questionable with regard to its validity and the issues raised, not least pertaining to that of Chairperson. The Board agreed that [Mrs Lakha] should continue in her role as Chair. It was agreed that the role was to oversee the running and maintenance of the courtyard.'

(2) By paragraph 2:

> 'The Board agreed that Mr Euan Lawson was not ever appointed as a Director of [the Company]';

(3) By paragraph 4:

> '… It was deemed that the 1st of October 2021 was the first date that the request for this transfer of share [relating to Unit 3] was lodged with the Company - being that this was the first time that the Company had seen it'

(4) By paragraph 4, that the Board would refuse to register the transfer of Mr Blake's share to the Claimants on the basis that:

> ‘The attached Resolution was passed deeming that the entry into the Ledgers was unlawful and that the Company had a role in protecting the restrictions on the Building including those laid out in 1984 planning documents which were created at the same time as the Covenants and the Company’s Articles thus deeming that Bramber Court and [the Company] was intended for units with unconnected owners. The Board agreed that there should be no deviation from this restriction.
>
> Therefore, in accordance with the company’s Articles, the resolution was passed for a Notice of Refusal to transfer the Share from Mr Blake to the joint ownership of [Mr Clarke] and Mr Lawson. [Mrs Lakha] and [Ms Hutchison] signed a written copy of the Resolution at this point in the meeting. The letter acting as the Notice of Refusal to transfer the share.. was to be sent to Mr Turkie as the legal representative of both [Claimants], within the [2 month] timeframe in accordance with the Company Articles.’

(5) By paragraph 4:

> ‘The Board agreed that it had a voice and that as per Company Articles all of the three Directors had a voice and that it was 1 vote per each of the three Directors’;

and that Unit 2 (Mrs Lakha’s Unit) was the Company’s registered office.

47. The document entitled ‘Written Resolution by The Board’ dated 17 November 2021, which was signed by Mrs Lakha and Ms Hutchison and referred to in the minutes, provided as follows:

> ‘1.October the 1st 2021 is the first request by Mr Clarke and Mr Lawson to the Board for the Transfer of Share from Mr Blake to a joint ownership of the share by Mr Clarke and Mr Lawson.
>
> 2. In accordance with the Company’s Articles, the Directors may refuse a share and have two months from the time that the request has been lodged with the Company to send a Notice of Refusal.
>
> 3. There are numerous issues surrounding the documents sent by Mr Turkie (Mr Clarke’s lawyer) in particular the dates and method of these entries in the company’s register. Mr Lawson was unable to provide proof of ownership in November 2019 and the entry provided predates this. It is therefore Board’s firm belief that these were created and added without the Consent of the Board. It is the Board’s view that the entry into the register of members by Mr Clarke into 2019 was unlawful and was carried out without the consent of the Board of Directors or the Company.

> 4. All Directors, Mr Clarke included, had been notified in a letter dated the 17th of December 2018 of the planning restriction with regards to ownership that were set out in the 1984 Planning Documents at Provision 002 and the Board of Directors of the Company therefore object to any deviation from this and John Blake was notified of this planning requirement again on 16th February 2019 and sent a copy of it.
>
> 5. It is therefore the Board's view that any sale or transfer of share is not in keeping with the intent or purpose of the building or requirements of the building nor is in the best interests of the Company which has a role in protecting the building and restrictions pertaining to it.
>
> 6. This Resolution is therefore a Notice of Refusal to register the transfer of the share from Mr Blake into the joint ownership of Mr Clarke and Mr Lawson. This decision was taken by the Board of Directors of the Company.
>
> 7. Furthermore, any the statutory books or registers of the Company held anywhere other than the registered office of [the Company] should be returned to the Company's registered office Unit 2…'

48. A further purported notice of refusal was sent by the Defendants on 25 November 2021 to Keystone Law. Again, the only basis of refusal was the planning restriction 'with regards to ownership'.

49. The Claimants dispute the validity of the 17 November board meeting and the resolutions purportedly passed at it. They also contest the Defendants' purported refusal to register the share transfer.

The Issues

50. No directions for pleadings were given in this case. There is however an agreed schedule of issues. The schedule was prepared for case management purposes, before the parties filed any trial witness statements. Any references to given witness statements in the schedule are therefore out of date, as the references are to an initial round of witness statements rather than the statements prepared for trial. The schedule does however remain useful in setting out the key issues and a broad summary of the parties' positions on each.

51. That the function of the schedule was only to set out the key issues and 'in broad summary' the parties' positions on the same (rather than to confine the parties to their position summaries on each issue *to the letter*, as suggested by Mr Churchill) is readily apparent, not only from the fact that all witness statement references in the schedule are out of date (see above), but also from the directions given by Deputy ICC Greenwood (as he then was) in his order of 15 July 2022, listing the claim for trial before me and providing for exchange of skeleton arguments in the run up to trial in the usual way. The schedule of issues was never intended to displace the function of skeleton arguments. I do not read paragraph 4 of the order of 15 July 2022, which

precluded further amendment of the schedule of issues save by consent of all parties or further order, as detracting from that conclusion. At trial, both sides raised a variety of points in their skeleton arguments and oral submissions which were not expressly set out, on an 'issue by issue' basis, in the schedule, but were plainly in the purview of the agreed issues and the schedule read as a whole. Most if not all material developments were heralded in the skeleton arguments, both sides were afforded adequate opportunities to address the same and neither side sought an adjournment. In my judgment it would be contrary to the overriding objective to impose on the Claimants (or indeed the Defendants for that matter) the restrictions proposed by Mr Churchill. For all these reasons, I reject his submissions on the approach to be taken to the schedule of issues. Moreover even if, contrary to my conclusion, permission to amend the schedule is required, I confirm that I am prepared to grant to both sides permission to amend their summary positions as set out in the schedule in relation to each issue in order to reflect their amplified positions as developed at trial before me in the manner that ultimately occurred.

52. The issues set out in the schedule (as referred to in the recitals to the order of Deputy ICC Judge Greenwood (as he then was) dated 15 July 2022) ('the Schedule') are as follows:

(1) Issue 1: Is each Unit Owner entitled (upon registration as a member) to exercise the voting rights set out in Regulations 54 and 55 of Table A and/or section 284 Companies Act 2006, being one vote in respect of each ordinary share of £1.00 each held by him on a vote on a written resolution or on a resolution on a poll taken at a meeting?

(2) Issue 2: Is each Unit Owner entitled to appoint one director by notice to the Company, including having the right to remove and/or replace any director so appointed by notice to the Company?

(3) Issue 3: With effect from 13 March 2003, were the names of "Jeremy Sinclair Clarke and Euan John Lawson" entitled to be entered on the Company's register of members as joint holders of 1 Ordinary Share in respect of Unit 4?

(4) Issue 4: With effect from 9 May 2019, were the names of "Euan John Lawson and Jeremy Sinclair Clarke" entitled to be entered on the Company's register of members as joint holders of 1 Ordinary Share in respect of Unit 3?

(5) Issue 5: Was Mr Clarke appointed company secretary of the Company by board resolution dated 28 November 2018 and/or at any other time? If so, does he remain company secretary?

(6) Issue 6: Was Mrs Lakha removed as co-chairman of the Board of Directors of the Company by board resolution dated 28 November 2018? If so, has any valid board resolution being passed appointed any person as chairman of the board of directors since the resignation of John Blake on 9 May 2019?

(7) Issue 7: Was Mr Lawson appointed a director of the Company on 9 May 2019 and/or at any other time? If so, does he remain a director?

(8) Issue 8: Were the following filings at Companies House inaccurate and/or done without the authority of the Company:

a. The AD02 filed on 25 February 2020 notifying the alternative location for the inspection of registers of the Company at Unit 2 …;

b. The PSC07 filed on 25 February 2020 notifying that Mr Clarke had ceased to be a person with significant control ("PSC");

c. The PSC07 filed on 25 February 2020 notifying that Mr Lawson had ceased to be a PSC;

d. The TM01 filed on 25 February 2020 notifying the termination of the appointment of Mr Lawson as a director;

e. The TM02 filed on 25 February 2020 notifying the termination of the appointment of Mr Clarke as company secretary;

f. The AD01 filed on 25 February 2020 notifying the change of registered office address to Unit 2;

g. The TM01 filed on 2 October 2019 notifying the termination of the appointment of Mr Lawson as a director.

(9) Issue 9: is the purported resolution dated 23 June 2021 invalid and of no effect?

(10) Issue 10: is the purported board resolution dated 17 November 2021 invalid and of no effect and/or factually inaccurate?

53. Issues 1 and 3 are now largely uncontentious. It is not disputed that upon registration as a member, each unit owner is entitled to exercise the voting rights set out in Regulations 54 and 55 of Table A and/or section 284 Companies Act 2006, being one vote in respect of each ordinary share of £1.00 each held by him on a vote on a written resolution or on a resolution on a poll taken at a meeting. Nor is it disputed that the names of the Claimants, Mr Clarke and Mr Lawson, as joint holders of 1 Ordinary Share in respect of Unit 4, were validly entered on the Company's register of members in 2003 following their acquisition of Unit 4 and one share in the Company in that year.

54. The more contentious issues are Issues 2, 4, 5, 6, 7 and 9. The resolution of Issues 8 and 10 will largely follow from the court's determination of these Issues.

Approach to the evidence

55. On behalf of the Defendants, Mr Churchill reminded me of the guidance given in the judgment of Leggatt J (as he then was) in Gestmin v Credit Suisse [2013] EWHC 3560 (Comm) at [15-22]. He also referred me to the speech of Lord Pearce in Onassis v Vergottis [1968] 2 Lloyd's Rep 402 at 468.

56. Naturally I take such guidance into account. I also acknowledge that I do not have the benefit of hearing evidence from any of the original shareholders in the Company. How the affairs of the Company were conducted in its early years can therefore only

be ascertained from its historic books and records and Companies House filings which, in keeping with many companies of this nature, are not comprehensive.

Written Evidence

57. I have read the following trial witness statements and their respective exhibits:

(1) the third witness statement of Jeremy Clarke dated 31 August 2023;

(2) the fourth witness statement of Jeremy Clarke dated 31 August 2023;

(3) the second witness statement of Mrs Yasmin Lakha dated 3 February 2023;

(4) the second witness statement of Pauline Hutchison dated 3 February 2023; (5) the first witness statement of Dr Parviz Lakha dated 3 February 2023.

I also read and considered other documents contained in the trial bundle, to which reference will be made where appropriate.

58. Mr Churchill objected to the inclusion of certain documents in the trial bundle. At paragraph 25 of his skeleton argument, he maintained that the Claimants should not have included in the trial bundle (i) the Defendants' earlier (non-trial) statements, filed in these proceedings and (ii) documents from separate county court proceedings between the parties over unpaid service charges and related issues. Mr Churchill maintained that it set 'at naught' the specific directions given by Deputy ICC Judge Greenwood by his order of 15 July 2022 if the Claimants were permitted to widen the scope of the material before this court to include such material.

59. In relation to (i), the Defendants' earlier witness statements were filed in answer to the claim. They are plainly of relevance to determination of the issues set out in the Schedule, as addressed in Judge Greenwood's order. Indeed the Schedule itself contains copious references to these witness statements and at points is difficult to understand without referring to them. To the extent that the Defendants' earlier statements in these proceedings differ in any material respect from their trial statements, they are also potentially relevant on the issue of credibility. For all these reasons I reject Mr Churchill's informal application to exclude the same from the bundle.

60. In relation to (ii), save to confirm the extremely sorry state of relations between the parties, the 36 pages of documents relating to the county court proceedings included in the trial bundle add little if anything of relevance to the issues and other evidence already before me. Given the lateness of the application to exclude the documents relating to the county court proceedings and the limited time available at trial to hear oral submissions on that application, however, I shall not formally exclude these documents. For the purposes of the proceedings before me, I shall instead simply disregard any matters raised in the evidence filed in the county court proceedings save to the extent that any such matters are either agreed or if not agreed are also raised in the trial witness statements filed in these proceedings.

Oral testimony

61. I heard oral testimony from Mr Clarke for the Claimants and from Mrs Lakha, Ms Hutchison and Dr Lakha for the Defendants.

The witnesses

62. In oral testimony, Mr Clarke was open and direct. He took care to listen to the questions put to him and to answer those questions. Whilst his memory (as with that of any witness), was far from perfect (one example being his mis-recollection of the timing of correspondence regarding the installation of CCTV at the premises), I am satisfied that he answered all questions put to him honestly and to the best of his recollection and ability.

63. Mr Churchill submitted that Mr Clarke's written evidence did not comply in all respects with PD 57AC and invited the court to draw adverse inferences about Mr Clarke's credibility as a witness in consequence of such non-compliance. In this regard he relied upon the approach taken by HHJ Pearce in Cumbria Zoo Co Ltd v The Zoo Investment Co Ltd [2022] EWHC 3379 (Ch) at [59]. In my judgment, any non-compliance with PD 57AC in the making of Mr Clarke's trial witness statements was minor and does not warrant such adverse inferences.

64. Mrs Lakha fared less well in the witness box. From the evidence overall, it was clear that on several occasions, she lied and persuaded herself of alternative truths to suit her case. There were marked inconsistencies between her oral testimony and contemporaneous documentation.

65. One example was her claim (introduced for the first time at trial) that she had been appointed as a director of the Company at a meeting of members in (variously) 2011 or 2012. This will be examined in more detail later in this judgment.

66. Another example was Mrs Lakha's claim that the Council had told her personally that ownership and occupation were one and the same for the purposes of the 1984 planning restrictions. This flew in the face of the correspondence from the Council in evidence which stated the opposite: see [25] above.

67. A further example was Mrs Lakha's claim that the Solicitors Regulation Authority ('SRA') had told her that they had issued Mr Lawson with a warning over Companies House filings, when in fact the SRA had written to Mr Lawson by email dated 19 May 2020 confirming that they had found no evidence of misconduct.

68. There were also marked and material inconsistencies between Mrs Lakha's written and oral testimony. Mrs Lakha stated in her second witness statement, for example, that she had no recollection of seeing the Claimants' letter dated 18 May 2019 until receipt of Mr Clarke's witness statement which exhibited it. In cross-examination however she accepted that she had received the letter and even volunteered that she had been shocked by it at the time.

69. Overall, I have come to the conclusion that Mrs Lakha was an unreliable witness and that, save where uncontentious or supported by contemporaneous documentation, her testimony should be viewed with considerable caution.

70. Ms Hutchison found herself in a difficult position as a result of her loyalty to Mrs Lakha. In what was plainly an act of solidarity with Mrs Lakha in context, Ms Hutchison introduced new evidence for the first time at trial that she, together with Mrs Lakha, had been appointed as a director of the Company at a meeting of members in 2011/12. This was inconsistent with Companies House filings from 2008 in evidence, bearing Ms Hutchison's own signature, which stated the date of her appointment as a director to be 29 April 2008. This aspect will be addressed in more detail later in this judgment.

71. From her oral testimony overall, it was clear that much of Ms Hutchison's evidence and understanding of what had taken place over the period 2011 onwards had come came from information provided informally by Mrs Lakha and accepted by Ms Hutchinson on trust. Ms Hutchinson confirmed that she had not personally read the planning restriction before agreeing to the November 2021 resolution, for example. In oral testimony she stated 'I had faith that Mrs Lakha had checked things out.'

72. It was also clear that Ms Hutchison's written evidence was not in all respects her own; some of it read identically to that of Mrs Lakha and contained the same inaccuracies. Paragraph 28 of Ms Hutchinson's second witness statement and Paragraph 54 of Mrs Lakha's second witness statement, for example, were in identical terms; each asserting that the maker of the witness statement had no recollection of seeing the Claimants' letter dated 18 May 2019 until receipt of Mr Clarke's witness statement which exhibited it. In oral testimony Ms Hutchison accepted that she had received the email dated 18 May 2019 and that it was 'not necessarily true' that she had first had sight of it on receipt of Mr Clarke's witness statement. When it was put to her that she had allowed someone to put together a witness statement supporting Mrs Lakha's case, Ms Hutchison replied: 'It's possible that happened'. Ms Hutchison's credibility was not greatly assisted in this respect by the revelation that Mrs Lakha had agreed to indemnify TFP in respect of the costs of the proceedings.

73. Ms Hutchison did have moments of candour. She openly accepted, for example, that the appointment of directors representing given unit owners was treated as a formality. At other times, however, it was clear that she struggled to reconcile her instinctive desire to tell 'the whole truth' with her wish to do the best she could for her friend Mrs Lakha.

74. Overall, while Ms Hutchison was undoubtedly truthful in her testimony in certain respects, I have come to the conclusion that aspects of her testimony should be viewed with caution.

75. Dr Lakha's written evidence was narrow in scope and of limited probative value in determining the issues before the court. Whilst she was understandably partisan in certain respects, overall, I am satisfied that she did her best to answer questions put to her honestly and to the best of her recollection and ability.

Articles of association: approach

76. Mr Churchill reminded me that the articles and memorandum of a company bind each member as if they were separately signed and sealed by each of them: s15 Companies Act 1985 and s33 Companies Act 2006.

77. On questions of interpretation, he submitted that:

(1) the articles and memorandum of association of a company must be construed and interpreted in accordance with principles analogous to those applicable in the interpretation of contract: Towcester Racecourse Limited v The Racehorse Association Limited [2002] EWHC 2141 (Ch) at [16];

(2) the court is seeking by an iterative process to identify what is the meaning of the language by which the parties have chosen to express their agreement: Wood v Capita Insurance Ltd [2017] AC 1173;

(3) the court should not invoke commercial commonsense and surrounding circumstances to undermine the language used by the parties: Arnold v Brittan [2015] AC 1619 at [17]. The clearer the contractual words are, the less willing the court should be to depart from the natural meaning of the words used: ibid, at [18]. Commercial common sense should be judged at the time that the contract was signed and should not be invoked retrospectively because it subsequently appears imprudent: ibid at [19-20];

(4) when considering Table A articles and those which have been specifically adopted by the Company, the two sources of a company's constitution

> '… must be construed together and effect given, so far as possible, to every provision; it is only if the express articles are inconsistent with the incorporated regulations of Table A that the former will override the latter….'

Re William Steward (Holding) Ltd [1994] BCC 284 per Gibson LJ at 289.

78. I accept such guidance with gratitude.

The Company's articles

79. The Company's articles include the following in respect of membership of the Company:

> 'MEMBERSHIP
>
> 2. In this and the following Articles:
>
> "Unit" means an office Unit (of which there are four) adjoining the Property for the time being managed by the company pursuant to sub-Clause (A) of Clause 3 of the Memorandum of Association.
>
> "Unit owner" means the person or persons who own the freehold of a Unit, and so that, whenever two or more persons are for the time being joint owners of any one Unit, they shall for all the purposes of these Articles be deemed to constitute one Unit owner.

3. The subscribers to the Memorandum of Association of the company shall be duly registered as Members of the company in respect of the Shares for which they have signed such Memorandum. Save as aforesaid no Shares shall be allotted or transferred to any person who is not a Unit owner.

(a) If any Unit Owner parts with all interest in the Unit held by him, or if his interests therein for any reason ceases and determines, he or, in the event of his death, his legal personal representative shall transfer his share in the company to the person or persons becoming Unit Owner of the Unit in his place.

(b) The price to be paid on the transfer of every Share under this Article shall, unless the transferor or transferee otherwise agree, be its nominal value.

(c) If the holder of a Share (or his legal personal representative) refuses or neglects to transfer it in accordance with this Article, one of the directors, duly nominated for that purpose by a resolution of the Board, shall be the attorney of such holder, with full power on his behalf and in his name to execute, complete and deliver a transfer of his Share to the person or persons to whom the same or to be transferred hereunder; and the Company may give a good discharge for the purchase money and enter the name of the transferee of the said Share in the Register of Members as the holder thereof.

4. If a member shall die or be adjudged bankrupt, his legal personal representative or representatives or the trustee in his bankruptcy shall be entitled to be registered as a member of the company, provided he or they shall for the time being be the Unit Owner of the Unit formally held by such deceased or bankrupt member.

5. The Directors may refuse to register any transfer of Shares and shall so refuse in the case of any transfer made in contravention of the foregoing provisions.'

80. Regulations 23 to 26 of Table A are also incorporated into the articles:

'TRANSFER OF SHARES:

23 The instrument of transfer of a share may be in any usual form or in any other form which the directors may approve and shall be executed by or on behalf of the transferor and, unless the share is fully paid, by or on behalf of the transferee.

24 The directors may refuse to register the transfer of a share which is not fully paid to a person of whom they do not approve and they may refuse to register the transfer of a share

on which the company has a lien. They may also refuse to register a transfer unless –

(a) it is lodged at the office or at such other place as the directors may appoint and is accompanied by the certificate for the shares to which it relates and such other evidence as the directors may reasonably require to show the right of the transferor to make the transfer;

(b) it is in respect of only one class of shares; and

(c) it is in favour of not more than four transferees.

25 If the directors refuse to register a transfer of a share, they shall within two months after the date on which the transfer was lodged with the company send to the transferee notice of the refusal.

26 The registration of transfers of shares or of transfers of any class of shares may be suspended at such times and for such periods (not exceeding thirty days in any year) as the directors may determine'.

81. In respect of directors, the articles provide:

'DIRECTORS

13 The first Director or Directors of the Company shall be the person or persons named in the statement delivered under Section 13 of the Act.

14 (a) Regulation 64 in Table A shall not apply to the company.

(b) the maximum number and minimum number respectively of the Directors may be determined from time to time by Ordinary Resolution in General Meeting of the company. Subject to and in default of any such determination there shall be no maximum number of Directors and the minimum number of Directors shall be one. Whensoever the minimum number of the Directors shall be one, a sole Director shall have authority to exercise all the powers and discussions by Table A and by these Articles expressed to be vested in the Directors generally, and Regulations 89 in Table A shall be modified accordingly.

(c) The Directors shall not be required to retire by rotation and Regulations 73 to 80 (inclusive) in Table A shall not apply to the company….

…

19 The Directors shall manage the business of the Company, and all the powers of the Company which are not by the

> Statutes, these Regulations or the Regulations of Table A which apply to the Company required to be exercised by the Company in general meeting shall be exercised by the Directors'.

82. The effects of disapplying Regulations 73 to 80 of Table A is that the articles are silent in relation to the appointment of directors. Among the various regulations so disapplied is Regulation 78 of Table A, which provides:

> '78 …. the company may by ordinary resolution appoint a person who is willing to act to be a director either to fill a vacancy or as an additional director and may also determine the rotation in which any additional directors are to retire'.

83. The following regulations of Table A relating to directors' meetings are incorporated:

> 'PROCEEDINGS OF DIRECTORS
>
> 88 Subject to the provisions of the articles, the directors may regulate their proceedings as they think fit. A director may, and the secretary at the request of a director shall, call a meeting of the directors. It shall not be necessary to give notice of a meeting to a director who is absent from the United Kingdom. Questions arising at a meeting shall be decided by a majority of votes. In the case of an equality of votes, the chairman shall have a second or casting vote. A director who is also an alternative director shall be entitled in the absence of his appointor to a separate vote on behalf of his appointor in addition to his own vote.
>
> 89 The quorum for the transaction of the business of the directors may be fixed by the directors and unless so fixed at any other number shall be two. A person who holds office only as an alternative director shall, if his appointor is not present, be counted in the quorum.
>
> …
>
> 91 The directors may appoint one of their number to be the chairman of the board of directors and may at any time remove him from that office. Unless he is unwilling to do so, the director so appointed shall preside at every meeting of directors at which he is present. But if there is no director holding that office, or if the director holding it is unwilling to preside or is not present within five minutes after the time appointed for the meeting, the directors present may appoint one of their number to be chairman of the meeting.'

84. In respect of expenses for the Courtyard, the articles provide as follows:

> 'EXPENSES

> 23 The Unit Owners shall from time to time, and whenever called upon by the company so to do, contribute equally, or in such proportions as the Directors may determine, to all expenses and losses which the company shall properly incur on their behalf, and in respect of which they are not otherwise bound to contribute in their capacity as Unit Owners.'

85. I shall now consider the Issues, starting with Issue 2.

Issue 2: Is each Unit Owner entitled to appoint one director by notice to the Company, including having the right to remove and/or replace any director so appointed by notice to the Company?

86. The Claimants maintain that each unit owner/member is entitled to appoint one director by notice to the Company, including having the right to remove and/or replace any director so appointed by notice to the Company. They contend that historically, each unit owner has appointed a director by notice to the Company without any board or members' resolution, including the appointments of Mrs Lakha and Ms Hutchison. The Claimants' case is that the articles have been amended by conduct. In the alternative they maintain that the circumstances have given rise to an estoppel by convention such that the Defendants are estopped from denying the Claimants' right to appoint a director in respect of units 3 and 4.

87. The Defendants have wavered in the past on the issue of who holds the power to appoint directors under the articles. By the time of the Schedule of Issues, however, their stance was that the power to appoint directors lay with the members exercising their powers under Regulations 54 and 55 of the Table A Regulations. The Defendants deny that any amendment of the articles by conduct has taken place and deny that any estoppel by convention has arisen. They maintain that the appointment of a director has to be approved by the shareholders.

88. As will become clear, the Defendants' stance on Issue 2 has certain unintended consequences for them. Neither Defendant is a registered member of the Company. Sand and Gravel Limited remains a registered member of the Company but I was taken to no evidence that it has played any part in the affairs of the Company since selling its unit. This (and other difficulties posed by the Defendants' stance) was spelt out in some detail at paragraph 118 of the Claimants' skeleton argument. I shall return to this aspect in due course.

89. I turn, then, to the articles. As will be seen from [81] to [83] above, the articles disapply the relevant provisions of Table A relating to the appointment of directors, without replacing them with any other express provisions. They are therefore silent on how directors are to be appointed and how that right is exercised. CA 2006 is also silent on the appointment of directors (save on incorporation of the Company).

90. Mr Churchill submitted that directors may be appointed by the directors if this power is delegated to them in the articles, otherwise it is only members who have an inherent power to appoint directors. In this regard, he relies upon Mortimore on Company Directors (3rd ed) at [6.42] and [6.46] and Worcester Corsetry Ltd v Witting [1936] Ch 640.

91. Ms Staynings argued that the position is a little more nuanced than that, submitting that a more accurate statement of the legal position is that, where a company's articles are silent, the court may seek to construe them to determine whether power actually lies.

92. I accept Ms Staynings' submissions on this issue. The approach espoused by Ms Staynings is demonstrated by the Worcester case itself. In Worcester, the Court of Appeal construed the articles *as a whole,* (including a temporary power of appointment given to the directors and a power for the general meeting to increase or reduce the number of directors), before concluding that the articles left the power to appoint with the members.

93. On a proper analysis, the reasoning in Worcester is plainly based upon the specific articles under consideration and the point (as summarised in the judgment of Lawrence LJ at p650) that:

> 'Unless you can find that that inherent power has been handed over by the company to the directors, I think they [ie the members] retain that power as a natural result of their having the power to increase their board of directors'.

94. In contrast, the Company's articles, in my judgment, point to the power being handed over by the Company to the directors. Article 19 provides that the powers of the Company are to be exercised by the directors *unless* they are *required* to be exercised by the Company in general meeting *by statute or the articles.* Unlike Worcester, there are no other articles that are only consistent with the general meeting retaining the power to appoint directors. Article 14(b), for example, is clearly limited to the determination of the maximum and minimum number of directors.

95. As a matter of construction, therefore, I conclude that the effect of Article 19, construed in the context of the articles as a whole, is to confer the power to appoint directors on the directors themselves.

96. The next question is whether the articles have been varied by agreement. In this regard, I remind myself that it is for those asserting an agreement (in this case the Claimants) to prove it.

97. Notwithstanding that articles must normally be amended by special resolution (s.21 CA 2006), they may also be amended by agreement, including informal agreement (s. 33 CA 2006, Cane v Jones [1980] 1 WLR 1451) or by acquiescence shown by a long course of dealing (Ho Tung v Man on Insurance Company Ltd [1902] AC 232).

98. The Duomatic principle is expressly preserved by s281(4) CA 2006. For the Duomatic principle to apply, it is sufficient that all members entitled to vote either gave their agreement to a course of action or so conducted themselves as to make it inequitable to deny that they had given their approval. As Neuberger J (as he then was) explained in EIC Services Ltd v Phipps [2003] BCC 931 at [3]:

> '… it was possible in principle for the issue and allotment of the bonus shares to have been authorised, other than through the approval of a general meeting, by virtue of the so-called

> principle in re Duomatic Ltd [1969] 2 Ch 365 that where the articles of a company required a course of conduct to be approved by a group of shareholders at a general meeting, that requirement could be avoided if all members of the group, being aware of the relevant facts, either gave their approval to that course, or so conducted themselves as to make it inequitable for them to denied that they had given their approval. Whether the approval was given in advance or after the event … and whether members of the group gave their consent in different ways at different times, did not matter'.

99. Before the Duomatic principle can be satisfied, the shareholders who are said to have assented must have the appropriate knowledge. As put by Neuberger J in the EIC case at [135]:

> 'If a shareholder is not even aware that his 'assent' is being sought to the matter, let alone that the obtaining of his consent is at least a significant factor in relation to the matter, he cannot, in my view, have the necessary 'full knowledge' to enable him to 'assent', quite apart from the fact that I do not think he can be said to 'assent' to the matter if he is merely told of it.'

100. It is not necessary, however, to demonstrate explicit, active consent. Instead, the authorities are clear that consent (or conduct that makes it inequitable for a member to deny that consent has been given) can take the form of acquiescence or agreement inferred from conduct.

101. In Re Bailey, Hay & Co Ltd [1971] 1 WLR 1357, for example, Brightman J held that there was Duomatic consent to the appointment of a liquidator where only two of five members voted in favour of the appointment at a general meeting. He reasoned at 1366H-1367C:

> 'Admittedly three of the five corporators did not vote in favour of the resolution, but they undoubtedly suffered it to be passed with knowledge of their power to stop it… What these corporators did and did not do [for the four years afterwards] points, in my view, to one conclusion only. The conclusion is that they outwardly accepted the resolution to wind up as decisively as if they had positively voted in favour of it. If corporators attend a meeting without protest, stand by without protest while their fellow-members purport to pass a resolution, permit all persons concerned to act for years on the basis that that resolution were duly passed and rule their own conduct on the basis that the resolution is an established fact, I think it is idle for them to contend that they did not assent to the purported resolution'.

102. In Sharma v Sharma [2013] EWCA Civ 1287, the court considered the question whether members had authorised a director to acquire certain businesses for her own benefit. The Court of Appeal held that Duomatic consent could be inferred in

circumstances where two of three members had remained silent at a meeting where the acquisition was discussed. The Court held that it would be unconscionable for them to keep quiet initially and only raise objections after the director had acted on the basis that consent had been given.

103. In Re Home Treat Ltd [1991] BCC 165, Harman J held at 168 that the silence of the majority shareholder to a change in the company's objects to allow it to carry on business as a provider of nursing homes was as good as acquiescence, and thereby constituted assent by conduct.

104. The principle was applied at first instance in re BW Estates Ltd [2016] BCC 814 to the alteration of articles. HHJ Purle QC at [28] held that there was a 'consistent course of conduct' by the sole extant shareholder by which he 'informally sanctioned the exercise of all the directors' powers by one director alone which thereby operated as an informal amendment to all variation of the articles'.

105. In Re Sherlock Holmes International Society Ltd [2017] 2 BCLC 14 ('Re Sherlock'), it was held that there was an amendment to the articles by conduct to amend the provisions requiring a director to be a member of the company.

106. The learned judge in Re Sherlock (at [72]) reasoned thus:

> 'Agreements can be inferred from conduct (Blackpool and Fylde Aero Club Ltd v Blackpool BC [1990] 3 All ER 25…. Modahl v British Athletic Federation [2001] EWCA Civ 1447…), and there is no reason in principle why that cannot apply to an agreement to amend the constitution of a company (as in Re Home Treat Ltd [1991] BCLC 705). Moreover, the conduct from which agreement may be inferred may include acquiescence in circumstances where the members that their ascent was being sought or where there was some reason why conscience demanded that they object sooner rather than later (Sharma v Sharma [2013] EWCA Civ 1287…). However, conduct may be ambiguous. A court should not infer an agreement from conduct where such an agreement is only one of several equal possibilities. Where conduct alone is relied upon, that conduct must lead to the conclusion that on the balance of probabilities the members intended to amend the articles and, further, intended to make the particular amendment contended for'.

107. The court in Re Sherlock also confirmed (at [75]) that it is not possible simply to waive articles of association:

> 'the "waiver" explanation was legally incorrect since the articles' provisions as to the appointment and removal of directors binds the company in general meeting unless and until they are amended (see Imperial Hydropathic Hotel v Hampson (1882) 23 Ch D 1)'.

108. The court in Re Sherlock further observed (at [76]) that:

> 'Whilst it is in theory possible to amend the articles to cater for a one-off event, the more natural amendment is one which changes the rules for the future as well'.

109. The principle was again applied to the appointment of directors in Kaye v Oxford House (Wimbledon) Management Co Ltd [2019] EWHC 2181 (Ch). In that case, there had been non-compliance with regulation 76(b) of Table A, which requires notice to be given proposing a director for appointment or reappointment: see [11]. None of the shareholders had previously taken issue with this until the claimant submitted that none of the current board had been validly appointed. It was held (at [138]):

> '… it is clear that the business of the company in terms of the appointment of directors, has been carried on for some time without the members requiring compliance with the requirements of reg. 76(b). Following from the judgment of Neuberger J (as he then was) in EIC Services Ltd v Phipps [2003] EWHC 1507 (Ch)… it would be inequitable, in my judgment, for any of the members now to deny that they have given their approval to not requiring compliance with the relevant parts of reg.76(b) so that the Duomatic principle applies. This effects [sic] not only the resolutions passed on 1 June 2019, but also those in December 2018 when Mr Drake and Mr Scott were appointed.'

110. With this guidance in mind, I consider the evidence.

The historical company documents

111. From the historical documents in evidence, I find that Mr RPC Dickson was the original sole director of the Company and that a Mr P Howe was the first company secretary. I further find that the subscribers to the memorandum were Ms Alison Dillon and Ms Tracey Brown.

112. Minutes recording the 'resolutions of the director of [the Company]' dated 4 September 1987 provide inter alia:

> 'Transfers
>
> It was Resolved that the following duly stamped transfers of subscribers' shares, signed by both the transferor and the transferee, be approved and registered, and that the sum of £1 per share be called up and paid forthwith by the transferees to the Company…'

113. Details of two share transfers are then given, recording the transfer of Ms Dillon's share to Cumac Financiera SA and the transfer of Ms Brown's share to The Ophthalmological Society of the United Kingdom and The Faculty of Ophthalmologists (hereafter, 'the Ophthalmological Society').

114. The minutes of 4 September 1987 go on to confirm that applications for allotments of the two remaining shares had been received from Freeholdings SA and Sand & Gravel Association Limited. The minutes provide (at paragraph 2):

> 'It was Resolved that the applicants be approved and that the allottees be registered accordingly'.

115. By 4 September 1987, Cumac Financiera SA, The Ophthalmological Society, Freeholdings S A and Sand & Gravel Association Limited had each become Unit owners.

116. The minutes of 4 September 1987 went on to provide:

> 'APPOINTMENT OF DIRECTORS
>
> It was Resolved that George Thurwall, J O'Bayda, Rodney McMahon and Madelaine Margaret Hallendorff be and are hereby appointed additional Directors of the Company with effect from today's date.
>
> RESIGNATION OF DIRECTOR
>
> It was reported that a letter of resignation had been received from Mr R P C Dickson resigning from his position as Director of the company with effect from today's date. It was Resolved that his resignation be and is hereby accepted.
>
> RESIGNATION OF SECRETARY
>
> It was reported that a letter of resignation had been received from Mr P A C Howe resigning from his position as Secretary of the Company with effect from today's date. It was resolved that his resignation be and is hereby accepted.'

The minutes are then signed by Mr Dickson.

117. From the register of members in evidence before me, I am satisfied that Sand and Gravel Association Limited, Cumac Financiera SA, the Ophthalmological Society and Freeholdings SA were all registered as members of the Company. I am further satisfied that the members of the Company remained the same until 1995: see paragraph [140] below.

118. From later minutes of a general meeting of the Company on 8 December 1987, which all four members attended, it is clear that the first four directors appointed following a sale of the units were 'nominee' directors; that is to say, each director was nominated by and represented a different unit owner/member of the Company. I so find. According to the minutes of the general meeting of 8 December 1987, Mr Thirlwall represented Sand and Gravel Association Limited, Mr McMahon represented Cumac Financiera SA, Ms Hallendorf represented the Ophthalmological Society and Mr Obayda represented Freeholdings SA.

119. The minutes of the general meeting of 8 December 1987 make express reference to Mr Dickson's sole director's resolution dated 4 September 1987. The minutes also expressly 'note' that as a result of Mr Dickson's resolution dated 4 September 1987, Mr Thirlwall, Mr Obayda, Mr McMahon and Ms Hallendorff had been appointed additional directors of the Company with effect from that date. It will be seen that the members of the Company were expressly informed at the AGM, qua members, not only of the appointment of these four directors, but also of the fact that the appointments were by way of formal resolution.

120. No resolution was passed by members at the general meeting of 8 December 1987 that such director appointments be continued. This is perhaps unsurprising, given my construction of the articles and the fact that regulations 73 to 80 of Table A are disapplied by article 14 of the same. The minutes of the general meeting do however record the members' 'agreement' that a Mrs Talbot (of Sand and Gravel) be invited to act as Company Secretary and that Mr Thirlwall (of Sand and Gravel) should act as Chair of the Company. This was a slight blurring of the boundaries.

121. The next minutes in evidence are minutes of a board meeting which took place on 8 June 1988. It is clear from the record of attendees and apologies that the directors of the Company remained the same at this stage. The board minutes of 8 June 1988 record that the minutes of the general meeting held on 8 December 1987 were approved and signed by the Chairman. The board minutes of 8 June 1988 also provide by paragraph 4:

> 'The Board agreed that an Annual General Meeting should be held on 8th June, 1988, for the purpose of adopting the Report and Accounts for 1986 and 1987'.

122. That is to say: the notice requirements of regulation 38 of Table A were dispensed with and the AGM took place the same day as the board meeting. Whilst no minutes of the AGM of 8 June 1988 were in evidence, given the timing of the AGM and the waiver of the usual notice requirements, I consider it legitimate to conclude that the directors attending the board meeting simply went on to represent the corporate members of the Company at the AGM. That pattern was repeated in subsequent years. I refer by way of example to the minutes of the board meeting held on 16 March 1989, addressed below.

123. The minutes of the next board meeting held on 16 March 1989 contain confirmation that the minutes of the board meeting of 8 June 1988 were approved and signed by the Chairman. There is no reference to any minutes of a general meeting held on 8 June 1988 being approved and signed.

124. Again, the minutes of the board meeting on 16 March 1989 contain a provision that:

> 'The Board agreed that an Annual General Meeting should be held on 16th March, 1989, for the purpose of adopting the Report and Accounts for 1988.'

125. The board minutes of 16 March 1989 also record Mr Thirlwall informing the board that he planned to retire later that year. The minutes do not, however, include any resolutions regarding the appointment of any successors.

126. No minutes of the AGM held on 16 March 1989 appear to have been produced; the minutes of the next board meeting in evidence, of 13 March 1990, again simply refer to the board minutes of 16 March 1989 being approved. No other board minutes are recorded as having been approved at the board meeting of 13 March 1990. I consider it legitimate to conclude that there were no other board meetings between 16 March 1989 and 13 March 1990.

127. By the time of the board meeting of 13 March 1990, there had been some changes at board level, although the members of the Company remained the same. It is clear from the 'footer' on the first page of the board minutes, which listed directors, that Mr McMahon and Mr Thirlwall were no longer directors. Their names had been crossed out and the names of Mr W Diab and Mr Macintyre respectively had been inserted in their place. Those present at the board meeting were listed in the minutes as Miss Hallendorf, Mr Macintyre, and Mr Obayda. Listed as in attendance was Mrs Talbot as secretary. Listed under apologies was Mr Diab. There is no mention of the change in directors in the body of the board minutes however and, in particular, no board resolution recorded of Mr Diab and Mr Macintyre being appointed by the board. The only change recorded was Ms Talbot's announcement that she was stepping down as company secretary on 31 May 1990. Ms Hallendorf is recorded as proposing that a Miss Helen Skelton take up the position of company secretary from 1 June 1990. There is no record in the board minutes of a formal vote being taken on this. Ms Talbot was simply thanked by the directors for her work as company secretary.

128. Again, the board minutes of 13 March 1990 record the board agreeing that an AGM should be held on 13 March 1990 (ie the same day) 'for the purpose of adopting the Report and Accounts for 1989'. Again, whilst no minutes of the AGM appear to have been prepared, I consider it legitimate to conclude that the director representatives of each unit-owner who attended the board meeting simply went on to represent the four corporate members of the Company at the AGM and that the only business considered at the AGM was the adoption of the report and accounts.

129. On the evidence before me, I am satisfied that the appointments of Messrs Diab and Macintyre as directors in place of Messrs McMahon and Thirlwall in the period between the March 1989 board meeting/AGM and the March 1990 board meeting/AGM were not the subject of a board or members' resolution. I so find. The members (who remained the same at this stage) cannot have been unaware of the requirements of the Company's articles in this regard; their first nominee directors, Mr Thirlwall, Mr Obayda, Mr McMahon and Ms Hallendorff, had been appointed as directors by formal resolution less than three years prior. The resolution appointing these four was then expressly referred to in the minutes of the general meeting held on 8 December 1987, which I am satisfied the members all attended (by Mr Thirlwall, Mr Obayda, Mr McMahon and Ms Hallendorff). In such circumstances, I consider it legitimate to conclude that the first four nominee directors (and through them, the four members, who remained unchanged) must be taken to have known that under the articles, directors were required to be appointed by board resolution. This procedure was not followed in the case of Mr Diab and Mr Macintyre. Instead, two of the members, Sand and Gravel Association Limited and Cumac Financiera SA, simply replaced their original nominee directors, Mr Thirlwall and Mr McMahon, with Messrs Diab and Macintyre, on notice to the Company. I so find.

130. I am satisfied that all members of the Company knew that this had occurred. The directors and the individuals representing the four corporate members of the Company at general meetings of the Company were one and the same. In addition, the stationery used by the Company over that period for a variety of different purposes, including minutes, draft budgets, and correspondence, contained 'footers' listing the directors (and any replacements made) at any given time.

131. It was not long before another member followed suit. In 1991 Freeholdings SA replaced their own nominee director, Mr Obayda, with Dr Kurukgy, again, simply on notice to the Company and without any formal board or members resolution. I so find.

132. Contemporaneous correspondence in evidence confirms how this occurred. By letter dated 5 February 1991 from Mr Obayda to Ms Skelton (by then Company Secretary), Mr Obayda wrote (with emphasis added):

> 'As I intend to move my office to Surrey, in the coming few weeks, I have to therefore *pass on my Directorship to my colleague* Dr. Ayad Kurukgy … (at the ground floor of Unit two) …'

133. The next minutes in evidence are minutes of a board meeting which took place on 27 February 1991, shortly after Mr Obayda's letter of 5 February 1991. The board minutes of 27 February 1991 make no reference to Mr Obayda's letter of 5 February 1991. The minutes do not record any vote being taken on the appointment of Mr Kurukgy as a director in place of Mr Obayda. In the 'footer' of page one of the board minutes, however, and the draft budget for 1991 which (from the minutes) it is clear was considered at the board meeting, the name of Mr Obayda is deleted, with the name 'A Kurukgy' inserted in its place.

134. As with previous years, the board minutes of 27 February 1991 record the board agreeing that an AGM should be held on 27 February 1991 (ie the same day) 'for the purpose of adopting the Report and Accounts for 1990'. Again, whilst no minutes of the AGM appear to have been prepared, it is in my judgment legitimate to conclude from the board minutes that the directors attending the board meeting went on to represent the corporate members of the Company at the AGM and that the only business considered at the AGM was the adoption of the report and accounts.

135. On the evidence before me, I am satisfied that the appointment of Mr Kurukgy in place of Mr Obayda in the period between the board meetings/AGMs of March 1990 and February 1991 was not the subject of a board or members' resolution.

136. These findings strongly support the Claimants' case that from very early on in the life of the Company, each unit owner/member simply appointed (or replaced) their own director on notice to the Company.

137. Contemporaneous correspondence in evidence also supports the Claimants' case. One example may be found in a letter dated 27 March 1991 from Ms Skelton (then company secretary) to Companies House regarding the Company's most recent annual return. This states (with emphasis added):

> 'I would just like to explain that in the Report and Financial Statement for the year ending 31 December 1990 it states that Mr W Diab resigned as Director in September 1990. What actually happened is that his company vacated Unit 4 of Bramber Court in September 1990. At the time we were not sure what was happening and in the absence of any communication from Mr Diab, despite attempts to contact him, we assumed that he had resigned. We have since discovered that the Unit has not been sold to anyone else, *therefore as his company are still the owners of the Unit I have included him as a Director* in the Annual Return…
>
> We have also had a change of director. Mr Yousif Obayda at Unit 2 resigned on 31 January 1991 *and handed over his directorship to Dr Ayad Kurukgy*. I have filled out a form 288 to notify you of this change but am not able to include it at the moment *as I am waiting for Dr Kurukgy to sign it*. I will of course forward onto you as soon as he does this.'

138. By the time of a board meeting held on 22 March 1993, there had been a further change on the board. The 'footer' of the agenda circulated for that board meeting listed the directors as Mr Hallendorff, Mr Macintyre, Mr Diab and Mr Fenton. By then it would appear that Mr Fenton had replaced Dr Kurukgy for Unit 2. According to the list of officers for the Company maintained at Companies House, Mr Fenton was appointed on 3 August 1992. Whilst no minutes for the board meeting of 22 March 1993 are in evidence, I consider it legitimate to conclude from the lack of any reference in the *agenda* for that meeting to a proposed vote on the appointment of Mr Fenton, the limited business habitually undertaken at the AGM and the lack of any other evidence to suggest that Mr Fenton's appointment was the subject of a board or members' resolution that, once again, the appointment of Mr Fenton in place of Dr Kurukgy in 1992 was not the subject of a board or members' resolution.

139. This again supports the Claimants' contention that from very early on in the life of the Company, each unit owner/member simply appointed (or replaced) their own director on notice to the Company.

140. On a close review of the historic company documentation in evidence and Companies House filings, I am satisfied on a balance of probabilities that the four members of the Company remained the same until 1995. The Ophthalmological Society sold Unit 3 to Flamecrest Limited in 1995. On the evidence before me I am satisfied that on completing the sale, the Ophthalmological Society transferred its share in the Company to Flamecrest Limited. Flamecrest's name appears in the register of members in evidence before me.

141. Freeholdings SA (latterly named Marfin Holdings SA) and Cumac Financiera did not sell Units 2 and 4 until 1997, when they sold to Mr Lakha and Cavendish White (Holdings) Ltd respectively. Sand & Gravel did not sell Unit 1 until 1998, when it sold it to TFP. It follows that the members of the Company remained the same at all material times until the sale of Unit 3 in 1995. I so find.

142. Bearing in mind the guidance given in Re Sherlock at [72] and the 'full knowledge' requirement addressed in EIC at [135], I turn to consider what intentions on the part of the Sand and Gravel Association Limited, Cumac Financiera SA, the Ophthalmological Society and Freeholdings SA, as registered members of the Company, can be objectively discerned from the facts that (i) directors (comprising or including Mr Diab, Mr Macintyre, Dr Kurukgy and Mr Fenton) were appointed on at least four occasions (in 1989-1990, 1991 and 1992) without board or members' resolution and (ii) there is no evidence of any other directors of the Company being appointed by board or members' resolution over the period 1989 to 1995.

143. There is no evidence before me to support a conclusion that the members believed that the articles in their original form permitted such appointments without a formal resolution, or that these appointments had in fact been made by such a resolution. Quite the contrary, for reasons already explored, I am satisfied that all members were aware that the articles in their original form required such appointments to be made by formal resolution and also knew that no such resolutions had been passed.

144. Mr Churchill maintained that on present facts, to quote Re Tulsesense [2010] 2 BCLC 525, '… this is a case where the articles were not … followed, not one where they were modified or disciplined.'. I reject that submission. Whilst Mr Churchill did not suggest that the facts of re Tulsesense were on all fours with the facts of the present case, for the avoidance of doubt I confirm that in my judgment, Tulsesense is readily distinguishable on numerous counts.

145. The appointments of Mr Diab, Mr Macintyre, Dr Kurukgy and Mr Fenton were made over a period of several years, at a time when the directors and members were in many respects observing the formalities of (i) board meetings with agendas and minutes and (ii) members meetings. During the course of such meetings, resolutions on other matters were passed.

146. The issue of who the directors were was important to all members, given the need to ensure that each member had an equal say in the management of the Courtyard (and, importantly, any expenses incurred).

147. I infer that it was therefore important to each of Sand and Gravel Association Limited, Cumac Financiera SA, the Ophthalmological Society and Freeholdings SA, who all remained members until 1995, to ensure that the appropriate person was properly appointed. In my judgment the only credible objective explanation of their conduct was that they intended to do whatever was required to allow the directors appointed over this period to be validly appointed. Since this required an amendment of the articles, I think their conduct is explicable only as evincing an intention to do so.

148. In my judgment, when Sand and Gravel Association Limited, Cumac Financiera SA, the Ophthalmological Society and Freeholdings SA allowed Mr Diab and Mr Macintyre to be appointed in the period 1989-90, the obvious inference is that they intended that Messrs Diab and Macintyre be properly appointed as de jure directors, and likewise Dr Kurukgy in 1991 and Mr Fenton in 1992.

149. I do not think it a credible explanation that they intended a one-off exception to the requirements of the articles for each appointment on an ad hoc basis, so that a further amendment would be necessary to appoint another replacement director in the future.

In this regard I remind myself of the guidance given in Re Sherlock at [76] that, whilst it is in theory possible to amend the articles to cater for a one-off event, the more natural amendment is one which changes the rules for the future as well. A bystander seeing Dr Kurukgy and Mr Fenton appointed in 1991 and 1992 respectively, with knowledge of the appointments of Messrs Diab and Macintyre in 1989-90, would conclude that the articles had been amended to allow each member to appoint (and remove/replace) one director on notice to the Company. Whilst it is strictly unnecessary to identify the exact point at which the amendment was effected, given that it was on any footing many years prior to the Claimants' introduction to the Courtyard, I am satisfied that it was effected by 1990 and was intended by all members to be a permanent amendment. I so find.

150. For all these reasons, on the evidence before me, I am satisfied that by 1990, the members of the Company had agreed by conduct to amend the articles. In my judgment, the conduct of Sand and Gravel Association Limited, Cumac Financiera SA, the Ophthalmological Society and Freeholdings SA, as registered members of the Company, is only consistent with an amendment to the articles in the form of a provision that: 'upon registration as a member, each unit owner shall be entitled to appoint one director by notice to the Company (with the right to remove and/or replace any director so appointed by notice to the Company).' That amendment was agreed and took effect by 1990 at the latest. The power to appoint directors conferred on the directors by the articles in their original form was not entirely extinguished by this amendment but was instead relegated to a residual power, exercisable only subject to the rights conferred upon each member by the amendment. I so find.

151. In light of my conclusions, it is in my judgment entirely unsurprising that there is no evidence among the books and records of the Company of any members' or board resolution ever having been proposed or passed for the later appointment of Mr John Blake as a director in 1995. On the evidence as a whole, I am satisfied on a balance of probabilities that no such resolution was proposed or passed. In this regard I note from Companies House filings for Flamecrest Limited (not included in the bundle but a matter of public record) that Mr Blake was a director and shareholder of Flamecrest Limited at the time of his appointment in 1995 as a director of the Company. I consider it legitimate to conclude that he was appointed as a director of the Company by Flamecrest Limited (by then owner of Unit 3 and a registered member of the Company) by notice to the Company, in accordance with the articles as amended by conduct.

152. The appointment of Mr White as a director in 1997 followed the same pattern. In that year, Mr White's company, Cavendish White (Holdings) Ltd, purchased Unit 4 and had transferred to it the one share in the Company previously held by the vendor, Cumac Financiera. Shortly after the purchase, the Company Secretary (by then a Mr Henry Day of Sand and Gravel Association Limited, then owner of Unit 1), wrote to Mr White by letter dated 13 March 1997, enclosing notices of the board meeting and AGM due to take place on 4 April 1997. The letter provides (with emphasis added):

> 'Can I assume that you will replace Mr Diab as the representative for Unit 4? *You will necessarily become a Director of Bramber Road Management Ltd* and I therefore enclose the official form that you will need to complete for

registration at Companies House. Please either complete it *and return it to me* ***for registering now or*** bring it to the meeting'.

153. Mr White replied by letter of 18 March 1997, enclosing a partially completed form 288a, stating 'I take it you will fill in the company number and other pertinent information'. It is clear from the completed version of the form 288a, signed by Henry Day as Company Secretary on 27 March 1997 and filed at Companies House in respect of Mr White, that one item of 'pertinent information' inserted by Mr Day was the date of Mr White's appointment as a director, which is stated to be 17 March 1997. I so find. This date (17 March 1997) was *ahead of* the board meeting and AGM due to take place on 4 April 1997. That the date was inserted by the Company Secretary, Mr Day, rather than Mr White himself, is readily apparent from a comparison of the differing manuscript '7s' included in the form. Mr White's '7' included a bar across the middle; Mr Day's did not.

154. The notices of the board meeting and the AGM due to take place on 4 April 1997 in evidence each contain an agenda. Neither agenda makes any reference (even in generic terms) to the resignation of Mr Diab as director or the appointment of Mr White (or the appointment of any other directors).

155. There are no minutes of either the board meeting or the AGM of 4 April 1997 in evidence. From the agenda for the board meeting in evidence, however, Mr Day's correspondence with Mr White (referred to at [152-153] above), the date of appointment included by Mr Day in the Form 288a for Mr White, the evidence of the manner in which former directors had been appointed without reference to the board or members in general meeting in the past, and the lack of any persuasive evidence to suggest otherwise, I consider it legitimate to conclude that Mr White's appointment as a director in 1997 was not the subject of a board or members' resolution. I so find.

156. Mr Lakha purchased Unit 2 from Freeholdings SA (renamed Marfin Holdings SA) in the same year (1997). Somewhat curiously, Mr Lakha was never entered in the register of members of the Company, although a short manuscript note which he inserted in the register of members on the page relating to Freeholdings SA indicates that a share transfer from Freeholdings SA to Mr Lakha had taken place. On the evidence before me it is clear (and I so find) that he chose not to become a director at the time of purchase, for professional reasons. By 1998, however, he had taken on the role of the role of company secretary.

157. The next minutes in evidence are 'blended' minutes, headed 'Minutes of the Annual General Meeting and Directors' Meeting'. These relate to a board meeting and AGM which took place on 15 May 1998 and appear to have been prepared by Mr Lakha, by then company secretary. These record that Mr White was 'appointed as the Managing Director by unanimous vote' but do not say in what capacity such votes were cast. I do not read these minutes as suggesting that Mr White's appointment *as director* was the subject of a vote of directors or members; according to the Companies House filings, Mr White had already been a director for over a year by then. Read in the context of earlier minutes and correspondence, it is more likely than not that the reference to Mr White's appointment as Managing Director was prompted by the retirement of the last Chair; Mr MacIntyre of Sand and Gravel having indicated by letter dated 12 March 1997 that he and Mr Day were soon to be stepping down as Chair and Secretary respectively.

158. In 1998, TFP acquired Unit 1 from Sand and Gravel Association Limited. As with Mr Lakha, TFP was not entered in the register of members as a member of the Company at the time of purchase. Companies House filings, however, state that Ms Huka of TFP was appointed as a director of the Company on 11 December 1998. There is no evidence in the Company's books and records to suggest that her appointment was the subject of a formal board or members' resolution. On the evidence as a whole I consider it legitimate to conclude that it was not.

159. That, then, forms the backdrop to the Claimants' introduction to the Courtyard in 2003. Mr Churchill argued that the manner in which Mr Clarke was appointed as a director of the Company in 2003 is inconsistent with a conclusion that the articles had been amended by conduct in the manner outlined at [150] above. I reject that argument. As I have found, the amendment of the articles had been effected by 1990, many years prior to the Claimants' introduction to the Courtyard. It was a permanent amendment.

160. Since 1989/90, directors had been appointed without the members requiring any formal resolution of the members or directors. From 1989/1990 onwards, there had been no mention in any of the books and records of the Company in evidence of the appointment of directors being the subject of a vote or formal resolution of either the board or members. Whilst I accept that the books and records of the Company in evidence did not contain minutes of *all* Company and board meetings which had taken place over the years, there were sufficient company records in evidence, spanning a sufficient number of years, to show an established pattern of conduct.

161. Mr Clarke and Mr Lawson purchased Unit 4 from Cavendish White (Holdings) Limited on 21 February 2003. According to the form 288b filed at Companies House in respect of Mr White (of the vendor), Mr White resigned as a director of the Company on the same day ie 21 February 2003. On the 363s Annual Return filed at Companies House for the period 2002/3, Mr White (of the vendor) is recorded as having transferred his one ordinary share in the Company to the Claimants on 21 February 2003. This accords with the date on the stock transfer form in evidence. The Claimants are entered in the register of members in respect of that share, with effect from 21 February 2003.

162. Mr Clarke's written evidence, which in this regard I accept, was that, at the time of purchasing Unit 4 in February 2003, Mr Lakha (then company secretary) told him that he would deal with his (Mr Clarke's) appointment as director of the company *before* the next AGM and directors' meeting. I pause here to note that this was consistent with the manner in which Mr White's appointment had been dealt with when his company had acquired Unit 4 in 1997: see [152] – [153] above. Mr Clarke's evidence (which in this regard I accept) was that his understanding at the time was that he would be appointed as the director representative for Unit 4 'as a matter of course'. Mr Lakha also decided at that time that he too would become a director and informed Mr Clarke of that fact. Mr Clarke's evidence, which in this regard I accept, was that Mr Lakha made the necessary entries in respect of his and Mr Clarke's appointment as directors in the Company's register of directors. The register of directors for the Company in evidence before me records the date of Mr Clarke's appointment as director (and Mr Lakha's appointment as director) as 21 February 2003, the date upon which Mr Clarke and Mr Lawson acquired Unit 4. This supports Mr Clarke's evidence that the later 'approval' of his (and Mr Lakha's) appointment as directors at

a meeting of members held on 21 October 2003 was a cosmetic 'given'. It was also an anomaly, when compared to appointments from 1989/1990 onwards.

163. Mr Clarke did not attend the AGM of 21 October 2003 but together with a work colleague had assisted in the drafting of an agenda for it. Mr Clarke's evidence, which in this regard I accept, was that he and a colleague had prepared paperwork for Mr Lakha to hold that meeting, so it was rather more formal than had typically been the case between 1997 and 2002 and reflected Mr Clarke's professional background as a solicitor. The agenda had listed the following items:

> '1. Apologies
>
> 2. Minutes of the previous Annual General Meeting
>
> 3. Presentation and adoption of Financial statements for the year ended 31 December 2002
>
> 4. To approve the appointment of the following on the Board of Directors:
>
> (a) Mr Azim Lakha
>
> (b) Mr Jeremy Clarke
>
> 5. To set a Management Fee for the year 2003 and 2004
>
> 6. Any other business'

164. In fact, there had been no AGM the previous year, so there were no minutes to approve.

165. Mr Lakha and Mr Blake attended the AGM, together with Ms N Reichman, Mr Clarke's work colleague. Mr Clarke did not attend, but at paragraph 31 of his witness statement he did summarise what took place at the meeting. He said this:

> 'There was no discussion at the 21 October AGM about our right to be appointed as directors. It was effectively taken as given by those attending…. The said appointments were therefore duly approved without discussion or formal resolution.'

166. Mr Clarke was challenged on this in cross examination, on the ground that he had not attended the AGM personally. It was clear from his testimony overall, however, that he had based his summary of what took place at the AGM on his recollection of what he had been told afterwards by others who did attend. Whilst in this respect his witness statement was not CPR compliant, as it should have confirmed the source of his information, on the evidence which I have heard and read, I am satisfied on a balance of probabilities that the appointments were approved at the meeting without discussion or formal resolution. I so find.

167. Following the AGM, Ms Reichman prepared (or assisted in preparing) the minutes, which Mr Clarke checked and Mr Lakha signed as Company Secretary. Paragraph 4 of the minutes provide:

> 'MR A LAKHA and Mr Jeremy Clarke were approved to be appointed to the Board of Directors and the Secretary was asked to complete the necessary forms for submission to the Registrar of Companies.'

168. For reasons already explored in this judgment, on a true construction of the Company's articles in their original (ie unamended) form, the power to appoint directors lay with the board in any case. Following the amendment by conduct of the articles which I have found took place by 1990, no resolution of the board approving the appointment of a director was required, still less a resolution of the members in general meeting; the Claimants, as registered members, were entitled to appoint Mr Clarke as a director simply on notice to the Company. The 'notice', for these purposes, did not need to take any particular form. By the time of the AGM, the Company was plainly on notice of the Claimants' wish to appoint Mr Clarke as representative director in respect of unit 4. Considered in context, the cosmetic formality of the agenda and minutes for the meeting (drafted/contributed to by members of Mr Clarke's office and overseen by Mr Clarke) was plainly driven by habit; ie, Mr Clarke's background in company law, rather than reflecting a substantive requirement that his appointment as a director be put to the vote of members or directors. I so find.

169. There was no mention in the agenda of any documents (such as CVs of the proposed appointees, or a report of existing directors on the suitability of the proposed appointees) that one might expect to be circulated ahead of any meaningful vote. I think Mr Clarke was right to observe in oral testimony that the minutes should probably simply have recorded that the members 'noted' the appointment of Mr Clarke and Mr Lakha as directors. I note that this terminology was similarly employed in the minutes of the meeting of members held on 8 December 1987: see [119] – [120] above.

170. That the members' purported 'approval' of the appointments of Mr Lakha and Mr Clarke as directors was no more than a cosmetic anomaly is also supported by the manner in which the Company's affairs have been conducted since.

171. In 2008, a form 288a was filed at Company's House stating that Ms Hutchison (of TFP) had been appointed as a director of the Company. At the same time, a form 288b was filed, stating that Ms Huka had ceased to be a director. On the evidence as a whole, for reasons more fully addressed below, I am satisfied that no formal board or members' resolution that Ms Hutchison be appointed as a director was passed.

172. Similarly, over the years following Mr Lakha's death in 2011, Mrs Lakha slowly became more involved in the Company's affairs and, over time, acted and was treated (by other directors and unit owners) as a director, as the successor owner to Unit 2. In 2015, Mrs Lakha, without reference to the board, instructed the Company's accountants to file an AP01 stating that she had been appointed as a director of the Company on 28 March 2015. On the evidence as a whole, for reasons addressed more

fully below, I am satisfied that no formal board or members' resolution that Mrs Lakha be appointed a director was passed. I so find.

173. It was in fact only in 2019, some months after the Claimants acquired Unit 3/the corresponding share in the Company from Mr Blake and appointed Mr Lawson as representative director for that unit, that Mrs Lakha and Ms Hutchison, who by that stage had fallen out with the Claimants over various matters, objected to Mr Lawson's appointment and claimed that a formal process of some sort was required, although they have wavered on quite what that process should be.

174. As became increasingly clear during the course of trial, Mrs Lakha and Ms Hutchison were in something of a glass house on this issue.

175. Before addressing the evidence on Mrs Lakha and Ms Hutchison's claimed status as directors of the Company, for the sake of completeness I should at this stage address briefly certain other factors raised by Mr Churchill which he maintained pointed against any amendment of the articles by conduct in relation to the appointment of directors.

(1) The first was Mr Clarke's objection to the purported unilateral appointment of Dr Lakha (Mrs Lakha's daughter) as a director in 2015. In context I am satisfied that Mr Clarke's objection was to any given unit-owner/member having *more than one* representative director on the board, not to any given member appointing a representative director per se.

(2) The second related to minutes of a meeting on 23 November 2016 prepared by Mr Clarke which stated, by paragraph 2 (with emphasis added), 'IT WAS NOTED that *each director* was entitled to appoint one director each to the board'. In this regard I accept Mr Clarke's oral testimony that this was a typographical error and that the provision should have read 'each member was entitled to appoint one director'. Read in the context of the written evidence as a whole, the reference to each 'director' being entitled to appoint one director was plainly an error. I so find.

(3) Mr Churchill also relied upon evidence of correspondence and exchanges between the parties over the period 2016 to 2021 in which the Claimants sought to achieve some consensus with the Defendants regarding various other matters including Mr Lawson's appointment as a director. Considered in context, however, I am satisfied that such efforts were simply reasonable attempts on the part of the Claimants to avoid the expense of legal proceedings in light of the stance latterly adopted by the Defendants on given issues. They do not in any way undermine my conclusions on the permanent amendment to the articles effected by conduct by 1990.

The status of Mrs Lakha and Ms Hutchison

176. I shall next address in more detail the evidence relating to the status of Mrs Lakha and Ms Hutchison. In this regard I refer to paragraphs [87] to [88] above.

177. At trial, Mrs Lakha (and thereafter Ms Hutchison) asserted through counsel, for the first time, that they had each been appointed as directors of the Company at a meeting of members. They each repeated this assertion in oral testimony. I reject their evidence on this issue.

178. No mention had been made in their written evidence of having been appointed as directors at a meeting of members. Quite the contrary: Mrs Lakha's first witness statement had asserted that power to appoint directors lay with the directors, not the members.

179. No mention had been made of their appointment at a meeting of members prior to issue of these proceedings either, despite a number of obvious points at which this would have been mentioned if it was true.

180. One example was at the purported board meeting of 17 November 2021. According to Mr Clarke's note of the meeting of 17 November 2021, the accuracy of which in this regard I accept, the following exchange took place at the meeting:

> 'Ms Hutchison] noted that she didn't understand how [Mr Clarke] thought he could unilaterally go ahead and appoint [Mr Lawson] as the shareholder and director…. [Mr Clarke] interrupted noting that they should have a look at [Mrs Lakha's] own appointment. [Dr Lakha] laughed alongside [Mrs Lakha] noting that [Mr Clarke] wasn't present and with [Mrs Lakha] suggesting that the matter be put down for [Mr Clarke's] lawyers to address'.

181. It would have been the simplest thing for Mrs Lakha and/or Ms Hutchison to say, at that point, that in fact, they *were* appointed as directors at a meeting of members, had that actually occurred. Instead, they ducked the challenge, relying on a point of procedure (that Mr Clarke had said he would only attend the meeting to take notes as he challenged the validity of the meeting) and suggesting that Mr Clarke's lawyers address the matter at some later stage.

182. In the event, Mr Clarke's lawyers did go on to 'address' the matter. By their letter before claim dated 1 July 2021, addressed to Mrs Lakha but sent to both Mrs Lakha and Ms Hutchison, Mr Clarke's solicitors wrote (with emphasis added) as follows:

> '1 Although the Company's Articles do not make specific provision for appointment of new directors from time to time, the members of the Company have long understood and accepted that the holder of each share shall be entitled to appoint one director….
>
> 2. Consistent with the automatic right described above, the mode by which new directors have been appointed from time to time has been informal, not requiring a formal resolution.. *For example, Mrs Lakha appointed herself... without formal resolution…*'

183. Again, it would have been the simplest thing, even as litigants in person, for either or both of Mrs Lakha and Ms Hutchison to have responded on this point to 'correct the record', had the record been incorrect. Instead, Mrs Lakha responded by email dated 6 July 2021, cc'd to Ms Hutchison, stating simply:

> 'Dear Mr Turkie,

> Thank you for your email. [The Company] had acted in line with the M & A and Company Law Procedures. To clarify, Mr Euan Lawson was not ever appointed by [the Company] as a Director.
>
> Kind regards
>
> Mrs Yasmin Lakha
>
> Chairperson'

184. I was taken to no response from Ms Hutchison to the letter before claim dated 1 July 2021, notwithstanding the fact that Ms Hutchison was corresponding with the Claimants' solicitors on other matters over this period (by way of example, by email of 31 July 2021). I consider it legitimate to conclude that she did not reply to the letter before claim.

185. The point was raised again, by the Claimants' initial evidence in support of the Claim. At paragraph 67 of his first witness statement dated 25 March 2022 in support of the Claim, Mr Clarke stated that

> 'in 2015 Mrs Lakha had unilaterally filed directors' appointments for herself and Parviz without any reference to or discussion with the board'.

(I should say that Mr Clarke gave similar evidence at paragraph 57 of his third witness statement, prepared for trial).

186. Mrs Lakha by paragraph 47 of her first witness statement dated 28 April 2022 responded directly to paragraph 67 of Mr Clarke's witness statement dated 25 March 2022, but did not suggest that she had been appointed some years prior at a members' meeting, as she went on to claim at trial.

187. Similarly, Ms Hutchison did not raise the point in her first witness statement in answer to the claim. At paragraph 46 of his first witness statement, Mr Clarke referred to the filing of a form 288a in 2008 in respect of Ms Hutchison and stated 'No board meeting was held at the time to approve the [ie Ms Hutchison's] appointment'. (Again, a similar point was made at paragraph 57 of Mr Clarke's third witness statement, prepared for trial). Ms Hutchison did not contest this point in her witness statement in answer dated 27 April 2022 and did not suggest that she had been appointed at a members' meeting in 2011/12, as she went on to claim at trial.

188. Neither Mrs Lakha nor Ms Hutchison claimed in their second witness statements dated 3 February 2023, prepared for trial, that they had been appointed as directors at a meeting of directors or members.

189. Indeed, at paragraph 12 of her witness statement dated 3 February 2023, Mrs Lakha stated that she was 'not involved with the Company prior to 2013', because she 'was not a member or director'.

190. By day one of the trial, however, Mrs Lakha's position had changed. At that stage she stated through Counsel that she was appointed a director 'at a 2011 members'

meeting'. Counsel also stated that he would confirm Ms Hutchison's position the following day, after taking instructions.

191. On day two of the trial, Mrs Lakha's position had changed again. That morning, Counsel informed the court on instruction that Mrs Lakha was appointed as a director at a meeting of members *in 2012*. In relation to Ms Hutchison, Counsel informed the court on instruction that 'Ms Hutchison believes that she was also appointed at the same meeting in 2012'.

192. Both Mrs Lakha and Ms Hutchison were challenged on this issue in cross examination. Neither fared well.

193. Mrs Lakha had no persuasive explanation for the inconsistency between her written evidence and oral testimony. She claimed simply that paragraph 12 of her second witness statement (quoted at [189] above) was wrong in this respect. She could not explain why she had shifted her stance between the time of her first and second witness statements on the issue of who had the power to appoint directors either, stating simply that she didn't think the court would see her first witness statement.

194. When pressed to state in cross examination when the meeting of members at which she was allegedly appointed as a director took place, Mrs Lakha said that it was around springtime in 2012, when she met the neighbours. She was reminded that at paragraph 21 of her second witness statement, she had referred simply to an 'introductory meeting with the other Unit Owners' shortly after her husband had passed away in 2011; a meeting which she had described as 'an informal neighbourly meeting', 'arranged so that I could meet the other Unit Owners'. She responded 'yes that first one was informal'; implying that there was another more formal meeting at some (unspecified) time later.

195. Mrs Lakha even suggested at one point in her oral testimony that Mr Clarke had attended the meeting at which she was appointed as a director, although she later rowed back on that assertion. Mr Clarke's oral evidence was that he had never attended (or been given notice of) any meeting at which Mrs Lakha was (or was to be) appointed as a director. I accept Mr Clarke's evidence on this issue. His evidence on this point is entirely consistent with the stance which he adopted on the issue prior to issue of proceedings (summarised in [180]- [182] above) and by his written evidence in support of the claim (see [185] and [187] above). I would add that, having been a de jure director of the Company for some 8 or 9 years by 2011/12, it would be reasonable to expect Mr Clarke to know if such a meeting had taken place.

196. Mrs Lakha gave evidence that Ms Hutchison was appointed as a director at the same meeting, in 2011/12. This however was inconsistent with the Form 288a filed at Companies House in 2008, which bore Ms Hutchison's signature and the signature of Mr Blake, was dated 29 April 2008 and stated that Ms Hutchison had been appointed on 29 April 2008. A Form 288b had been filed at Companies House at the same time, stating that Ms Huka had resigned as director. The Annual Return for 2008 contained similar provisions.

197. Mrs Lakha claimed in oral testimony that there were typed minutes for the members' meeting of 2011/12 at which she was appointed a director, stored on her husband's computer, but said that the computer had been taken by the company which purchased

her husband's business. She also claimed that all Unit holders were given a hard copy of the minutes. No hard copy of such minutes has ever been disclosed or adduced in evidence, however. When it was pointed out that she hadn't asked Mr Clarke for a copy of these minutes at any stage in these proceedings, Mrs Lakha had no persuasive explanation.

198. Mrs Lakha was also in some difficulty explaining why the filings at Companies House stated that she had been appointed as a director on 28 March 2015. Mrs Lakha accepted that the relevant form AP01 had been prepared and filed by the Company's accountant in 2015 on her own instruction, without reference to the other directors. Mrs Lakha also confirmed in cross examination that she had told the accountant what to put in the form AP01. When she was pressed to explain why the form AP01 stated that she had been appointed in 2015 if she had been appointed in 2012, she had no satisfactory answer.

199. The AR01s filed at Companies House for the periods ended 27 March 2013, 2014 and 2015, make no mention of Mrs Lakha as a director. All state the directors of the Company to be Mr Blake, Mr Clarke and Ms Hutchison.

200. Ms Hutchison found herself in similar difficulty in cross-examination on her claim to have been appointed as a director of the Company at a meeting of members in 2011/12. In oral testimony she initially accepted that she had taken over from Ms Huka in 2008. She said (with emphasis added):

> 'I had two meetings with Mr Lakha and he briefed me on what was happening *and that was it really'*.

In answer to a follow up question from me at the end of her testimony, she confirmed that the two meetings in question had been in 2008.

201. Ms Hutchison was taken to the Form 288a filed in 2008. When asked if the date of 29 April 2008 given in the form as the date of her appointment was the date that she was appointed as a director, she responded: 'I would imagine it would be'.

202. Later in oral testimony however she claimed that following an initial 'informal introductory meeting' in 2011, which by her witness statement she had said was held 'so that the Unit Owners could get to know each other', there had been 'a meeting shortly after' at which she and Mrs Lakha had been appointed. She volunteered that she and Mrs Lakha 'were proposed' at the meeting, but in response to Counsel's questioning, could not recall if anyone had seconded.

203. When reminded that she had just said she was appointed in 2008 and asked to explain why there be a meeting in 2011/12 about her appointment, Ms Hutchison confessed that she was 'a little confused at the sequence of events'.

204. It was then put to her: 'Is this recollection after discussions with Mrs Lakha about what might have happened in 2012'. She first accepted that it was and then sought to row back from that admission, stressing that she remembered going to a meeting and people welcoming her as a new member of the board. When it was put to her that all she recalled was being welcomed and that there was no formal resolution, however, she answered:

> ‘Possibly not because that wasn’t the way the Company operated. It was so informal I’d be surprised if there was any discussion’.

205. In answer to my question, Ms Hutchinson confirmed that she had not been asked for a CV or consent to act in the run-up to the meeting of members at which she thought she had been proposed.

Conclusions on the evidence of Ms Hutchison and Mrs Lakha regarding their appointment as directors

206. On the evidence which I have heard and read, I am satisfied (i) that TFP informed the Company in 2008 that it wished to appoint Ms Hutchison in place of Ms Huka; (ii) that no formal board or members’ resolution was passed approving Ms Hutchison’s appointment as director; and (iii) that Mr Blake filed Forms 288a and 288b stating that Ms Hutchison had been appointed and that Ms Huka had ceased to be a director. To the extent that Mrs Lakha and Ms Hutchison suggested in oral testimony that they were appointed at a meeting of members in 2011/12, I reject their evidence. At best, Ms Hutchison was welcomed at a subsequent meeting of unit owners, not all of whom were registered members. There was no formal board or members’ resolution approving her appointment.

207. On the evidence which I have heard and read, I am further satisfied (i) that no formal board or members’ resolution was passed approving Mrs Lakha’s appointment as a director; and (ii) that the Company’s accountants, on Mrs Lakha’s instructions, without reference to the board, filed a form AP01 stating that she had been so appointed in 2015. To the extent that Mrs Lakha and Ms Hutchison suggested in oral testimony that they were appointed at a meeting of members in 2011/12, I reject their evidence. At best, Mrs Lakha was welcomed at a subsequent meeting of unit owners, not all of whom were registered members. There was no formal board or members’ resolution approving her appointment.

Conclusions on Issue 2

208. On Issue 2, for the reasons which I have given, I conclude that upon registration as a member, each unit owner is entitled to appoint one director by notice to the Company, including having the right to remove and/or replace any director so appointed by notice to the Company. The requirement that the unit owner in question must be a registered member of the Company should be noted. In my judgment, the amendment to the articles by conduct which I have found was effected by 1990 extends only to registered members. Viewed objectively, the conduct of Sand and Gravel Association Limited, Cumac Financiera SA, the Ophthalmological Society and Freeholdings SA does not support an amendment to the articles allowing unit owners who are *not* registered members to appoint a director. The only unit owners who appointed/replaced directors by notice to the Company over the period to 1995 were registered members.

209. The conduct of unit owners *since* 1995 does not support a further amendment to the articles allowing appointments by unit owners who are not registered members, as a number of the unit owners whose conduct would need to be relied upon for this purpose have never been registered members of the Company. The Duomatic

principle only applies to registered members: In re BW Estates Ltd (No 2) (CA) 2018 2 WLR 1175 per Sir Geoffrey Vos KC at [81] – [82]. At least one former unit owner, Sand and Gravel Association Limited, whose name still appears on the register of members, has played no part in the Company's affairs since 1998 and so cannot on any footing clear the EIC threshold of assent with full knowledge.

210. I shall deal next with Issues 5 and 6.

Issue 5: Was Mr Clarke appointed company secretary of the Company by board resolution dated 28 November 2018 and/or at any other time? If so, does he remain company secretary?

Issue 6: Was Mrs Lakha removed as co-chair of the Board of Directors of the Company by board resolution dated 28 November 2018? If so, has any valid board resolution been passed appointing any person as chairperson of the board of directors since the resignation of John Blake on 9 May 2019?

211. The Defendants contend that the meeting of 28 November 2018 was not properly called and that the resolutions passed at the meeting were of no effect. By his skeleton argument Mr Churchill argued that

(1) reasonable notice of the meeting had not been given;

(2) the meeting was not conducted in accordance with the notice given, as the venue changed after the meeting had started;

(3) the meeting was not quorate;

(4) the meeting should not have gone ahead in the absence of Mrs Lakha and Ms Hutchison, who had challenged its validity by GPT Law Practice letter dated 22 November 2018.

212. In my judgment, the November 2018 board meeting was validly convened and the resolutions passed at that meeting were validly passed.

213. In relation to (1): even putting to one side the obvious questions regarding Mrs Lakha's and Ms Hutchison's claimed status as directors which arise in light of my findings and conclusions on Issue 2, the fourteen days' notice given of the meeting was in my judgment plainly reasonable notice, which is all that is required. There was no suggestion that Mrs Lakha and Ms Hutchison could not have attended had they wished to do so.

214. Dealing next with (2): the Defendants' objection that the venue of the meeting was changed by the chairman after the meeting had been opened is not well founded. Again, even putting to one side the obvious questions regarding Mrs Lakha's and Ms Hutchison's claimed status as directors which arise in light of my findings and conclusions on Issue 2, the change of venue was done with the consent of all those attending and there was no prejudice to Mrs Lakha and Ms Hutchison, who chose not to attend the original venue. There is no requirement under the Company's articles to give notice of the place of the meeting (see Regulation 88 of Table A). The two venues were in any event no more than three metres apart. By Regulation 88 the

directors are empowered to 'regulate their proceedings as they think fit'. This includes a power to adjourn a board meeting to a different venue with the consent of directors attending.

215. Turning next to (3): the submission that Mr Clarke had a conflict of interest and could not be counted in the quorum is not in my judgment a valid ground of objection. Article 16(a) provides that a director may vote and be counted in the quorum on any resolution, notwithstanding that he has any kind of interest in it.

216. A further argument, that the meeting was not quorate as Mr Blake had resigned as a director prior to the November 2018 meeting, was dropped at trial. For the sake of completeness, I confirm that on the evidence before me, the point was rightly abandoned. On the evidence before me I am satisfied that Mr Blake was validly appointed as a director of the Company by Flamecrest Limited (a registered member) in 1995 in accordance with the articles (as amended by conduct) and remained a director at all material times until 2019, when he sold unit 3 to the Claimants. The meeting was quorate.

217. With regard to (4): again, even putting to one side the obvious questions regarding Mrs Lakha's and Ms Hutchison's claimed status as directors which arise in light of my findings and conclusions on Issue 2, both Mrs Lakha and Ms Hutchison were given reasonable notice of the meeting and it was entirely their decision not to attend. Even if, as suggested by Mrs Lakha and Ms Hutchison in their written evidence, they did not attend because they assumed that the meeting would not go ahead following the letter sent on their instructions by the GPT Law Practice to Mr Clarke and Mr Blake on 22 November 2018, that does not affect the validity of the convening of the meeting or the resolutions passed at that meeting. In the absence of express confirmation that the meeting had been cancelled, it was in any event not reasonable for Mrs Lakha and Ms Hutchison to proceed on an assumption that the meeting would not go ahead as planned.

218. In short, the Defendants' attempts to challenge the convening of the November 2018 meeting and the resolutions passed at that meeting are entirely unsuccessful. I find that the meeting was validly convened and that the following resolutions (among others) were validly passed by the directors at the meeting:

(1) Mr Blake was appointed sole chairman in substitution for the joint chairmanship of Mrs Lakha and Mr Blake;

(2) Mr Clarke was appointed Company Secretary; and

(3) The registered office was confirmed as Unit 4.

219. Mr Blake later stood down as chair, when he sold unit 3 to the Claimants. He confirmed this by email to Mr Clarke and the Defendants dated 18 September 2019.

220. In light of my conclusions on Issues 9 and 10 (addressed below), the current position is that (i) the board of directors does not have a chair; and (ii) Mr Clarke has at all material times since the November 2018 meeting remained company secretary.

221. I turn next to Issue 4.

Issue 4: With effect from 9 May 2019, were the names of 'Euan John Lawson and Jeremy Sinclair Clarke' entitled to be entered on the Company's register of members as joint holders of 1 Ordinary Share in respect of Unit 3?

222. The Claimants' names were entered on the register of members as joint holders of one share in respect of Unit 3 from 9 May 2019. The Defendants have not applied under s125 CA 2006 to rectify the register of members to remove the Claimants' names. Nor have the Defendants purported to amend the register of members. The current position, therefore, is that the Claimants are members of the Company as joint holders of 1 Ordinary Share in respect of Unit 3. There is no application before the court by the Defendants to reverse this position.

223. Nonetheless, it will plainly be helpful to all parties for the Claimants' entitlement to be registered as members to be addressed in this judgment and the parties have expressly included this in their agreed schedule of issues. I turn then, to consider this issue.

224. Mr Churchill submitted that the registration of a share transfer was a four- stage process, comprising (i) the share transfer; (ii) the lodging of the share transfer with the Company; (iii) the decision of the directors on whether or not to register the share transfer; and (iv) if the directors decide in favour, the registration of the transfer. He maintains that in the case of the Unit 3 share transferred in 2019 from Mr Blake to the Claimants, the Claimants jumped directly from stage (i) to stage (iv).

225. Ms Staynings accepted that generally the process of registering a share transfer would involve the four stages contended for by Mr Churchill, but argued that this process has never been followed by the Company. On the evidence before me, Ms Staynings appears to be right: from the books and records of the Company in evidence before me, the only occasion upon which the directors of the Company have passed a resolution that a transfer of shares in the Company be approved and registered was on 4 September 1987. On the evidence before me, I am satisfied on a balance of probabilities that no transfer of shares in the Company registered since 4 September 1987 has been the subject of a board resolution. I so find.

226. The question is where that leaves the parties.

227. Ms Staynings ran a number of arguments in support of the Claimants' entitlement to be entered on the register of members as joint holders of one share in respect of Unit 3 from 9 May 2019.

228. The first was a construction argument. In this regard she contended that article 5 should be construed narrowly in light of article 3. She submitted that while article 5 does (on its face) give the directors a discretion to decline to register the transfer of any share, the purpose of this is to ensure compliance with article 3 and/or to ensure that only valid unit owners are entitled to exercise any membership rights in connection with the Company.

229. I do not accept that article 5 can be construed as narrowly as Ms Staynings suggests. While the directors are by article 5 *obliged* to refuse to register a transfer of shares in the case of any transfer made in contravention of article 3, article 5 also confers on the directors a *discretion* to refuse to register a transfer of shares. Any such discretion

would be redundant if it could only be exercised in the case of a transfer in contravention of article 3. It follows that the discretion has to be construed as exercisable in circumstances other than a transfer in contravention of article 3. Those circumstances cannot be treated as narrowed by Article 24 of Table A: see [77] above. I accept, however, that any exercise of that discretion by the directors of the Company must be in accordance with their statutory duties, including those imposed by ss171 and 172 CA 2006.

230. Ms Staynings next argued that the members of the Company agreed to amend the articles by conduct and/or by operation of the Duomatic principle, so that:

(1) article 5 is varied as follows: ‘The Directors may refuse to register any transfer of shares (save in relation to any transfer to a Unit Owner) and shall so refuse in the case of any transfer made in contravention of the foregoing provisions’; or

(2) alternatively, that each Unit Owner is entitled to be entered on the register of members without any requirement for a formal board resolution to approve the same.

231. The evidence before me did not support a finding of either variation by conduct. There was no registration of any membership between 2003 and 2019. I would add that this argument runs into similar problems to those mentioned in paragraph [209] above; the Duomatic principle only applies to registered members: In re BW Estates Ltd (No 2) (CA) 2018 2 WLR 1175 per Sir Geoffrey Vos KC at [81] – [82]. At least one former unit owner, Sand and Gravel Association Limited, whose name still appears on the register of members, has played no part in the Company’s affairs since 1998 and so cannot on any footing clear the EIC threshold of assent with full knowledge.

232. Ms Staynings next argued that the Defendants were estopped by conduct from contending that the Claimants are not entitled to be entered on the register of members as a result of the transfer from Mr Blake on 9 May 2019, on the basis of a ‘shared assumption and/or understanding that there was such a right’. Again, however, the evidence before me simply did not support this argument.

233. Ms Staynings went on to submit that the Defendants were in any event guilty of unreasonable delay and had failed to comply with the strict two-month time limit in s771(1) CA 2006.

234. Section 771(1) CA 2006 provides that:

‘(1) When a transfer of shares in .. a company has been lodged with the company, the company must either-

(a) register the transfer, or

(b) give the transferee notice of refusal to register the transfer, together with its reasons for the refusal, as soon as practicable and in any event within two months after the date on which the transfer is lodged with it.’

235. Regulation 25 of Table A similarly provides:

‘If the directors refuse to register a transfer of a share, they shall within two months after the date on which the transfer was lodged with the company send to the transferee notice of the refusal.’

236. If directors fail to exercise a company’s right of refusal within a reasonable time, the power of refusal is lost: Re Swaledale Cleaners Ltd [1968] 1 WLR 1710 (CA); Re Inverdeck Ltd [1998] BCC 256.

237. In the present case, the Claimants maintain that the transfer was lodged with the Company by 10 October 2019 at the latest. This was the date on which Mr Lawson sent a copy of the stock transfer form together with the TR1 to Mrs Lakha and Ms Hutchison among others.

238. No board decision was purportedly taken until more than two years later (at the November 2021 meeting).

239. Mr Churchill submitted that the Claimants should not be permitted to run the ‘timing’ argument on the grounds that it was not expressly set out in the summary of their position contained in the Schedule of Issues. I reject that submission. The Claimants’ summary of their position in the Schedule of Issues made express reference to certain paragraphs of Mr Clarke’s first witness statement, which in turn addressed (among other things) the question of timing. Contemporaneous correspondence in evidence also confirms that the Defendants were clearly alive to the timing issue: see paragraphs [42]-[47] above. The Schedule of Issues does not displace the function of skeleton arguments: see [50]-[51] above. Legal argument on the timing issue was set out in the Claimants’ skeleton argument and was based on facts and matters already flagged in the Schedule of Issues.

240. Turning next to address the timing issue itself, Mr Churchill submitted that time should not treated as starting to run until a *request* to register the transfer of the share had been made. In this regard he relied upon Re Swaledale Cleaners Ltd [1968] 1 WLR 1710. I reject that submission. It is not supported by the ratio of Re Swaledale. Both Section 771 CA 2006 and Regulation 25 of Table A are in mandatory terms. Time runs from the date that the share transfer is lodged with the company. Within 2 months of lodging, the company must either register the transfer or give notice of refusal.

241. On the evidence which I have heard and read, I am satisfied that the share transfer was ‘lodged’ with the Company by 10 October 2019 at the latest. Indeed, as Mr Clarke was company secretary and unit 4 was the registered office of the Company by the time of the share transfer (see [218] above), there is an argument that the share transfer was ‘lodged’ prior to that date. On any footing, however, I am satisfied that it was lodged by 10 October 2019 at the latest. I so find. To the extent that the Defendants sought to argue that transmission by email did not qualify as lodging for such purposes, I reject that argument. The evidence confirms (and I so find) that Company business was habitually conducted by email.

242. In my judgment, in the events which have occurred, even putting to one side the obvious questions regarding Mrs Lakha’s and Ms Hutchison’s claimed status as

directors which arise in light of my findings and conclusions on Issue 2, any power of the Company acting by its directors to refuse to register the transfer was lost at the latest on the expiry of 2 months running from 10 October 2019. I so find.

243. In light of my conclusions in [242] above, it is unnecessary for me to consider the Claimants' remaining arguments on this issue.

244. Suffice it to state that, even putting to one side the obvious questions regarding Mrs Lakha's and Ms Hutchison's claimed status as directors which arise in light of my findings and conclusions on Issue 2, in light of my conclusions on Issue 7 (addressed below), the November 2021 meeting at which the Defendants purportedly resolved to refuse to register the transfer was in any event of no effect.

245. I would add that the only reason given in the notice of refusal was plainly misconceived, as the planning restriction relied upon did not operate either to prevent a valid transfer of legal title in Unit 3 to the Claimants or to ensure that members of the Company were all unconnected. There cannot have been any proper purpose in refusing to register the transfer on such a basis.

Conclusions on Issue 4

246. The register of members itself allows for different dates to be inserted for (i) 'date of entry as a member' and (ii) 'date of acquisition by allotment or transfer'. In my judgment, the Claimants were entitled to have their names entered on the Company's register as joint holders of one ordinary share in respect of Unit 3 (ie 'date of entry as a member') on the expiry of 2 months running from 10 October 2019 (ie 10 December 2019) at the latest. Any power of the Company acting by its directors to refuse to register the transfer was lost by 10 December 2019 at the latest. For the sake of clarity, I confirm that the 'date of entry as a member' for the purposes of the register of members does not impact on the 'date of acquisition by transfer' as set out in that register. The 'date of acquisition by transfer' is plainly that set out in the stock transfer form ie 9 May 2019.

247. I would add that, even putting to one side the obvious questions regarding Mrs Lakha's and Ms Hutchison's claimed status as directors which arise in light of my findings and conclusions on Issue 2, in light of my conclusions under Issue 7 (addressed below), the business transacted at the November 2021 meeting was in any event invalid and of no effect. As a director, Mr Lawson was entitled to notice of that meeting and was deliberately excluded: see John Shaw & Sons (Salford) Ltd v Shaw [1935] 2 KB 113 (CA). It follows that even if the right of refusal had not already been lost, the purported resolution of Mrs Lakha and Ms Hutchison to refuse to register the transfer of one share in respect of Unit 3 would in any event have been of no effect.

Issue 7: Was Mr Lawson appointed a director of the Company on 9 May 2019 and/or at any other time? If so, does he remain a director?

248. On the evidence which I have heard and read, I am satisfied that the Claimants' names were entered in the register of members on 9 May 2019 in respect of Unit 3 prior to the appointment of Mr Lawson as a director. The register of members is in evidence before me and supports Mr Clarke's testimony in this regard. There has never been any application by the Defendants pursuant to section 125 CA 2006 to rectify the

register of members to remove the Claimants' names. As both unit owners and registered members in respect of the share relating to Unit 3, under the articles as amended by conduct, the Claimants were entitled to appoint Mr Lawson as a director by notice to the Company.

249. As Mr Clarke was at the time the company secretary and Unit 4 was the registered office of the Company, there is an argument that the Claimants gave such notice to the Company on 9 May 2019. On any footing however, (again, putting to one side the obvious questions which arise as to Mrs Lakha's and Ms Hutchison's claimed status as directors in light of my findings and conclusions on Issue 2), I am satisfied that the Claimants gave such notice to the Company on 18 May 2019 at the latest. On that day, Mr Clarke emailed Mrs Lakha and Ms Hutchinson (among others), confirming that the Claimants had acquired Unit 3 and that Mr Lawson had been appointed as a director of the Company in respect of that unit. Mr Lawson's appointment as a director therefore took effect on 18 May 2019 at the latest. I so find.

250. Even if I am wrong in my conclusion on the timing of Mr Lawson's appointment, and that appointment falls instead to be treated as not taking effect until the expiry of 2 months from the date of lodging of the stock transfer form with the Company on 10 October 2019 (ie 10 December 2019, the point at which the directors of the Company lost the right to refuse to register the share transfer) the effect would be simply that Mr Lawson was appointed with effect from 10 December 2019 and not 18 May 2019. Little turns on that in the current context.

251. I turn next to Issue 9.

Issue 9: Is the purported resolution dated 23 June 2021 invalid and of no effect?

252. Mrs Lakha and Ms Hutchison each described the June 2021 resolution as a members' resolution in their witness statements. By the time of closing submissions, Mr Churchill conceded that the resolution could not be a members' resolution, as the Defendants were not registered members of the Company. He argued that it was a board resolution instead.

253. The Claimants maintained that whether viewed as a purported members' or board resolution, the purported resolution was of no effect. They argued as follows:

(1) the members of the Company do not have any power to alter the articles or direct its directors to take any specified action except by special resolution: see s.21(1) CA 2006 and Regulation 70 of Table A;

(2) on any footing, the June 2021 resolution could only ever have been passed as an 'ordinary' resolution, as the Claimants cast their votes against it. Even if Mr Blake was treated as having remained a member, he was not given notice of the resolution and did not vote in favour of it;

(3) there was no valid resolution of the board of directors authorising the proposal of any members' resolution (or even any consideration of this by the board) and it was, accordingly, invalid: there is no power for members to circulate a written resolution (ss 292-3 CA 2006, Re Sprout Land Holdings Ltd (in administration) [2019] EWHC

806 (Ch)) or to requisition a general meeting them themselves save in the limited circumstances prescribed by s 303 CA 2006;

(4) there is no provision under the articles or CA 2006 for votes to be cast 'virtually' by email. There was no valid members' meeting and no valid members' written resolution;

(5) if the June 2021 resolution was instead characterised as a board decision then it could have no effect on the Company's constitution or on the rights of members; and

(6) in any event, no valid board decision was taken because no board meeting was convened and it was not a unanimous resolution in writing pursuant to Regulation 93. Moreover, no notice of the June 2021 resolution was given to Mr Lawson who by then was a director of the Company.

254. In my judgment, whether characterised as a members' resolution or a board decision, the June 2021 resolution is invalid and of no effect.

255. If characterised as a purported members' resolution: even putting to one side (i) the fact that the Defendants are not registered members and so cannot vote (ii) any questions of whether the Claimants by their letter dated 17 June 2021 voted against the resolution in their capacity as members (or simply as directors, as Mr Churchill argued) and (iii) any questions of whether all registered members were given notice of the proposed resolution, there was in any event no valid resolution of the board of directors authorising the proposal of any members' resolution (or even any consideration of this by the board) and it was, accordingly, invalid: there is no power for members to circulate a written resolution (ss 292-3 CA 2006, Re Sprout Land Holdings Ltd (in administration) [2019] EWHC 806 (Ch)) or to requisition a general meeting them themselves save in the limited circumstances prescribed by s 303 CA 2006. There is no provision under the articles or CA 2006 for votes to be cast 'virtually' by email either.

256. Dealing next with the Defendants' final position in closing, that the resolution be treated as a board resolution instead: even putting to one side the obvious questions which arise as to Mrs Lakha's and Ms Hutchison's claimed status as directors in light of my findings and conclusions on Issue 2, no valid board decision was taken because no board meeting was convened and it was not a unanimous resolution in writing pursuant to regulation 93. In addition, no notice of the June 2021 resolution was given to Mr Lawson, who was by then a director of the Company: see John Shaw & Sons (Salford) Ltd v Shaw [1935] 2 KB 113 (CA).

257. For all these reasons, I conclude that the purported resolution dated 23 June 2021 is invalid and of no effect.

Issue 10: is the purported board resolution dated 17 November 2021 invalid and of no effect and/or factually inaccurate?

258. In light of my conclusions on Issue 7, even putting to one side the obvious questions which arise as to Mrs Lakha's and Ms Hutchison's claimed status as directors in light of my findings and conclusions on Issue 2, I conclude that the purported board resolution dated 17 November 2021 is invalid and of no effect: see John Shaw & Sons

(Salford) Ltd v Shaw [1935] 2 KB 113 (CA). Mr Lawson was entitled to receive notice, attend and vote but was deliberately excluded. I so find.

259. In light of my conclusions at paragraph [258] above, save to repeat my observations at [245], it is unnecessary for me to address the Claimants' other arguments on this issue. In the interests of brevity, I decline to do so.

Remaining Issues

260. Issues 1 and 3 are not contested.

261. The status of the filings at Companies House listed in Issue 8 largely follows from the other conclusions set out in this judgment.

The Way Forward

262. I shall hear submissions on costs and any consequential relief upon the handing down of this judgment. Plainly it will be in all parties' interests to ensure that the Company's register of members is updated and its affairs regularised at the earliest juncture. To the extent that this has not been attended to already since trial, the Defendants should give consideration to lodging with the Company any stock transfer forms/other forms of transfer required for the updating of the register of members (and in Mrs Lakha's case, any notice of election to become holder in accordance with Regulation 30). I encourage the parties to cooperate in this regard.

263. I invite counsel to agree and lodge a draft order in advance of handing down.

ICC Judge Barber