The Court of Appeal for Bermuda

CIVIL APPEAL No. 20 of 2016

B E T W E E N:

EAST ASIA COMPANY LIMITED

Appellant

-v-

PT SATRIA TIRTATAMA ENERGINDO

Respondent

Before: **Baker, President**
Clarke, JA
Kawaley, AJA

Appearances: Narinder Hargun and Rhys Williams, Conyers Dill & Pearman Ltd., for the Appellant
Steven White, Cox Hallett Wilkinson Ltd, for the Respondent

Date of Hearing: **14 & 15 June 2017**
Date of Judgment: **18 September 2017**

JUDGMENT

Rectification of share register – validity of board resolutions approving sale of shares in subsidiary and registration of transfer of shares – validity of share sale agreement and share transfer instrument – conflict of interest – consequences of failure of directors to disclose their financial interest in proposed arrangement – Companies Act 1981 sections 48, 50, 67, 97 – ostensible authority of directors

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CLARKE JA

The Issue

1 The issue in this case is whether Hellman J was right to order rectification of the share register of Bali Energy Ltd ("BEL") so as to record PT Satria Tirtatama Energindo ("PT Satria"), the Respondent, as the registered owner of 51,135,000 shares which it claims to have purchased from East Asia Company Limited ("EACL"). EACL is the Appellant.

The players

2 **PT Satria** is part of an Indonesian conglomerate called PT Satria Gemareska ("SGR"). SGR's business includes power generation. PT Satria's business includes the development of geothermal energy sites in Indonesia. PT Satria's sole director and 85% shareholder, who is also President and director of SGR, is Mr Wisnu Suhardono ("Mr Suhardono").

3 **BEL** is a Bermuda exempted company. It owns, at any rate for the moment, the right to develop a geothermal energy site at Bedegal in Bali.

4 **EACL** is the sole shareholder of BEL. Its shareholding consisted of 51,135,000 common shares. The sole shareholder of EACL is Affluent Ocean Ltd ("**AOL**"), a company incorporated in the Seychelles, which is owned and controlled by Mr Matsuo Watabe ("Mr Watabe"). He had apparently acquired it for $93,000. When and how he became the owner of AOL is unclear. He was entered on the Register as holder of the one share in, and a director of, AOL on 20 January 2015. EACL had no other assets and was simply a holding company for Mr Watabe.

5 The shares in BEL were previously held by a Japanese company called AIM Holdings Ltd (“AIM”). The Chairman and principal of AIM was formerly Mr Koji Matsumoto (“Mr K Matsumoto”). He used, also, to be Chairman and a director of BEL, but resigned on 1st June 2013, together with another former director of BEL called Shu Hirano, (“Mr Hirano”) when they were both declared bankrupt by the Tokyo District Court in Japan. AIM was also the subject of bankruptcy proceedings in that Court at the time.

6 There is a dispute as to the true composition of the Boards of EACL and BEL.

BEL’s Board

7 In respect of BEL the two longest serving directors at the beginning of 2015 were Edwin Joenoes (“Joenoes”) and Ira Hata (“Hata”). Joenoes was appointed in 2004. Hata had been involved in the company since 2007. He was appointed Chief Executive Officer on 4 December 2009 and a director on 24 December 2010. Joenoes is described in the share register as at 20 October 2014 as Chief of General Affairs. Joenoes and Hata worked closely together and ran the company. Neither of them had shares in it.

8 The other directors were Kiyoshi Yamaura (“Mr Yamaura”), Yoshiniri Matsumoto (“Mr Y Matsumoto”) and Masayo Matsumoto (“Ms M Matsumoto”). The first two were appointed on 1 July 2013. The date of the appointment of Ms M Matsumoto is unknown. They played no active role in the business of BEL. Mr Yamaura is an old friend of Mr K Matsumoto. Mr Y Matsumoto and Ms M Matsumoto are Mr K Matsumoto’s children.

9 Mr Yamaura and Ms M Matsumoto resigned as directors of BEL with effect from 1st April 2015 and Mr Y Matsumoto resigned as a director with effect from 15th April 2015.

10 The most recent Register of Directors and Officers of BEL shows that as of 15 April 2015 the directors of BEL were Hiroichi Kitamoto ("Mr Kitamoto") and Motonaru Takeyama ("Mr Takeyama"). They were purportedly elected as directors on 4 March 2015. Whether that register is correct is in dispute, as is the appointment of OSIRIS Limited, which maintained the Register, as Secretary

EACL's Board

11 As of 20 October 2014, EACL had three directors; Joenoes, Hata and Mr Yamaura. Mr Yamaura resigned with effect from 20 March 2016. The appellant contends that the present directors are Mr Kitamoto and Baotake Manaka ("Mr Manaka"). They, too, were purportedly elected as directors on 4 March 2015.

12 The judge described the participants in this dispute as falling into two camps of purported directors. They are as follows:

The Watabe camp

- Mr Yamaura, Mr Y Matsumoto and Ms M Matsumoto[1] – formerly directors of EACL and/or BEL

and then

- Mr Kitamoto and Mr Manaka (said now to be directors of EACL) and

- Mr Takeyama (said now to be a director with Mr Kitamoto of BEL)

The opposing camp

[1] The judge refers to Mr K Matsumoto which would appear to be in error or, at any rate, requires the addition of Ms M Matsumoto, his daughter.

- Joenoes and Hata

13 The history leading up to the share transfers in issue is set out in the following paragraphs of the judgment which it is convenient to set out:

> *"21 BEL owns rights to develop a geothermal energy site at Bedugul in Bali, Indonesia. BEL intends to develop the site to generate electricity. This project ("the Project") is the company's only business. The rights are secured by two agreements, both dated 17th November 1995 and updated in 2004."*

14 The first agreement is a joint operations contract ("JOC") with PT Pertamina Persero ("Pertamina"), an Indonesian state owned company. Under the agreement, BEL is obligated to design, finance, construct and operate an electric power plant at Bedugul at its own cost and risk.

15 The second agreement is an energy sales contract ("ESC") between BEL, Pertamina and PT PLN Persero ("PLN"), the Indonesian state power company, under which, once the power plant is built, PLN will buy electricity from BEL.

16 The most recent financial statements for BEL were prepared by PriceWaterhouseCoopers for the financial years ended 31st December 2008 and 2007. The notes to the financial statements recorded:

> "*As at 31 December 2008, the Company has a* ***negative working capital of US$ 8.3 million, accumulated deficit of US 11.9 million, recurring losses and negative operating cash flows.*** *Furthermore, the project is suspended as a result of delay in obtaining*

> *permit from the Government … These conditions raise substantial doubt about the Company's ability to continue as a going concern since ultimate realization of the Company's assets depends on the successful development of its commercial production and continuing financial support of its affiliated companies or its shareholders.*"

17 Joenoes and Hata tried to find a suitable investment partner and/or buyer of BEL. They entered into discussions with several of the leading companies in the engineering and power generation sector. These included PT Satria in 2011 – 2012 and subsequently another Indonesian energy company called PT Praja Bumi Selaras ("PBS").

18 PBS entered into a memorandum of understanding ("MOU") with EACL and EACL's then beneficial owner, Mr K Matsumoto, in 2012. When the MOU expired, they entered into a second MOU with EACL and EACL's new owner, AOL, in 2013.

19 The premise of the MOUs was that PBS would acquire BEL by purchasing 80 per cent of the shares in EACL upon completion of satisfactory due diligence, and that in the interim PBS would provide BEL with a level of financial support. The purchase price stated in the second MOU was US$8,000. AOL would be entitled to a share of revenue generated by future development of the project, but would have to contribute proportionately to the cost of such development.

20 PBS cancelled the second MOU in October 2014. This left BEL with a pressing need to find alternative funding. The minutes of a Board meeting of BEL, which took place on 14th December [2014][2] via Skype and at which the directors present

[2] Referred to in the judgment as 2016

were Joenoes and Hata, noted that whereas the key assets of the company, namely the JOC and the ESC, were intact, there was a possibility that due to financial constraints the company would fall out of compliance with them.

21 In addition, BEL and EACL had to pay their Bermuda Government annual fees by 31st January 2015. Non-payment would incur the risk that the companies would be struck off the Register of Companies. Further, both companies needed to secure the services of a new corporate secretary, to replace the old one, which had resigned, and to pay the new secretary's annual fee, which would be required in advance as an annual retainer.

22 In December 2014 BEL issued cash calls to its shareholder EACL, which in turn issued cash calls to its shareholder AOL. The cash calls were authorised by Board resolutions of BEL dated [22nd December 2014][3] and EACL dated 6th January 2015. Both meetings took place via Skype and the directors present were Joenoes and Hata. The resolutions noted that if the members failed to provide financial support the respective companies would consider other sources.

23 The cash calls sought funds to: (i) facilitate a request by the Government of Indonesia for a site visit to Bedugul in January 2015 (US$14,000); (ii) pay outstanding tax liabilities to the Indonesian Tax Authorities; a judgment from the Department of Manpower in Indonesia ordering BEL to pay ex-employees back-pay and severance; and postponed payments to vendors (US$ 1.4 million); and (iii) pay outstanding salaries due to Joenoes and Hata plus compensation for (presumably the next) six months (US$518,500). The cash calls went unanswered.

[3] Referred to in the judgment as 22 October 2014.

24 When PT Satria heard that PBS had terminated the MOU, it contacted BEL to discuss re-opening talks. This was in December 2014. Mr Suhardono gave evidence that this was because the Indonesian Government had asked him to intervene and take what was potentially a failing project in hand. He said that the Government had confidence in him because he had previously done just that with two geothermal energy projects which were substantially larger than this one. He referred to it disparagingly as a "*trash project*".

25 Negotiations commenced in earnest on 16th January 2015, after the deadlines for the cash calls had expired. PT Satria undertook due diligence in relation to BEL, including reviewing the company's financial documents, and assessed the value of the company. PT Satria had conducted substantive due diligence in 2012, so it had only to update those findings. The work was undertaken by PT Satria's staff, who reported their findings to Mr Suhardono.

26 Having satisfactorily completed its due diligence, PT Satria began closing negotiations on 16th February 2015. When valuing BEL it took into account that the company was in debt by almost US$ 2 million; had no assets other than the JOC and ESC; did not own the Bedugul site; was insolvent in that it was unable to pay its debts as they fell due and was therefore vulnerable to enforcement action from creditors; and that on Mr Suhardono's estimate an investment of $60 million would be required to produce sufficient capacity at the site to realise a profit, or, as he put it, "*change trash into fertiliser*".

27 On 27th February 2015 PT Satria and EACL executed a document headed "*Heads of Agreement ('HOA') on the Sale and Purchase of Bali Energy Ltd.*". It was signed by Mr Suhardono in his capacity as director on behalf of PT Satria and Joenoes in his capacity as director on behalf of EACL, and witnessed by Hata in his capacity as CEO on behalf of BEL. The contact between Mr Suhardono/PT Satria and EACL was made by Hata and Joenoes. No other directors of BEL or EACL or

AOL were aware of what was going on or of the making of the HOA. Nor was Mr Watabe.

The Heads of Agreement of 27 February 2015

28 The Heads of Agreement ("HOA") of 27 February was drafted by PT Satria's legal department. They are expressed to be between EACL and PT Satria "Concerning BEL". Paragraph 1 recorded that EACL held the sole right to develop exploitable geothermal energy within Bedugul geothermal field located within the major Breton caldera, at Bedugul, Bali, Indonesia (the "Project"). Paragraph 2 recorded that EACL was seeking to sell 100% of its shares in BEL totalling 51,135,500 shares ("the Purchase Shares") to a competent investor that could develop and operate the Project; and that PT Satria sought to purchase the Purchase Shares with a commitment to developing BEL's geothermal project in Bali expeditiously.

29 Paragraph 3 provided:

> *"[EACL] and [PT Satria], (collectively referred to as the 'Parties'), now wish to record* ***their intent to proceed to negotiate a Sale and Purchase Agreement*** *('the Final Agreement') for the Purchase Shares as follows.*
>
> *A. [EACL] agrees to sell, and [PT Satria] agrees to purchase, the Purchase Shares for a consideration of two million United States Dollars and zero Cents (2,000,000 USD), hereafter referred to as the 'Cash Payment'.*
>
> *B. The aforementioned Cash Payment shall be paid in full by [PT Satria] to [EACL] within thirty (30) days of the commissioning of the final unit of the Project.*
>
> *C. The Parties acknowledge that in purchasing the Purchase Shares, [PT Satria] assumes all the current*

financial liabilities of BEL in the Republic of Indonesia, totalling up to one million nine hundred thousand United States Dollars (1,900,000 USD).

D. *[EACL] agrees and is ready to transfer the Purchase Shares immediately upon the signing of the agreement.*"

30 Paragraph 4 provided that:

> "*The Parties wish to conclude the Final Agreement as soon as possible, recognizing that there are pressing outstanding financial obligations in BEL, and that there is an urgency to formalise agreement and commence implementation of the Project as soon as possible."*

31 Paragraphs 6 – 8 provided as follows:

> "6 *EAC, Hata and Joenoes guarantee that all approvals needed to sign the HOA have been obtained.*
>
> *7 EAC, Hata and Joenoes, jointly and severally, undertake to indemnify and keep indemnified and hold harmless STE from and against all claims, costs, expenses, losses, damages or liabilities suffered by STE directly or indirectly from and against any claims, costs, expenses, losses, damages or liabilities suffered by STE directly or indirectly, as a result of or in connection with any breach of any representations and warranties and/or covenants given by EAC, Hata and Joenoes including but not limited to, (i) any claims that are submitted or any action that may be made by any party,*

> *including any of EAC, Hata and Joenoes, against Bali Energy Limited arising from events, matters or circumstances occurring before and after the HOA and Final Agreement, (ii) any diminution in the value of the assets of the Bali Energy Limited, and (iii) any payment made or requested to be made by STE in connection with Bali Energy Limited actions arising from events, matters or circumstances occurring before the HOA and Final Agreement*
>
> *8 It is the intent that the Parties shall negotiate in good faith to finalise the Final Agreement, and that this Heads of Agreement shall be legally binding."*

32 Exhibit A to the HOA set out the financial liabilities of BEL which would be paid from the $1.9 million, although they were stated to be subject to audit and confirmation, and the dates by which they would be paid. Certain fees and retainers, totalling US $ 18,500, were to be paid immediately upon signing. Outstanding officers' compensation due from BEL to Joenoes and Hata in the sum of $483,100 was payable in stages: 50% within 2 weeks of the transfer of the shares, (together with an outstanding payment of $ 35,400 for the lease of an apartment for Hata); 25% within 1 month and a final 25% within two months of the transfer of shares. Back pay and severance to BEL's other employees, amounting to the equivalent of more than $570,000, was payable by no later than 31st December 2015.

Was the HOA legally binding?

33 The judge was satisfied that the HOA was, as paragraph 8 stated, legally binding. It included all the terms necessary for the agreement to be workable and was an enforceable agreement between the parties [54]. I take that to mean that it was

an agreement under which EACL was obliged to transfer BEL shares to PT Satria even though no Final Agreement had been agreed.

34 I have no difficulty in accepting that clauses 6 and 7 contain, in the light of clause 8, legally binding promises to guarantee and indemnify. More problematic is the question whether, absent any subsequent development, clause 3 has binding contractual effect. That is for two reasons. First, clause 3 records an intent to proceed to negotiate a Sale & Purchase Agreement as set out in A - D. This is not the language of promising to sell rather than to negotiate. Second, under "D" the Purchase Shares are to be transferred immediately upon the signing of the agreement. Although "*the agreement*" lacks a capital "A" it seems to me that it must refer to the Final Agreement, and not the HOA, since (a) sub paragraph D is one of the four sub paragraphs A – D which describe the Final Agreement which is to be negotiated; and (b) if the parties meant the HOA they could easily have said either "this agreement" or "the/this HOA" – HOA being the defined abbreviation for the document which was signed.

35 In those circumstances the HOA was either an agreement to negotiate an agreement whereby EACL would transfer and PT Satria purchase the shares upon signature of the Final Agreement (as seems to me likely to be the proper analysis: *see Barbudev v Eurocom* [2012] All ER (Comm) 963, 974); or, at best, it was an agreement to transfer the Purchase Shares immediately upon the signing of the Final Agreement. In either event, if the negotiations failed to produce a signed Final Agreement, EACL would not, as it seems to me, have been obliged to transfer the Shares since, even in the latter case, the condition on which the transfer of the Shares was to take place would not have arisen.

36 It is, however, unnecessary to resolve this question since, although there were no further negotiations, those purporting to represent EACL and PT Satria treated the HOA as the Final Agreement and executed a transfer of the shares.

Maneuvering prior to 27 February 2015

37 A series of board meetings of EACL and BEL took place in December 2014, on 16, 18, 22 and 31 December. The meetings were held by Skype and those participating were Hata and Joenoes.

Issue of shares in BEL to Hata and Joenoes

38 The minutes of the **18 December 2014** meetings recorded the issue to Hata and Joenoes of share transfer agreements (“STAs”) executed on 1 January 2010 and filed with both companies which acknowledged that Hata had the legal right to 3,579,800 shares (7% of the outstanding) and Joenoes to 5,114,00 shares (10% of the outstanding) in BEL. The board minutes of both companies recorded that the transfers were not proceeded with because a purchase of shares in BEL by PBS was imminent and PBS agreed to negotiate the terms of those shares. The Boards of both companies resolved to continue to recognise the executed STAs and to execute the transfer of BEL shares from EACL to Hata and Joenoes immediately upon their demand.

39 On the same day Mr Yamaura, Mr Matsumoto and Ms Matsumoto signed a written request to Hata and Joenoes not to hold meetings of BEL by Skype but for discussion and vote to be by email. Mr Yamaura signed a similar request in relation to the Board meetings of EACL held and/or to be held on 16,18,22 and 31 December. On 22 December 2014, the Boards of EACL and BEL rejected these requests at a meeting held by Skype in which Hata and Joenoes participated.

Attempts to remove Mr Yamaura, Mr Matsumoto and Ms Matsumoto as directors of BEL

40 On **18 December 2014** Hata and Joenoes gave notice to the members and board of BEL that there would be a Special General Meeting of BEL on 31 December 2014 in Japan for the purpose of removing Mr Yamaura, Mr Matsumoto and Ms Matsumoto as directors of BEL.

AOL’s written warning to Hata and Joenoes

41 Also on **18 December 2014** AOL, as owner of EACL, issued a "*Written Warning on Acts in Breach of Trust of the Sole Member*" under which AOL resolved that Hata and Joenoes be warned that their "*recent acts can and will construe acts [sic] in breach of trust against the Sole Member of the company and may result in their removal as Directors with immediate effect*". The introduction to the Resolution recorded that the signatory as Sole Member of the Company (the warning was signed on behalf of AOL by Mr Clifford Frank) strongly condemned the convening and/or holding by Mr Hata and Joenoes of Board meetings on 16,18, 22, and 31 December 2014. Mr Frank was the original registered owner of the shares holding, originally, as a nominee for a Hong Kong company.

42 The warning was sent by Mr Yamaura to Hata and Joenoes on **19 December 2014**. On **20 December 2014** they replied to say that pursuant to a resolution at a meeting of the board of directors of EACL earlier that day EACL would continue its normal course of business, including proper corporate governance, following the Company Bye-laws, Bermuda *Companies Act 1981*, and laws of Bermuda.

The purported removal of Mr Yamaura, Mr Matsumoto and Ms Matsumoto as directors of BEL

43 On **31 December 2014**, a Special General Meeting of BEL took place in Japan attended by Hata, representing 30,000,000 shares and a Mr Unger representing 21,135,500 shares. At the meeting, which took place without reference to AOL or Mr Watabe, it was resolved that the Company should immediately remove the three individuals as directors. This resolution was invalid because 14 days' notice had not been given to the directors in question stating an intention to remove them nor had they been given an opportunity to be heard, as was required by Bye-Law 15 of BEL as a condition of the power to remove.

The purported removal of Hata and Joenoes as directors of EACL

44 On **2 January 2015** Mr Watabe emailed to Hata and Joenoes a letter from him to them dated 1 January 2015 in which on behalf of AOL he purported to relieve them of their duties as Directors and Officers of EACL immediately on the ground that they had acted fraudulently and illegally by "*removal of director*" (sic) without approval of the sole shareholder. Mr Watabe expressed himself as signing for AOL because the signature of the Owner (Clifford Frank) could not be obtained at the time of writing.

45 Hata replied to Mr Watabe. In his email, he pointed out, as was the case, that according to Article 41 of the Bye Laws of EACL only Members could remove a Director at an SGM held in accordance with the Bye-Laws and had to submit notices to the directors 14 days before the SGM; and, according to Article 21, only the President or the Chairman (if any) or any two directors or the director or the Secretary of the Board could convene an SGM; and he was neither a confirmed Member, President Chairman or Director. Accordingly the Board did not recognise the validity of his letter of 1 January 2015 and EACL would continue its daily course of business accordingly.

46 On **12 January 2015** an SGM of BEL, attended by Hata and Paul Unger, between them representing all the shares, resolved to approve the share transfers to Hata and Joenoes according to their STAs with EACL.

47 By **20 January 2015** Mr Watabe had become registered as the shareholder of AOL and had secured the services of Isis Law Ltd ("Isis"). Now began the second attempt to remove Hata and Joenoes as directors of EACL and an attempt to remove them as directors of BEL.

48 On **24 January 2015** Isis on behalf of AOL emailed to Mr Yamaura, Hata and Joenoes a requisition of an SGM of EACL and a notice from EACL of an SGM to be convened on 9 February 2015. The requisition was contained in a letter from

Isis to the Board of Directors of EACL dated **23 January 2015** and hand delivered to EACL on that date in which they said:

> "*By this letter [AOL] hereby requires the Board of EACL to convene a special general meeting of EACL forthwith to take place at 5th Floor Andrew's Place, 51 Church Street, Hamilton, HM 12 Bermuda to take place on 9 February 2015 or on the earliest date thereafter.*"

The letter specified the purposes of the SGM as being to remove Messrs Hata and Joenoes as directors and elect Messrs Manaka and Kitamoto in their place and to recommend the approval of a change of corporate administrator. It attached a notice of the SGM which it said was served on Hata and Joenoes at their last known email address.

49 On **24 January 2015** Isis emailed to Mr Yamaura, Hata and Joenoes and others a notice of an SGM to take place on 9 February 2015 in order to remove Hata and Joenoes as directors of BEL and to elect Hiroichi Kitamoto and Molonari Takeyama as directors and to appoint Osiris Ltd as Company Secretary. The notice was expressed to be by order of Mr Yamaura and Mr and Ms Matsumoto

50 On **5 February 2015** Hata and Joenoes acknowledged receipt of the requisition and notice in respect of EACL and advised that, as the "*purported requisition*" had not been made in compliance with the *Companies Act 1981* (section 74), the Board would not be taking steps to convene an SGM on the terms set out in the notice; but said that upon receipt of a requisition made in accordance with the Act the Board would meet its obligation to convene an SGM.

51 On **10 February 2015** Isis replied saying that the SGM of EACL had been validly requisitioned and that AOL looked forward to receipt of confirmation that the SGM had been convened in accordance with section 74.

52 On **17 February 2015** Hata and Joenoes wrote to Isis to say that the requisition received from AOL was invalid because it purported to convene a meeting at Isis' offices on 9 February 2015 when the Act did not provide that a requisitionist could specify the date and location of the meeting. By this time Mr Suhardono was engaged in "closing negotiations" with Joenoes and Hata, who did not inform any other director of BEL, EACL or AOL that they were going on.

53 On **6 February 2015**, Hata and Joenoes had acknowledged receipt of the notice of an SGM of BEL and advised that as Mr Yamaura and Mr and Ms Matsumoto were removed as directors of BEL on 31 December 2014 they had no authority to convene an SGM and that any purported SGM on 9 February would be invalid. On **7 February 2015** Isis emailed Hata and Joenoes asking them to provide evidence that 14 days' notice of the SGM of BEL was given to the purportedly dismissed directors and that they were given the opportunity to be heard. No such evidence was or could have been given.

54 On **18 February 2015** Isis emailed a notice on behalf of AOL of an SGM of EACL to be held on Wednesday 4 March 2015 at 10.00 in Bermuda for the purpose of removing Hata and Joenoes as directors of EACL and the election of Mr Manaka and Mr Kitamoto as directors of EACL and the appointment of Osiris Ltd as its secretary. This followed the failure of the directors of EACL to convene such a meeting following AOL's notice of 23 January 2015.

55 On the same day Isis sent a notice by order of Mr Yamaura, Mr and Ms Matsumoto of an SGM of BEL to be held on Wednesday 4 March 2015 at 11.00 for the purpose of removing them as directors of BEL and electing Mr Manaka and Mr Kitamoto as directors of BEL and the appointment of Osiris Ltd as its secretary.

56 As a result, Hata and Joenoes were aware that, subject to any procedural arguments, they were at risk of being removed as directors of EACL and BEL on 4th March. Despite that they continued to negotiate the sale of EACL's 100% holding in BEL without informing any other director of BEL, EACL or AOL or Mr Watabe, the shareholder of AOL.

57 By **13 February 2015** PT Satria had completed its due diligence in respect of the purchase of BEL. On **16 February 2015**, by which time the time for responding to the cash calls had expired, the closing negotiations began. By this time BEL and EACL were, as the judge found ([24]-[31]) effectively broke.

58 The HOA was dated **27 February 2015**, which was a Friday.

Saturday 28 February 2015

59 At 16.48 Japanese Standard Time on Saturday **28 February 2015** Joenoes emailed Hata and Mr Yamaura a message to the Board of EACL attaching a notice of a meeting of the Board to be held by Skype on Sunday March 1 2015 at 10.00 Japan Time. The Agenda included the following:

> *"3 Share transfer cancellations*
> *4 Share transfer approval"*

60 At 17.05 Japanese Standard time Joenoes emailed a message to the Board of BEL attaching a notice of a meeting of the Board to be held by Skype on Sunday March 1 2015 at 10.15 Japan time. The notice contained an agenda in which items 3 and 4 were in the same terms.

Sunday 1 March 2015

61 At 07.55 on **1 March 2015** Mr Yamaura emailed Hata and Joenoes attaching a letter from himself and Mr and Ms Matsumoto objecting to the convening of the BEL Board meeting on two grounds: (i) that they were not able to participate by

Skype which was not a valid, reliable means of communication and there was no physical location or dial number on the notice; (ii) the majority of the shares in the Company were wholly owned by EACL and its sole shareholder, AOL, had convened an SGM of EACL to be held on 4 March 2015 to remove them as directors of EACL; and Messrs Yamaura and M and Y Matsumoto had convened an SGM of BEL to be held on the same date to remove both of them as directors of BEL; they should not therefore be approving any actions which related to the assets or shares of the company.

62 At 09.07 on **1 March 2015** Mr Yamaura emailed Hata and Joenoes, enclosing a letter of 28 February 2015 from himself as a director of EACL objecting to the convening of the EACL Board meeting on three grounds: (i) that he was not able to participate in Skype about which he made the same objections as in (i) above; (ii) the shares in the Company were wholly owned by AOL and, therefore, no dealings in those shares could be approved without the involvement of the sole shareholder; (iii) an SGM had been convened by the sole shareholder, AOL to be held on 4 March 2015 to remove the two of them as directors and they should not therefore be approving any actions which related to the assets or shares of the company.

The Board Meetings

63 At 08.27 GMT Isis sent Joenoes and Hata an email stressing to them that in their capacity as directors they owed both statutory and common law fiduciary duties to BEL and that if they breached them they would have personal liability under Bermudian law, and asserting that the actions proposed to be considered at the BEL Board meeting would in their view, amount to a breach of those duties.

EACL

64 At 10.00 Japanese time a meeting of the Board of EACL took place by conference call, in which Hata and Joenoes participated. At the meeting, the Board resolved to cancel the transfers to Hata and Joenoes of shares in BEL (see [24] and [32] above) and to approve the sale of 51,135,500 shares in BEL to PT Satria. Paragraph 4 of the Minutes, which records that resolution, states that PT Satria had "*submitted an offer for all of the Company's shares in BEL*" for a consideration of $1,900,000 including all BEL's financial liabilities, and cash compensation upon commissioning of units, and that as BEL was under serious pressure from the Indonesian Government for its outstanding taxes, as well as unpaid salaries and severance, the Company could no longer delay these payments totalling in excess of $1,300,000 and must fulfil its obligations to the Indonesian Government, or risk losing its only asset namely BEL.

65 There is no reference in the minutes to the HOA, which does not appear to have been presented to the meeting in any way, nor of the benefits which Hata and Joenoes stood to gain from it; nor was there any declaration of interest. Hata and Joenoes were, of course, aware of the HOA and its terms.

BEL

66 At 10.15 Japan time a Board meeting of BEL took place by Skype, in which, again, the participants were Hata and Joenoes. The minutes record that the Board had received a duly executed stock transfer form affecting (sic) the transfer of 51,135.500 common shares of BEL to PT Satria; and that the Board resolved:

> *"that the transfer be approved and the register of members be updated accordingly."*

67 The Share Transfer is dated **1 March 2015**. It is signed by Joenoes as (semble on behalf of) the transferor and Mr Suhardono on behalf of PT Satria. It reads:

> *"FOR VALUE RECEIVED, namely the assumption by [PT Satria] of the outstanding liabilities of [BEL] in the amount of …1,900,000.00 USD*
>
> *We, East Asia Company Limited (the "Transferor") hereby sell, assign, and transfer unto [PT Satria] …51,135,500 Common Shares of the Company"*

68 It is common ground that the transfer of shares required the approval of the Bermuda Monetary Authority ("BMA") which had not then been given and was not given until 27 April 2015.

69 On **2 March 2015** Isis, as counsel for AOL, wrote to Mr Suhardono, copied to, *inter alios*, Hata and Joenoes, to say that it had come to their notice that on March 1 2015 Messrs Hata and Joenoes improperly sought to transfer the shares of BEL owned by EACL to PT Satria pursuant to the Share Transfer form which he, Mr Suhardono, had signed. They asked him to note that this was not a valid or effective transfer of the shares of BEL to PT Satria and that, therefore, no transfer had occurred. A similar letter was sent to Messrs Hata and Joenoes.

The Special General Meetings of 4 March 2015

EACL

70 At 10.00 on **4 March 2015** an SGM of EACL took place. Mr Katsumi, a representative of AOL, attended by telephone as did Mr Yamaura, also by telephone. Present in Bermuda at Isis's offices were representatives of that firm. It was resolved that Hata and Joenoes be removed as directors of EACL and that Mr Manaka and Mr Kitamoto be elected as directors in their place. It was also

resolved that the 1 March Board Meeting which purported to transfer the shares of BEL to PT Satria should be rejected as being invalid.

BEL

71 At 10.15 on **4 March 2015** an SGM of BEL took place at which it was resolved that Hata and Joenoes be removed as directors of BEL and Mr Takeyama and Mr Kitamoto were elected as directors in their place. It was also resolved that the 1 March Board Meeting which purported to transfer the shares of BEL to PT Satria should be rejected as being invalid

72 On **6 March 2015** Isis wrote to Mr Suhardono/PT Satria on behalf of the current board of BEL to say that the purported actions taken by Hata and Joenoes did not result in a valid or effective transfer of the shares in BEL.

73 On **7 May 2015**, according to the evidence of Mr Yamaura contained in an affidavit sworn on 8 May 2015, he executed a Unanimous Resolution of the Board of Directors of **EACL** which was exhibited to that affidavit. The resolution resolved, *inter alia*, for the avoidance of doubt, that "*the purported share transfer of [BEL] shares to [PT Satria] is completely rejected as being, invalid, null and void*". The resolution also had the signature of Mr Manaka dated 7 May 2015 and of Mr Kitamoto dated 7 May 2016 (semble an error).

74 An affidavit of **8 May 2015** from Mr Takeyama deposed to the fact that he had executed a Unanimous Resolution of the Board of **BEL** on 7 May 2015 which he exhibited. This contained a similar resolution to that set out in the previous paragraph. The exhibit contained a signature to the resolution by Mr Kitamoto dated 7 May 2015.

75 On **7 April 2015** PT Satria began these proceedings seeking rectification of the share register of BEL in accordance with the HOA and the meetings of the Board of Directors of EACL and BEL. By his judgment dated **21 October 2016** Hellman

J ordered the rectification of the share register of BEL to record PT Satria as the owner of the 51,135,500 shares.

76 We were told by Mr Narinder Hargun, for the Appellant, that PT Satria has made no payments under the HOA other than the equivalent of about $ 39,000 in Indonesian currency and that the licence remains in place. Mr Suhardono's statement of 11 June 2016 refers to payments of circa IDR 2,953,594,569, which appears to be about £170,000, as money paid to preserve BEL pending the resolution of the current dispute.

The issues

77 This complicated set of manoeuvres gives rise to at least the following issues:

(i) Was entry into the HOA (followed by the execution of the share transfer agreement) actually authorised by EACL?

(ii) If not, was the entry into the agreement validly ratified by the Board of EACL at the meeting on 1 March 2015?

As to that:

(a) Was the notice of the meeting adequate?

(b) Did Hata and Joenoes have an interest (or a conflict of interest) which required to be declared at the meeting and which was not declared, so that they could not vote or be counted in the quorum?

(c) If the meeting was invalidly summoned or inquorate, did Hata and Joenoes nevertheless have ostensible authority to make and implement the HOA?

In particular:

(a) does the rule in *Turquand's* case assist PT Satria?

(b) to what extent, if at all, can PT Satria rely on any apparent authority of Hata and Joenoes to communicate to Mr Suhardono that they were authorised to enter into the MOA?

(c) was PT Satria put on notice or on inquiry that those two might lack authority?

(d) If not, were the HOA and the transfer voidable and have they been avoided?

(e) Was the approval of the sale and transfer of the shares invalid under section 48 (2) of the *Companies Act 1981* and was it, therefore, unlawful to register the transfer?

(f) Did it, in the light of section 50 of the *Companies Act 1981* and Byelaw 62 (2) of the Byelaws of BEL, become impossible for BEL to refuse to accept registration of the transfer because of a failure of the Board of BEL to resolve to refuse registration within 3 months of the transfer or to notify PT Satria of such refusal within 3 months of the lodgement of the share transfer.

Actual authority

78 Byelaw 45 of EACL provided:

> *"45 Directors to Manage Business*
>
> *The business of the Company shall be managed and conducted by the Board. In managing the business of the Company, the Board may exercise all such powers of the Company as are not by the Act or these Bye-laws,*

required to be exercised by the Company in general meeting."

The "*Board*" is defined in Bye-Law 1.1. as "*the board of directors appointed or elected pursuant to these Bye-laws and acting by resolution in accordance with the Act and these Bye-laws or the directors present at a meeting of directors at which there is a quorum."*

The quorum for a meeting is two directors: Bye-law 57. A resolution is said to be carried by the affirmative votes of the majority of the votes cast by those present: Bye-law 54.

79 Bye-Law 46 provided:

"Powers of the Board of Directors

The Board may:

…

(b) appoint one or more Directors to the office of managing director or chief executive officer of the company , who shall, subject to the control of the board supervise and administer all of the general business and affairs of the Company;

…

(g) delegate any of its powers…to a committee of one or more persons appointed by the Board which may consist partly or entirely of non-Directors, provided that every such committee shall conform to such directions as the

> *Board shall impose on them, and provided further that the meeting and proceedings of any such committee shall be governed by the provisions of these bye-laws regulating the meetings and proceedings of the Board, so far as the same are applicable and are not superseded by directions imposed by the Board*
>
> *(h) delegate any of its powers …to any person on such terms and in such manner as the Board may see fit;"*

80 No appointment was made under 46 (b). It is common ground that, since there had been, prior to the signing of the HOA, no resolution of the Board, no Board meeting, and no delegation of powers by the Board, the HOA was unauthorised when signed. The power to sell the assets of EACL, in particular its sole asset, rested with the Board. The guarantee in paragraph 6 of the HOA that all approvals needed to sign it had been obtained was false.

Ratification

81 The judge found [55] – [60] that there was no merit in the objections made as to the convening of the Board meetings of BEL and EACL made by Mr Yamaura in his letter emailed on 28 February 2015: see paragraphs [47] and [48] above; or as to the timing of the notices [66] and there is no appeal from that decision. He accepted that Joenoes and Hata did not have actual authority to conclude the HOA without a resolution of the Board but was satisfied that the requirements of the Bye-laws were satisfied by the Board retrospectively approving the sale: [61].

Notice of the meeting

82 As to the content of the notice, the judge accepted that there was no obligation when giving notice of a directors' meeting to give notice of the business to be transacted even if it was of a non-routine, extraordinary or unusual character:

La Compagnie de Mayville v Whitley [1896] 1 Ch 788 EWCA. By contrast shareholders should have clear and precise advance notice of the substance of any special resolution which it is intended to propose at a meeting of members.

83 Mr Saul Froomkin, QC, who then appeared for the appellant and BEL, had relied on the Australian case of *Dhami v Martin* [2010] NSWSC 770. In that case the Court held that a notice convening a directors' meeting was inadequate because the meeting transacted business – the appointment of a representative to deal with a third party in relation to a debt owed by that third party to the company – which was not stated in the notice of meeting. The appointment was therefore held to be void.

84 The judge cited the following passage from the decision of Barrett J at paras 51 and 52:

> "[51] *Where there is a requirement that the notice convening the meeting state the purpose or the business proposed to be transacted, the position is as stated in McLure v Mitchell (1974) 24 FLR 115 at 140:*
>
>> *'The purpose of a notice of meeting is to enable persons to know what is proposed to be done at the meeting so that they can make up their minds whether or not to attend. The notice should be so drafted that ordinary minds can fairly understand its meaning. It should not be a tricky notice artfully framed (Henderson v Bank of Australia (1890) 45 Ch D 330 [EWCA] at 337).'*

> *[52] The position must be the same where the person summoning the meeting chooses to state what is proposed to be done at the meeting, even though there is no requirement that he or she do so and the meeting would have been properly convened by a notice that did not state a purpose. A statement of purpose actually included by the summoning person, whether or not required, is put forward in order that those entitled to attend can decide whether or not to do so. Indeed, in the context of a board of directors, where there is no requirement that the proposed business be stated, there is no other conceivable reason for a statement of purpose. The implied message conveyed by the statement of purpose and its inclusion is that the meeting is being summoned not to do anything and everything that the board of directors has power to do and may decide to do but for the particularly defined and limited purpose notified. The need for the statement to convey a fair description of the purpose on which a decision to attend or not may reliably be based is therefore both emphasised and obvious."*

In that case the judge held that the effect of the notice being misleading was that the proceedings of the board were either void or void as to the parts of it affected by the misleading conduct.

85 The judge said he did not entirely agree with this reasoning because directors were generally expected to attend meetings and advance notice of the business to be transacted was something at least as much for the benefit of those who attend as for those who did not. But he agreed that a notice of a board meeting should not be a "*tricky notice artfully framed*". As to that he took the view that

item 4 in the notices, namely "*share transfer approval*" was "*stated concisely but accurately and was not misleading*". Nor was the collocation of item 3 with item 4 misleading as the notice did not imply that both items concerned the same shares. Accordingly, both board meetings were validly convened.

86 I am not persuaded that the judge's conclusion in this respect was wrong. The Agenda made plain that share transfer cancellation and approval were to be discussed; and that was apt to include a transfer of shares in BEL. No shares in EACL had been transferred. Further item 5 was "*Any other business*" which would *prima facie* embrace any business that the Board could lawfully conclude. In *Dhami* the court considered that the absence of a provision such as "*to transact such other business as may be lawfully brought forwar*d" was significant. In those circumstances, it was for the directors to attend if they wished to be involved in any consideration of a transfer of shares in BEL.

87 I note in this connection that although Mr Yamaura's letter of 28 February 2015 to Hata and Joenoes, written as a director of EACL and headed "*Re: East Asia Company Ltd*" said that no dealings in the shares of EACL could be approved at the EACL Board meeting without the involvement of AOL, his letter to them of the same date headed "*Re: Bali Energy Ltd*", written as a director of BEL and to which Mr and Ms Matsumoto were also signatories, said that they should not at the Board Meeting of BEL be approving any actions which related to the assets or shares of BEL. He appears thus to have contemplated that some disposition of the shares of BEL might be under consideration. Isis' email of 1 March 2015 (see [49] above) appears to have been written on the same basis.

Conflict of interest

88 Section 97 of the *Companies Act 1981* provides as follows:

"(1) Every officer of a company in exercising his powers and discharging his duties shall –

(a) act honestly and in good faith with a view to the best interests of the company;

. . . . .

(4) Without in any way limiting the generality of subsection (1) an officer of a company shall be deemed not to be acting honestly and in good faith if –

. . . . .

(b) he fails to disclose at the first opportunity at a meeting of directors or by writing to the directors –

(i) his interest in any material contract or proposed material contract with the company or any of its subsidiaries

89 Bye-law 52.2. of EACL's Bye-laws provides:

"*A Director who is directly or indirectly interested in a contract or proposed contract shall declare the nature of such interest as required by the Act.*

Bye-law 52.3. provides:

"Following a declaration being made pursuant to this Bye-law, and unless disqualified by the chairman of the relevant Board meeting, a Director may vote in respect of any contract or proposed contract or arrangement in which such Director is interested and may be counted in the quorum for such meeting,"

90 It is implicit in Bye-law 52.3. that a director who does not make a required declaration may not vote or be counted in the quorum. Any such interest needs to be declared before the contract is approved: *Re Nuneaton Borough AFC Ltd (No 2)* [1991] BCC 44, 59-60.

91 The judge accepted that section 97(4)(b) gave statutory effect to the fiduciary duty of loyalty which was said to be "*the distinguishing obligation of a fiduciary*": *Bristol and West BS v Mothew* [1998] Ch 1 EWCA. He referred to the case of *Bott v Southern California Recyclers* [1986] Bda LR 39, where Collett J said at 15:

> "*In those circumstances the Defendants rely upon the well established principle of Equity, which forbids an agent from entering into any transaction in which **he has a personal interest which might conflict with his duty to his principal unless the principal with full knowledge** of all the material circumstances, and of the exact nature and extent of the agent's interest, consents to it: See Bowstead on Agency, 14th Edition, page 130. A number of legal authorities bearing upon that principle and its application have been cited in argument and counsel for the Plaintiff does not seek to dispute it. Nor does he dispute the further proposition established by Boston Deep Sea Fishing and Ice Co. v. Ansell (1888) 39 Chancery Division 339 that, where an agent makes a secret commission he is … accountable to his principal for the amount of it …*"

The judge accepted that the phrase "*might conflict*" means in this context that a reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict: see *Bhullar*

v Bhullar [2003] 2 BCLC 241 EWCA at 253 *per* Jonathan Parker LJ, giving the judgment of the Court, at 253 d – e, applying the analysis of Lord Upjohn in *Boardman v Phipps* [1967] 2 AC 46 HL at 124 C. In *Re Dominion International Group plc (No 2)* [1996] 1 BCLC 572 Knox J held that what was needed was "*a realistic appraisal of the nature of the interest and to see whether it is real and substantial or merely theoretical and insubstantial*". Mr Steven White for PT Satria submits that this was the correct approach.

92 The judge found that, since the HOA did not give rise to any new contractual benefits for Joenoes and Hata but merely secured the payment of BEL's existing contractual obligations towards them, which would have been recorded in BEL's records, and because BEL was insolvent, the interests of Joenoes and Hata "*were not in conflict with the interests of the other creditors, and so the interests of the company, but were aligned with them*". I take the reference to "*the company*" to be a reference to BEL. Further, the judge observed, the HOA provided for payment of all creditors within a specified timeframe.

93 I do not, with respect, accept this analysis. The relevant question, so far as EACL is concerned, is whether there was a conflict of interest between Joenoes and Hata, on the one hand, and *EACL*, which was not insolvent and had no sizeable liabilities (or assets other than BEL), on the other. As to that, the HOA was manifestly to the benefit of Joenoes and Hata. By virtue of it over $500,000 owed to them by BEL, of which, absent the HOA, they had practically no hope of recovery, would be paid within 3 months. From the point of view of EACL, however, the sale would mean the loss of its only asset for a consideration which might well never materialise. A properly informed Board might decide to affirm and fulfil the HOA forthwith. On the other hand, it might seek to secure better or additional terms, or at least agreement on certain matters, as the HOA itself had contemplated; and, in any event, not regard it as essential or desirable to make a share transfer on Sunday in pursuance of an agreement reached the

previous Friday. It might also wish to ascertain the views of the owner of EACL. There was, thus, a potential conflict between the interests of Joenoes and Hata and EACL and their interest required disclosure. I have not forgotten that the judge thought that the idea that better terms were available was fanciful but that was a decision for the board to make (I note that it was Mr Hata's evidence that, if BEL's debts were paid off it was worth not less than $ 60,000,000); and, even if that was so, it would not necessarily mean that the HOA should be ratified and implemented immediately.

94 It is no answer to point out that Hata and Joenoes knew that they had an interest in the HOA and that they formed a majority of the Board. The Statute and Bye-laws require disclosure to the Board at a board meeting or by writing to the directors. The matter requires consideration, or the opportunity for consideration, by the board as a body - see *Guinness plc v Saunders & Anr* [1988] BCLC 607, 612b-d.

95 There is authority that this must be the case even if there is only one director: *Neptune (Vehicle Washing) Ltd v Fitzgerald* [1995] BCLC 352. In that case Lightman J explained the object of the then relevant UK statute (section 317 of the *Companies Act 1985*) namely (i) that directors should know or be reminded of the interest; (ii) the making of the declaration should be the occasion for a statutory pause for thought about the existence of a conflict of interest and of the duty to prefer the interests of the company to their own; and (ii) the disclosure or reminder must be a distinct happening at the meeting which must therefore be recorded in the minutes.

96 Mr White submitted that there was no conflict of interest and that when section 97 (1) of the Act spoke of an "*interest in any material contract*" it meant an interest that conflicted with that of the directors(s) concerned. I am dubious as to this. The statute does not refer to conflict and on its face requires the declaration of any interest. I am prepared to assume, without deciding, that an interest which

could not realistically be thought to give rise to a possible conflict would not need to be disclosed under section 97. But if, looking at the matter sensibly there was a conflict in that the interest of the director might influence the way he voted, the interest should be disclosed. That was the case here.

97 In those circumstances both Joenoes and Hata were disqualified from voting at the EACL Board Meeting on 1 March 2015 and the meeting was inquorate. There was, therefore, no valid approval of the HOA or the transfer and the purported ratification was without legal effect.

98 Even if Mr Joenoes and Hata had been entitled to vote, there could have been no valid ratification of the HOA without full disclosure of all the material circumstances relating to the HOA: *Bowstead & Reynolds* on Agency 20th Edition 2-069; *Suncorp Insurance & Finance v Milano Assicurazioni SpA* [1993] 2 Lloyd's Rep 225,234; *Eastern Construction Company Limited v National Trust Company Limited* [1914] AC 197, JCPC at 213. That would involve tabling the executed HOA for consideration and revealing:

(i) that it was claimed to be (as Joenoes and Hata asserted in evidence) a binding agreement (although described in the minutes as an offer);

(ii) the consideration which PT Satria was to provide and, in particular, the fact that it would involve Joenoes and Hata receiving from PT Satria $241,500 within two weeks of the transfer, together with $35,400 as an outstanding apartment lease payment; a further $120,775 within one month and a final instalment of $120,775 within two months of the transfer, in priority in terms of timing to almost all other creditors;

(iii) the fact that Joenoes and Hata had represented (falsely) that all approvals needed to sign the HOA had been obtained and had both personally and on behalf of EACL guaranteed that that was so and to indemnify PT Satria in respect of any claims arising out of any breach of any representation.

None of this occurred.

99 There was also a conflict of interest between Joenoes and Hata in relation to BEL. The Bye-laws of BEL contain in Bye-law 21 (2) and 21 (3) the same provisions as Bye-Law 52.2 and 52.3 of EACL. In other words, Joenoes and Hata as directors of BEL could only *"vote in respect of any contract or proposed contract or arrangement in which such Director is interested" if they had first declared the relevant interest at the meeting.*

100 Joenoes and Hata had a financial interest in BEL registering PT Satria as a shareholder of BEL, by which means they would secure payment of what was due to them by BEL. It is true that in the light of BEL's financial position the interests of its creditors held pride of place. But that did not absolve Joenoes and Hata from declaring an interest if the HOA is to be taken as an "*arrangement*" with BEL. In my view, it is. BEL is named in the agreement on the basis that the agreement was "*Concerning BEL*" and Mr Hata was a witness to it. That reflects the fact that the arrangement with PT Satria was negotiated by Hata and Joenoes as directors of both companies so as to constitute a scheme whereby PT Satria would get the BEL shares and BEL's debts would be paid, which scheme required, if it was to be carried into effect, the registration of PT Satria as shareholder of BEL. As Nourse LJ observed in *In re Duckwari PLC (No.2)* [1998] Ch 255 *" "Arrangement" is a word which is widely used by Parliament to include agreements or understandings having no contractual effect".*

101 In any event, Hata and Joenoes as directors of BEL were in a fiduciary position vis-a-via BEL; and were under a duty to declare their interest to the Board of BEL. Since they did not do so the decision of the Board of BEL on 1 March 2015 to approve the transfer and update the register was inquorate and without effect. That would not, however, preclude the Court from ordering registration.

Ostensible authority

Turquand's case

102 The judge held that applying the "*indoor management rule*" in *Turquand's* case Joenoes and Hata were authorised to enter into the HOA on EACL's behalf, citing Lord Simmonds in *Morris v Kanssen* [1946] AC 459 HL at 474:

> "*The so-called rule in Turquand's case [(1856) 6 E & B 327] is, I think, correctly stated in Halsbury's Laws of England, 2nd ed., vol. V., at p. 423:*
>
> > *'But persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular'.*"

103 In my judgment the rule, whilst covering procedural irregularities such as a failure to have a loan passed by the relevant Board committee, does not extend to entitle a third party automatically to assume that, where the bye-laws allow a delegation to a director such a delegation has taken place: see the judgment of Sargant LJ, with whom Atkin LJ agreed, in *Houghton and Company v Nothard Lowe and Wills Ltd* [1927] I KB 246 at 266: set out:

> "*But even if Mr Dart, and through him the Plaintiffs, had been aware of the power of delegation in the articles of the defendant company, this would not, in my judgment, have entitled him or them to assume that this power had been exercised in favour of a director, secretary or other*

> *officer of the company so as to validate the contract now in question. The Learned Judge, indeed, has said that this follows from well recognised line of cases, refers as an example to the case of in re Fireproof Doors Ltd [1916] 2 Ch 142, and holds that the plaintiffs were entitled to assume that anything necessity to delegate any of the functions of the board to one of the directors or two directors had been done as a matter of internal management. But, in my opinion, this is to carry the doctrine of presumed power far beyond anything that has hitherto been decided, and to place limited companies, without any sufficient reason for so doing, at the mercy of any servant or agent who should purport to contract on their behalf. On this view, not only a director of a limited company with articles founded on Table A, but a secretary or any subordinate officer might be treated by a third party acting in good faith as cable of binding the company by any sort of contract, however, exceptional, on the ground that a power of making such a contract might conceivably have been entrusted to him"*

104 Sargant LJ went on to consider the case of *Biggerstaffe v Rowatt's Wharf Ltd* [1896] 2 Ch 142 saying this:

> *"But there the agent whose authority was relied on had been acting to the knowledge of the company as a managing director, and the act done was within the ordinary ambit of the powers of a managing director in the transaction of the company's affairs. It is I think clear that the transaction there would not have been supported had it not been in this ordinary course or had*

> *the agent been acting as one of the ordinary directors of the company. I know of no case in which an ordinary director acting without authority in fact, has been held capable of binding a company by contract with a third party, merely as one of the ordinary directors of the company".*

105 Reference should also be made to the judgment of Dawson J in *Northside Developments* [1990] 170 CLR cited in *Thanakaran Khasikorn Thai Chamkat (also known as Kasikornbank Public Company Limited) v Akai Holdings Limited* (hereafter "Akai") in the Hong Kong Court of Final Appeal HKCFA No 16 of 2009:

> "*The correct view is that the indoor management rule cannot be used to create authority where none otherwise exists; it merely entitles an outsider, in the absence of anything putting him upon inquiry, to presume regularity in the internal affairs of a* ***company when confronted by a person apparently acting with the authority of the company****. The existence of an article under which authority might be conferred, if it is known to the outsider, is a circumstance to be taken into account in determining whether that person is being held out as possessing that authority. … In other words, the indoor management rule only has scope for operation if it can be established independently that the person purporting to represent the company had actual or ostensible authority to enter into the transaction. The rule is thus dependent upon the operation of normal agency principles; it* ***operates only where on ordinary principles the person purporting to act on behalf of***

the company is acting within the scope of his actual or ostensible authority.”

Holding out

106 In order for Joenoes to have ostensible authority to agree to the HOA on behalf of EACL it would, subject to the considerations set out in [96] below, be necessary to show:

(i) that a representation was made to PT Satria that he had authority to enter on behalf of the company into a contract such as the HOA;

(ii) that that representation was made by someone who had actual authority to manage the business of the company either generally or in respect of the matters to which the HOA relates; and

(iii) that PT Satria in fact relied on such representation when entering into the contract: *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480.

In addition, PT Satria must not have known that Joenoes lacked authority.

107 A representation of the requisite kind may be made in a number of different ways the most common of which is by the conduct of the principal in permitting the agent to act in the management or conduct of the principal’s business. Such permission represents to anyone dealing with the agent that he has authority to do those acts on behalf of the company which an agent authorised to do acts of the kind which he is in fact permitted to do normally does in the ordinary course of business: see *Auxil Pty Ltd v Terranova* [2009] 260 ALR 164, para 176 per Newnes JA; or to put it another way, to enter on behalf of the principal into contracts with other persons of the kind which an agent acting in the conduct of his principal’s business in the way in which he is permitted to act has usually

actual authority to enter into: see Diplock LJ in *Freeman & Lockyer* at 503 and 505.

108 The basis upon which the judge decided that Joenoes had ostensible authority to conclude the HOA was as follows:

> "*64 In the present case, PT Satria had positive reason to believe that Mr Joenoes and Mr Hata were* ***authorised to conclude the HOA****. Its staff spoke with Mr Joenoes and Mr Hata and reviewed the corporate documents of BEL and EACL. It established to its satisfaction that Mr Joenoes and Mr Hata remained directors of these companies; that* ***the Board of EACL had authority to enter into an agreement with PT Satria for the sale and purchase of EACL's shares in BEL; and that the Board of BEL had authority to register the share transfer****. PT Satria also established with the various Indonesian state authorities with which BEL dealt that Mr Joenoes was their key contact in all matters relating to the company.*
> *65 I am satisfied that in the circumstances Mr Joenoes and Mr Hata had ostensible authority (as well as actual authority) to conclude the HOA and that this was something upon which PT Satria was entitled to rely"*

I take the reference to "*actual authority*" in paragraph [65] to refer to the authority conferred by the ratification the judge found to have occurred.

109 I am of a different opinion.

110 There are several factors which militate against Joenoes (or Joenoes and Hata) having ostensible authority to enter into the HOA on or before 27 February 2015:

(i) Mr Suhardono's evidence was that, after conducting detailed financial and legal due diligence, which included looking at the Bye-laws, PT Satria was satisfied on inspection of the Bye Laws that *the Board* had authority to transact the business of the company. Such inspection would have revealed that individual directors in the position of Joenoes and Hata (neither of whom was a managing director or CEO of EACL) had no authority to bind the company in respect of the sale of its only asset (Mr Suhardono knew it was EACL's only asset), absent a delegation to them by the Board either by resolution or at a quorate board meeting. Bye-law 60 provided that a written resolution "*signed by all the directors shall be as valid as if it had been passed at a meeting of the Board duly called and constituted*";

(ii) No resolution or Board minute was produced or available to PT Satria/Mr Suhardono. PT Satria was not entitled to assume that such a delegation had taken place: *Houghton and Company v Nothard Lowe; Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 at 496[4]. Nor was there evidence of Mr Joenoes having explained how he came to have authority (the possibilities being that the Board had decided to contract or had delegated the decision whether to do so to him);

(iii) Mr Suhardono accepted that he had never seen any document authorising Joenoes to sell the shares in BEL and that he did not check with anyone to see whether Joenoes had authority to sell such shares. He did not do so

[4] "*If the articles merely empower the directors to delegate to an officer authority to do the act, and the officer purports to do the act, then – (a) if the act is one which would ordinarily be beyond the powers of such an officer, the plaintiff cannot assume that the directors have delegated to the officer the power to do the act: and if they have not done so, the plaintiff cannot recover*".

because he trusted Joenoes, having worked with him in 1994. In his witness statement Mr Suhardono said that Hata and Joenoes told him that they had authority to act on behalf of EACL and BEL and he had no reason to doubt what they said. But, as the Bye-Laws of which PT Satria was aware revealed, neither of them had such authority unless it was delegated to them by the Board. Any ostensible authority to contract needed a representation from the Board. Joenoes and Hata could not expand the scope of their authority as agents for EACL by representing that they had it: *Armagas v Mundogas* [1986] AC 717,777F-778D;

(iv) The *Companies Act 1981* and the EACL Bye-laws also required a declaration of interest by Hata and Joenoes – see [74] and [75] above - and there was no evidence that this had occurred;

(v) The fact that negotiations had taken place with PT Satria in 2011-2 told PT Satria nothing about authority to conclude a contract of sale on behalf of EACL since no contract or Heads of Agreement were entered into;

(vi) The fact that Hata and Joenoes had had entered into MOUs with PBS does not take the matter further. Mr Suhardono did not say that he relied on the fact that MOUs were entered into with PBS as showing that Hata and Joenoes had authority. He did not have sight of the MOUs and so could not tell who was party to them and who signed on their behalf. The 2012 MOU was approved by an SGM of EACL attended by Mr Koju Matsumoto, the effective owner of EACL, who also signed the MOU, at which meeting Hata and Joenoes were specifically authorised to execute the MOU on behalf of EACL. The 2013 MOU was made between AOL and PBS;

(vii) The fact that Hata and Joenoes would, at a quorate meeting, be able to secure the passing of a resolution would not give them ostensible authority

to sign the HOA without one; nor did PT Satria plead or state in evidence that that fact was something on which it relied;

(viii) This is not a case where the making of an HOA of this type could be said to fall within the usual authority of a single director such as Joenoes. The subject matter of the HOA was the sale of the sole asset of EACL for a consideration (apart from the payment of BEL's debts) which might well never materialise and, if it did, would be payable at some time in the distant future. Such a power would not ordinarily be exercisable by a single director; and in any event the Bye-laws make plain that a decision of the Board was required.

Accordingly, in my view ostensible authority was not established.

111 Mr White submitted that this was a case in which Hata and Joenoes, even if lacking authority to *enter into* the HOA on behalf of EACL, had ostensible authority *to communicate that EACL had authorised Joenoes to* sign an agreement such as the HOA. They were in practice running the business of EACL and BEL; it was the two of them (and only the two of them) with whom PT Satria had had negotiations in 2011/2 and 2015. They had been put in a position by the Board of EACL such that it was they (or one of them) whom third parties such as PT Satria could expect to be the person(s) to inform them of Board approval.

112 This way of putting it was not something that was pleaded by PT Satria. Indeed, there was nothing on the pleadings about ostensible authority or reliance on any representation, express or implied, as opposed to a non-admission that Hata and Joenoes lacked proper authority to negotiate the sale (paragraph 3 vii of the Reply)[5]. Nor was Mr Suhardono's evidence put that way. Nor was it the basis

[5] PT Satria's skeleton argument did however claim that the directors who entered into the HOA on behalf of EACL and BEL had the apparent, or, alternatively, at least the ostensible authority to do so: 12.1.3.

upon which the judge decided the case. It also raises the difficult question as to the circumstances in which a company may be bound by an untrue statement by an agent that he has or has obtained authority to bind.

113 The classic answer to that question is that an agent can "never" or "practically never" acquire *an authority to contract* which he does not possess by saying that he has such authority or has obtained it.

114 The question was considered in *Akai* by the Court of Final Appeal of Hong Kong under the heading "*Can an agent clothe himself with apparent authority?"*. The judgment was given by Lord Neuberger NPJ. He considered three English cases: *Armagas v Mundogas*; *Egyptian International Foreign Trade Co v Soplex Wholesale Supplies Ltd ("The Raffaella")* [1985] 2 Lloyd's Rep 36; and *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194.

115 In *Armagas* the trial judge had found that the defendants were liable on the basis that the agent had ostensible authority to communicate the fact that he had obtained the defendants' express authority to enter into the agreement with the plaintiff. The Court of Appeal and the House of Lords took a different view. As Lord Neuberger said in *Akai*:

> "*The judgment of Goff LJ and the speech of Lord Keith of Kinkel in Armagas [1985] UKHL 11; [1986] AC 717, 730H-732F and 777C-778D indicate great scepticism as to the notion that an agent could clothe himself with authority in this way. Having said at [1985] UKHL 11; [1986] AC 717, 777D that there might be "very rare and unusual" circumstances in which this might happen, Lord Keith continued at 779D-G:*

> *"Robert Goff L.J. said of the trial judge's view in this case, ante, pp. 730H-731C:*
> *'the effect of the judge's conclusion was that, although [the alleged agent] did not have ostensible authority to enter into the contract, he did have ostensible authority to tell [the third party] that he had obtained actual authority to do so. This is, on its face, a most surprising conclusion. It results in an extraordinary distinction between (1) a case where an agent, having no ostensible authority to enter into the relevant contract, wrongly asserts that he is invested with actual authority to do so, in which event the principal is not bound; and (2) a case where an agent, having no ostensible authority, wrongly asserts after negotiations that he has gone back to his principal and obtained actual authority, in which event the principal is bound. As a matter of common sense, this is most unlikely to be the law.'*
> *I respectfully agree. It must be a most unusual and peculiar case where an agent who is known to have no general authority to enter into transactions of a certain type can by reason of circumstances created by the principal reasonably be believed to have specific authority to enter into a particular transaction of that type."*

116 In *The Raffaella* the agent had represented that he was authorised to sign the relevant letter himself. The agent was held to have apparent authority apart from that statement. But Browne-Wilkinson, LJ, as he then was, was inclined to think (but expressed no concluded view) that an agent with authority to make representations as to a transaction could make representations that he had authority to enter into a transaction. By contrast Kerr LJ thought that an agent's

untrue assurance that he had obtained the necessary authority "*cannot possibly invest him with any apparent authority for this purpose*".

First Energy

117 However, in *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] BCLC 1409 the Court of Appeal in England accepted that the agent (J)'s position as senior manager in the Manchester office of the bank clothed him with authority to communicate to a third party that he had obtained head office approval for a credit facility offered in a letter. The fact that the offeree knew that J's actual authority to enter into transactions on behalf of HIB was limited did not mean that it had knowledge of his inability to communicate head office's approval of it. Lord Keith's observation in *Armagas* that it would be somewhat rare for a principal to be regarded as having authorised his agent to communicate whether or not he had authority was regarded by Steyn LJ (as he then was) as "*valuable guidance, which judges at every level will want to consider carefully when the occasion arises"* but not as amounting to a rule or principle of law.

118 *First Energy* was a decision reached on its own particular facts. J was the manager of the bank's Manchester office, its only office outside London, with a status close to that of a general manager. His job involved presenting terms for commercial loans, which is what he had been doing. The idea that the third party should have checked with the managing director in the London office as to whether the bank had approved the transaction was held to be unreal; and such as would defeat the apparent object of appointing a senior manager in charge of the Manchester office so that local businessmen could deal with him there.

119 In *Akai* Lord Neuberger concluded (*obiter*) that, although it was inadvisable to lay down any rigid principles in this area, the law was as stated by Lord Keith in *Armagas*; and added that he found it very hard indeed to conceive of any

circumstances in which an alleged agent who does not have actual or apparent authority to bind the principal could nevertheless acquire apparent authority simply by representing that he had such authority. He was, as it seems to me, addressing in this respect the question of authority to contract rather than authority to communicate.

Kelly v Fraser

120 *First Energy* was approved by the Privy Council in a Jamaican appeal: *Kelly & Ors v Fraser* [2012] UKPC 25 in which Lord Sumption, giving the Opinion of the Board, said:

> *"It is clear from the judgments in First Energy that the Court of Appeal regarded their approach in that case as being wholly consistent with the law stated by Lord Keith in Armagas v Mundogas. In the Board's opinion, they were right to regard them as consistent. Lord Keith's speech remains the classic statement of the relevant legal principles. An agent cannot be said to have authority solely on the basis that he has held himself out as having it. It is, however, perfectly possible for the proper authorities of a company (or, for that matter, any other principal) to organise its affairs in such a way that subordinates who would not have authority to approve a transaction are nevertheless held out by those authorities as the persons who are to communicate to outsiders the fact that it has been approved by those who are authorised to approve it or that some particular agent has been duly authorised to approve it. These are representations which, if made by someone held out by the company to make representations of that kind, may*

give rise to an estoppel. Every case calls for a careful examination of its particular facts."

121 In the light of *First Energy* and *Kelly v Fraser* it must, as it seems to me, be accepted that, despite the strength of judicial indications that an agent cannot secure ostensible authority by saying that he has obtained his principal's approval, in appropriate circumstances a principal may be bound because he has held out an agent, even one known to have no authority to contract, as being the person who would, or could be expected, to tell the third party that the principal had given approval.

122 On the facts of the present case, I do not regard it as established that Joenoes was held out *by EACL* as having authority to communicate to PT Satria that the Board had authorised him to contract on behalf of ECL or delegated to him the ability to decide to enter into the HOA on its behalf. The HOA was not akin to a credit facility offered in the ordinary course of business of a bank by a manager whose function was to negotiate such arrangements, but a one-off disposition of EACL's only asset, which, as PT Satria knew from the Bye-Laws, required the assent of the Board either by resolution or at a Board meeting. It seems to me far from clear that PT Satria could in ordinary course expect that communication of the necessary Board approval of a contract of this nature, of which Joenoes and Hata would be principal beneficiaries, and under which the consideration payable to EACL was a distant prospect, would be given by a single director, or even a single director acting with another director, without production of a board resolution or board minute or any explanation as to how approval had been given i.e. whether it was by resolution or decision at a Board meeting (and whether the decision of the Board was to contract or to delegate that decision to Joenoes). Production of such evidence would be neither difficult, expensive or time consuming. If the Board had made a unanimous resolution, a copy could be produced; if it had met, there would be minutes.

123 Further, a claim to rely on apparent authority requires a representation from the principal which is clear and unequivocal. Whilst that requirement should not be interpreted with undue rigour, and such a representation can be given impliedly by placing the agent in a particular position, it does not seem to me that in the present case the necessary clarity is present. Further the fact that someone such as Joenoes was negotiating with PT Satria does not automatically mean that he was authorised to communicate that he had authority to make the contract, at any rate in circumstances where PT Satria had studied the Bye-laws.

124 I would, in any event, be reluctant, and would decline, to uphold the judgment on this ground, which was not argued before the judge, to whom *First Energy* was not cited. The contention, in relation to which the onus of proof lay on PT Satria, was not pleaded, as it ought to have been, since EACL and the court would need to know exactly what was being said about how the implied representation arose and the basis upon which it was said to have been relied on. Nor was the basis for such a representation examined in evidence.

125 Such an inquiry would or might involve exploring with Mr Suhardono why he took EACL to be representing that Joenoes and Hata could tell him that Board approval had been given without any explanation as to how that had come about; and why, if that was what he understood EACL to be representing, it was necessary to have a personal covenant from each of them that all approvals needed to sign the HOA had been obtained. It could also have involved evidence as to whether in a transaction of this nature and magnitude, from which Joenoes and Hata stood to benefit significantly, the normal course would have been for a purchaser to obtain a certified copy of a Board resolution from the seller or a copy of the board minutes, or a legal opinion as to whether EACL would be bound by the HOA; and cross-examination of Mr Suhardono as to why he took none of those steps.

"Put on inquiry"

126 The appellant submits that PT Satria was, in any event, "put on inquiry", which it failed to make, as to whether Joenoes did have authority to contract on behalf of EACL such that, not having done so, it cannot rely on either the rule in *Turquand*'s case or upon ostensible authority.

127 That assumes that the relevant question is whether PT Satria was put on inquiry as to whether Joenoes had the authority claimed. That that is so appears to be established by a number of cases including *B Liggett (Liverpool) Limited v Barclays Bank Limited* [1928] 1 KB 48, 56-7; *Al Underwood Limited v Bank of Liverpool and Martins* [1924] 1 KB 774, 788-9; *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1984] BCLC 466, 497 ("*even if persons contracting with a company do not have actual knowledge that an irregularity has occurred, they will be precluded from relying on the rule* [in Turquand's case]*, if the circumstances were to put them on inquiry which they failed to make"; Wrexham Association Football Club Ltd v Crucialmove Ltd* [2008] 1 BCLC 508 at [46].

128 However, in *Akai* the Court addressed the question of the state of mind of a person alleging apparent authority and what had to be shown if a third party was to be disabled from relying on apparent authority. On one side it was contended that the third party could rely on apparent authority unless he knew of the agent's lack of authority, was dishonest or irrational, or reckless in his belief or turned a blind eye. On the other side, it was said that apparent authority could not be relied on if the third party had failed to make the inquiries that in the circumstances a reasonable person would have made to verify the authority of the agent. Lord Neuberger, who gave the only reasoned judgment, with which the other members of the Court agreed, had some doubt as to the extent to which there would in practice be much difference in the outcome of the two tests[6]. He preferred the former analysis, placing reliance on the fact that apparent

[6] There would seem to me to be considerable potential difference. One test requires either knowledge (a subjective consideration) or irrationality – a high test. The other is satisfied if there was a failure to make reasonable inquiries – an objective and lower test.

authority was a species of estoppel by representation and that in the field of misrepresentation it was no defence to an action for rescission that the representee might have discovered its falsity by the exercise of reasonable care.

129 Lord Neuberger considered that *Underwood v Bank of Liverpool* had to be considered in the context of section 82 of the Bills of Exchange Act 1882 under which the defendant had to rebut an allegation of negligence; and that *Houghton and Co v Nothard*, which propounded the lower test, was concerned with the rule in *Turquand*'s case decided at a time when a person dealing with a company was deemed to know of the terms of its memorandum and articles (as remains the case in Bermuda). There was however a difference between the indoor management rule and apparent authority. He regarded *Rolled Steel*, although supporting the lower test, as one in which the precise nature of the state of mind of the person alleging apparent authority was not in issue.

130 The reasoning in *Akai* has been followed in a number of English cases; but, according to the authors of *Bowstead*, is *"based on a misunderstanding of prior authorities and of general principle*": 8-050.

131 The points made by the authors of *Bowstead* are substantial; they were not, however, developed in any detail before us. I am prepared to assume, without deciding, that the decision of the Final Court of Hong Kong, given, as it was, by reference to English law authorities, and with the only reasoned judgment being that of the President of the United Kingdom Supreme Court, was correct, not least because any decision on this question in this judgment would be *obiter*.

132 The matters upon which the appellant relies to defeat the claim to rely on ostensible authority can be summarised as follows:

(a) PT Satria/Mr Suhardono knew that only the Board had the authority under Bye-law 45 to authorise the contract and that an individual director such as Joenoes could not acquire such authority unless it was delegated to him; they knew that he was neither a managing director nor a CEO;

(b) PT Satria/Mr Suhardono knew that EACL was a holding company of BEL and that neither Joenoes nor Hata were shareholders of EACL, as Mr Suhardono acknowledged.

(c) PT Satria knew from their financial due diligence that BEL did not have the cash flow to service its accumulated liabilities and ongoing current liabilities. So, if the HOA was agreed, creditors were likely to recover what was owed to them by BEL which would otherwise probably be irrecoverable. Joenoes and Hata would be particular beneficiaries of this since they stood to receive $518,500 which they were otherwise unlikely to recover. Given this knowledge they must or should have realised that Joenoes and Hata were obliged to declare their interest under Bye-Law 52 of EACL and that as a consequence of Bye-law 52.3. they could not be counted in the quorum at any meeting at which the HOA was being considered and could not approve the HOA at a Board Meeting of EACL.

(d) PT Satria knew that Joenoes and Hata required the approval of EACL for the HOA, as clause 6 of the HOA confirmed. The obvious way to satisfy itself on that score was to have a certified board resolution (or a legal opinion) confirming Joenoes' authority to execute the HOA on behalf of EACL. Instead Joenoes and Hata personally undertook to indemnify PT Satria against any claims in connection with any breach of any representation including the representation that they had obtained all approvals needed to sign the HOA. This was highly unusual given that Joenoes and Hata had no equity in EACL or BEL.

(e) The HOA was premised on the assumption that the parties intended to negotiate a Final Agreement. It was executed on Friday 27 February. Mr Suhardono said in his statement that this negotiation did not occur because of the urgency of BELs financial situation and that it was never intended that the core terms would be renegotiated; and in consequence on 1 March 2015 PT Satria acquired the BEL shares via a certified share transfer agreement. The notices convening the meeting were given on Saturday 28 February. On that basis PT Satria must have taken the view that within 24 hours of executing the HOA on a Friday BEL's financial situation had worsened to such an extent that the Board meeting of EACL approving the HOA and of BEL approving the transfer must take place by Sunday 1 March. This is incredible. The real reason must have been that Joenoes and Hata were going to be removed on Wednesday 4 March 2015 as directors of both companies.

(f) Mr Suhardono accepted in evidence that there was no particular reason so far as PT Satria was concerned why the HOA had to be executed urgently on 27 February 2015. Mr Hata was asked why it was so critical that the HOA was signed before the 4 March 2015 Board meeting and said:

> "*We did it before the 4th …we weren't sure what was going on legally…Watabe had already retained Isis, they were challenging the removal of Yamaura and two Matsumotos and you know, they submitted the requisition…So better…you know, try to conduct our business sooner than later"*

It is apparent from this evidence that the appellant submits that the threat of removal of him and Joenoes as directors of EACL on March 4 2015 was a reason for the urgency.

(g) Mr Suhardono executed the instrument of transfer on behalf of PT Satria on Sunday 1 March 2015. The fact that he was executing documentation for the transfer of the shares on a Sunday, two days after the execution of the HOA was an extraordinary fact which itself put PT Satria on inquiry;

(h) PT Satria had no contact with any of the directors representing AOL either on the board of EACL or BEL;

(i) All of the negotiations between Joenoes and Hata on behalf of EACL and Mr Suhardono and his legal term appear to have been conducted orally so that there is not a single document which records any communication between Hata and Joenoes and Mr Suhardono relating to the events which lead to the execution of the HOA. The HOA itself is a two page document with a one page exhibit, which is remarkably small for a transfer of rights of this magnitude.

133 This line of submission only arises upon the assumption that EACL held out Joenoes or Joenoes and Hata as having authority to communicate to PT Satria that Joenoes had authority to sign the HOA. I do not share that assumption, but, if I am wrong on that, I am not persuaded that we should find that PT Satria or Mr Suhardono did not honestly believe that Joenoes had such authority or that such a belief was irrational, reckless or involved turning a blind eye.

134 The judge made no finding to that effect; nor any finding that PT Satria was put on notice or failed to make reasonable inquiries. It is not apparent that he was ever invited to do so. Although it is, in some circumstances, open to an appellate court to make such a finding on appeal (as happened in *Akai*) I would decline to do so in this case. The judge obviously accepted that Mr Suhardono trusted Joenoes when he said that he had authority. Mr Hargun characterised such belief as "blind faith". But it does not appear to me irrational to trust a man with whom you have familiarity as a result of business dealings, or that to do so

involves turning a blind eye. The transaction was not self-evidently one of which the Board could not have approved, or is most unlikely to have done so. Joenoes and Hata would benefit from it but so would every other creditor of BEL. Blind eye knowledge involves suspecting that something is wrong and declining to ask questions because the answer may turn suspicion into knowledge (see Lord Blackburn in *Jones v Gordon* [1876-7] 2 App. Cas 616,628-9 cited in *Akai* at [53]). I do not regard it as apparent from the material before us that Mr Suhardono had such suspicion. The fact that Joenoes and Hata were personally guaranteeing that the necessary approvals had taken place was unusual but also consistent with the guarantee being right. Further Mr Suhardono explained later in his cross examination that the urgency was not PT Satria's urgency but in order not to let BEL's licence be terminated by Pertamina.

135 Care must also be taken in examining the question in the light of events after the HOA was signed. Whether PT Satria can rely on apparent authority is to be judged at the moment when the contract was made. Even if the right analysis is that the agreement to transfer only became complete when the actual transfer took place on March 1 2015, it is not apparent that PT Satria or Mr Suhardono knew of the Board Meeting fixed for 4 March 2015 or the intention to remove Joenoes and Hata as directors or that, so far as PT Satria was concerned, the rush to transfer was to avoid their removal. Mr Suhardono's evidence was that he was unaware of the intended meeting.

136 If, therefore, the approach in *Akai* is correct, and if I had concluded that Joenoes had ostensible authority, I would not have concluded that PT Satria was disentitled to rely on that ostensible authority. If, however, the test is whether PT Satria was put on inquiry I would accept that they were for the reasons set out in 118 above, other than the points contained in sub-paragraphs (e) and (f).

Avoidability on account of the failure of Joenoes to declare an interest in the HOA

137 If, contrary to my view, Joenoes had ostensible authority to enter into the HOA, the question arises as to whether the HOA, and the share transfer made in pursuance of it, was voidable by EACL and has been avoided.

138 If a director fails to disclose a disclosable interest either under a statutory provision such as section 97 or under the Bye-laws, any contract entered into on behalf of the company is voidable at the option of the company: *Hely-Hutchinson v Brayhead Ltd* [1968] 590 F, 594 C-G; *Guinness v Saunders* [1990] 2 AC 663, 694E, 697 G.

139 In order for the contract to be voidable against a third party, such as PT Satria, it is necessary for the third party to have notice of the irregularity or to have been put on inquiry. A person may be put on inquiry by the very nature of the proposed transaction: *Rolled Steel Products v British Steel Corp* [1984] BCLC 466. 496c – 497e.

140 In my view PT Satria was put on inquiry. It was obvious that Joenoes and Hata stood to gain from the HOA monies, which, although due to them from BEL, would otherwise probably not be paid. There was no indication when the HOA was made that there had been any declaration of interest; and after it was made, there was no indication that their interest had been declared at the board meeting on 1 March (it is not clear that PT Satria ever saw the minutes of that meeting or was aware that it was taking place) or by notice to all directors. Further the matters set out in [118] above, other than those which assume that Mr Suhardono was aware of the imminence of the 4 March 2015 meeting, were such as to add to the need to inquire as to the position.

Avoidance

141 The question then remains whether or not the contract has been avoided. EACL relies on the unanimous written resolution of the Board of Directors of *EACL* dated 7 May 2015, signed by Messrs Manalo, Kitamoto and Yamaura, which includes at 1.2 (b):

> "*for the avoidance of doubt the purported share transfer of [BEL] Shares to [PT Satria] is completely rejected as being invalid, null and void".*

142 A similar statement appears in the unanimous written resolution of the Board of Directors of BEL of the same date: see [60] above. PT Satria contends that no reliance can be placed on this latter document, which should be treated as inadmissible, and would no doubt say the same in relation to the resolution relating to EACL. I shall assume for the moment that the EACL board resolution is admissible.

143 That begs the question as to whether, as at 7 May 2015 the Board of EACL was comprised of Messrs Manaka, Kitamoto and Yamaura. The true composition of the boards of EACL and BEL on that date was not something which the judge found it necessary to decide.

The Board of EACL on 7 May 2015

144 As to the EACL board, it seems to me that the requisition contained in the letter of 23 January 2015 in relation to EACL was valid under section 74 of the Act and Bye-law 22, which is to the same effect. I do not regard the fact that in the letter AOL requested an SGM to take place at a specified address in Hamilton at 10.00 am on 9 February 2015 or on the earliest date thereafter and provided a notice for that date and place, as invalidating the requisition. The requisitioner is not entitled to dictate the date and place. But the letter did not do so; it accepted that it was for the company to select the date. The fact that it referred to the place where it wanted the meeting to take place did not entitle the company

to treat it as if it was not a requisition at all. It was a requisition setting out the purpose of the meeting as required by section 74 (2) of the Act.

145 No meeting was called in consequence of the letter, such that on 18 February 2015 AOL was entitled to convene through Isis, as it did, a meeting of EACL on 4 March 2015 for the purpose of removing Hata and Joenoes as directors of EACL and appointing Manaka and Kitamoto in their place. The meeting on that date was attended by AOL, the sole shareholder, by its proxy. The removal of Hata and Joenoes, who had received at least 14 days' notice, was effective as was the appointment of Messrs Manaka and Kitamoto.

146 The 7 May 2015 EACL Board resolution is not the only indicator of avoidance. It is apparent from the course of the present proceedings that EACL seeks to avoid the HOA and the transfer purportedly made pursuant to it. In paragraph 3 of its defence it said:

> *"It is accordingly averred that any binding agreement that may have been reached at that time, which is denied, was void on account of the breach of Mr Joenoes and Mr Hata's aforementioned Fiduciary Duties, attempt at enriching themselves, self-dealing and Conflicts of Interest, of which the Plaintiff either know or ought to have known".*

EACL has, thus, purported to avoid the HOA and, in the absence of some intervening affirmation, if entitled to avoid, it has done so. Further, at the very least the HOA is avoidable by EACL.

Registration of the shares of BEL

Section 48 "proper instrument of transfer"

147 Section 48 of the *Companies Act 1981* provides:

> *(1) Subject to any other enactment the shares or other interest of any member in a company shall be personal estate, transferable in manner provided by the bye-laws of the company.*
>
> *(2) Notwithstanding anything* ***in the bye-laws of a company, it shall not be lawful for the company to register a transfer of shares in or debentures of the company unless a proper instrument of transfer has been delivered to the company****:*

148 The instrument of transfer in this case was executed pursuant to a purported decision of the Board of EACL. The Board was inquorate and the resolution ineffectual. In those circumstances the share transfer relied on cannot be regarded as a "*proper instrument of transfer*". It was, accordingly, unlawful for BEL to register PT Satria as the shareholder.

Section 50 Time limit for refusal and notification thereof

149 Section 50 of the *Companies Act 1981* provides:

> ***Notice of refusal to register transfer***
>
> *(1) If a company refuses to register a transfer of any shares or debentures, the company shall,* ***within three months after the date*** *on which the transfer was lodged with the company, send to the transferor and transferee notice of the refusal.*

(2) If default is made in complying with this section, the company and every officer of the company who is in default shall be liable to a default fine

150 Bye-law 62 of BEL provides:

"*62 Restrictions on Transfer*

(1) The Board may in its absolute discretion and without assigning any reason therefore, refuse to register the transfer of a share. The Board ***shall refuse to register a transfer unless all applicable consents, authorisations and permissions*** *of any governmental body or agency have been obtained.*

(2) If the Board refuses to register a transfer of any share the Secretary shall, within 3 months after the date upon which the transfer was lodged with the Company, send to the transferor and transferee notice of the refusal."

151 On 1 March 2015 the Board or purported board of BEL passed the following resolution:

"*WHEREAS the Board of Directors has received a duly executed stock transfer form effecting the transfer of 51,135, 500 common shares of the Company to [PT Satria] RESOLVED that the transfer* ***be approved and the Register of Members be updated accordingly."***

152 It is common ground that the registration of the transfer of shares in the present case required the consent of the Bermuda Monetary Authority ("BMA"), which was not in place on 1 March 2015 and was not given until 27 April 2015. EACL contends that the resolution passed on 1 March 2015 was, accordingly, in breach of Bye-Law 62 (1) of BEL's Bye-laws because the Board had decided to register when the necessary permission had not been obtained.

153 The judge decided that in context, "*the board resolution of BEL approving the registration of the share transfer was effective from 27 April 2015*" i.e. the date on which BMA approval was obtained.

154 I take a different view. The relevant question is whether, at the date when the Board decided to register, the relevant authorisations had been obtained. That approach is somewhat technical. But it appears to me to be what the Bye-law requires. In many cases it makes no difference because the Board can decide to register when the approval has been obtained. The Board could have decided that the registration should take effect when, but not before, the authorisation occurred. That is not, however, what happened in this case. That may well have been because of a desire to avoid the risk of a change of mind by the Board after 4 March. The decision to update the register was not subject to, or conditional upon, subsequent BMA approval; nor do I think that such a condition was necessarily to be implied. In terms of the resolution it was open to the Secretary to update the Register the next day.

155 Accordingly, the Board of BEL was, on 1 March, bound to refuse to register the transfer of shares.

Was there a failure by the BEL (a) to refuse registration and/or (b) to notify PT Satria of the refusal within three months (in either case) and, if so, what are the consequences?

156 The appellant relies on the BEL board resolution of 7 May 2015: see [60] above. If this document is admissible it would, in my view, subject to the question in [152] below, constitute a refusal of registration and, since it was exhibited to an affidavit in these proceedings, a refusal of which PT Satria was notified within the 3 month period beginning no earlier than 1 March 2015.

157 PT Satria objects to the admission of this document on the following grounds. It was never pleaded. Nor was it mentioned to the judge. Counsel then appearing for EACL raised a different argument. He contended that, even assuming that the 1 March 2015 Board resolution of BEL was valid, it had been superseded by the resolution made by BEL at a general meeting on 4 March 2015 and a letter from ISIS of 6 March 2015. The general meeting resolved that the "*1 March Board meeting which purported to transfer the shares of the Company to [PT Satria] be rejected as being invalid"*. The letter was written by ISIS on behalf of "*the current board of BEL*" and asserted that there was no valid or effective transfer of the shares of BEL. The judge held, contrary to my conclusion in [87] above, that the contention that the Board meeting of BEL on 1 March 2015 was invalid was wrong; and that what was said or done thereafter could not alter what had happened at the meeting. In any case the decision was for the Board and was not within the competence of the SGM. The Board or purported Board of BEL did not, the judge held, "*pass a resolution within three months after the transfer was lodged with the company (or at all) purporting to reverse its previous resolution and refuse registration*". He did not, therefore, have to consider whether such a resolution would have had that effect. That he expressed himself in this way shows that he was not directed to the 7 May 2015 BEL board resolution.

158 Neither the contents of the 7 May 2015 BEL board resolution nor any of the circumstances relating to its creation were admitted by PT Satria. The resolution is exhibited to the affidavit of Mr Takeyama of 8 May 2015. The affidavits which

exhibited the two Written Resolutions of 7 May 2015 were ordered for a different purpose, namely as proof that Mr Takahiro Katsumi was authorised to swear affidavit evidence on behalf of the Board of both companies. The directors other than Mr Yamaura did not attend to give evidence. Inclusion of the document in the trial bundles, Mr White submits, is insufficient. Order 38 (1) provides that unless the court otherwise orders any fact required to be proved at trial shall be proved by examination of witness orally and in open court. No such order has been made or sought and, if sought now, it would fail the *Ladd v Marshall* test because the evidence was available at trial but not relied on. Further if the directors gave evidence the respondent would be entitled to cross-examine them on whether they acted in good faith and in the best interests of the company and not for a collateral purpose.

159 I see the force of these points. I would, however, order that the 7 May 2015 EACL and BEL Board resolutions be admitted in evidence. There seems to me to be no reason whatever to suppose that these documents were never executed on 7 May 2015, as is vouched in the affidavits, and it would be highly artificial to determine the case on the footing that they had never been executed. Further it seems to me impossible to say that the Board of BEL could not properly take the view that the HOA should be cancelled, in circumstances where the transfer was invalid and it would be unlawful for BEL to register PT Satria as the shareholder.

160 Mr Hargun for the appellant submitted that the Court was not required to consider the *bona fides* of the decision of the BEL Board resolution of 7 May 2015 as neither BEL nor the transferor i.e. EACL, as opposed to PT Satria, the transferee, alleged breach of fiduciary duty. I do not regard that as correct. Section 67 is in the widest terms. A person aggrieved can apply for rectification and that has been construed as a person "*who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongly refused him something*": *Sidebotham ex p*

Sidebotham [1880] 14 Ch D 458,465; *Re Reed Bowen & Co ex p Official Receiver* [1887] 19 QBD 174, 177-178; *AG of Gambia v N'Je* [1961] AC 617, 634. The definition clearly includes PT Satria. Further, I note that in *Tett v Phoenix Property* [1984] BCLC 399 rectification was ordered at the suit of a purchaser who established that the directors did not act in the best interests of the company in refusing registration.

161 If the BEL Board made no decision not to register within the 3 months (or must be taken not to have done so), then, in the absence of exceptional circumstances which do not appear to me to arise, the Board would have lost its power to exercise a discretion adversely to PT Satria: see the case cited in [148] below. If it did so decide, such a failure to notify does not of itself nullify the decision: *Popely v Planarrive Ltd* [1997] 1 BCLC 8.

162 In *Capital Partners Securities Co Ltd v Sturgeon Central Asia Balanced Fund Ltd* [2016] SC (Bda) 68 Com, Kawaley CJ concluded that:

> *"… as a matter of law, a company may not ordinarily* ***refuse to register*** *a transfer of shares after the time for giving notice of refusal has expired. This is not an inflexible rule, but exceptional circumstances…are required to justify departing from the general rule."*

.

163 In that case a decision to refuse registration was not taken within 3 months. At [45] of his judgment the Chief Justice said:

> "*The primary basis for this conclusion is that* ***by failing to give notice of refusal to register*** *the Share Transfers within the 3 months' period mandated by*

section 50 (1) of the Act, the Defendant lost the right to refuse altogether".

164 I doubt that the Chief Justice intended to decide (*obiter*) that, if a decision to refuse was taken within the 3 months, registration could not, absent exceptional circumstances, be refused if notice of refusal was not given within that period.

165 It does not seem to me that the Board of a company, which has in fact decided to refuse registration, is bound to do the opposite of what it has decided because it has failed to give notice of its decision within 3 months, unless some form of estoppel arises, which cannot, I think, be the case here given that the BEL Board meeting of 1 March 2015 was invalid and that as early as 2 March 2015 Mr Suhardono was on notice that the transfer of shares to BEL was said to be neither valid nor effective, a message that was repeated on 6 March 2015 – see [58] above.

166 The analysis in [141] above assumes that as at 7 May 2015 the Board of BEL was comprised of Messrs Takeyama and Kitamoto – a matter which, again, the judge did not feel the need to decide.

The Board of BEL on 7 May 2015

167 The SGM of BEL on 4 March 2015 was called on 18 February 2015 by order of Messrs Yamaura, Mr Y and Ms M Matsumoto, three of the five directors. These three were then a majority of the Board. At the 4 March 2015 SGM Hata and Joenoes were purportedly removed as directors of BEL and Mr Takeyama and Mr Kitamoto were elected in their place.

168 Section 71 (2) of the *Companies Act 1981* gives "*the directors*" power to convene a general meeting whenever they think fit. Section 93(1) of the Act provides that:

> *"(1) Subject to its bye laws the members of a company may at a special general meeting called for that purpose remove a director."*
>
> *…*
>
> *"Provided that notice of any such meeting shall be served on the director concerned not less than fourteen days before the meeting and he shall be entitled to be heard at such meeting."*

The question, therefore, arises as to whether the power under section 71 (2) can be exercised by a notice from three out of five directors. The answer is that it can. Under Bye-law 33 of BEL:

> *"The President or the Chairman or any two Directors or any Director and the Secretary or the Board may convene a special general meeting of the Company whenever in their judgment such a meeting is necessary, upon no less than five clear days' notice which shall state the time, place and the general nature of the business to be considered at the meeting."*

169 Accordingly, the BEL Board resolution of 7 May 2015 was effective and PT Satria was notified of it within the three-month period. In any event, the fact that the Board may have lost its right to refuse registration on discretionary grounds, either for want of a decision or of notice thereof within the prescribed time, does not mean that the Court is bound to order it.

170 Section 67 of the *Companies Act 1981* provides:

> *Power of Court to rectify register*

> *(1) If the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person aggrieved, or any member of the company, may apply to the Court for rectification of the register.*
>
> *(2) Where an application is made under this section, the Court may either refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved.*
>
> *(3) On an application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for rectification of the register.*

171 Failure to make a decision within the required time will deprive the directors of their discretionary power of refusal. But it would still be necessary for the transferee to show that there was a valid and binding contract for the purchase of the shares, pursuant to which it is entitled (leaving aside any question of discretion) to registration. In *Capital Partners* it was not, as I understand it, suggested that the transfer itself was defective. Registration had not taken place on account of regulatory concerns.

172 In the present case, there are a large number of objections to registration, which arise independently of whether the Board of BEL failed to decide not to register within the three month period or to notify PT Satria of that decision, namely:

(i) The HOA was entered into by Joenoes on behalf of EACL without any actual or ostensible authority.

(ii) The HOA was not validly ratified at the 1 March 2015 meeting since

(iii) The meeting was inquorate since no declaration of interest by Joenoes and Hata had been made; and

(iv) Full disclosure of the details of the HOA were not given so as to enable proper consideration to be given to the question of ratification'

(v) The instrument of transfer presented to the Board was not a proper one so that it was unlawful to give effect to it.

(vi) The HOA has been validly avoided, or, at the lowest, is voidable;

(vii) On 1 March 2015, it was not open to the Board to permit registration, given the absence of BMA consent.

173 If the last point stood alone I would not refuse to order registration since consent has now been obtained. But in the light of all the others I would do so. Whilst the exercise of the court's discretion was one for the trial judge, in the light of his findings he did not address himself to the question and it is incumbent on us to do so.

174 I would accordingly allow the appeal; and, subject to any further submissions as to the form of the order, set aside the order of the judge of 21 October 2016 and

dismiss the claim. Subject to any submissions that may be made within 21 days of the receipt of this judgment in draft I would order the Respondent to pay the costs here and below to be taxed on the standard scale if not agreed. I would invite Counsel for the appellant to draw up an order.

175 I wish to express my gratitude for the quality of the submissions made on both sides, both in writing and orally. My gratitude would have been greater if the parties had provided (i) a core bundle including no more than the Bye-Laws of each company and the material contemporaneous documents in chronological order (which we have scattered around several bundles as exhibits to different affidavits and not necessarily in chronological order) and (ii) a chronology limited to the events relevant to the appeal cross-referenced to the pagination of the appeal bundles.

KAWALEY JA (ACTING)

176 I agree that, for the reasons set out in the Judgment of Clarke JA, this appeal must be allowed. There are a few matters on which I would like to add a few observations of my own.

The distinctive role of 'employee' directors in a closely-held trading company

177 Joenoes and Hata were directors employed to manage the affairs of EACL and BEL for the benefit of these companies' ultimate beneficial owner, Mr Watabe. The fundamental issue in this case was whether these directors, acting against the wishes of EACL's sole shareholder (AOL), had validly transferred EACL's major asset (its shares in BEL) to the Respondent. Mr Hargun, throughout his submissions on appeal, made the point that the validity of the transactions and the actions of Joenoes and Hata in relation to an extraordinary transaction needed to take account of their status as employee directors.

178 It does not appear that this important dimension of the background facts received similar emphasis before Hellman J at trial. The actual and apparent authority of directors is not simply informed by a company's bye-laws, but also by the character of the relevant company. Directors of a fund company whose shareholders are numerous and who have no expectation of participating in the running of the company have a generous margin of appreciation in making significant decisions, particularly in the context of insolvency. In my judgment the apparent authority of employee directors of closely held companies such as EACL and BEL is far narrower, and their purported consummation of substantial transactions, even after the onset of insolvency, warrants heightened scrutiny by counterparties to such transactions and by the courts.

179 The factual matrix of the present case also warrants heightened scrutiny of the question of whether or not the directors, acting against the wishes of the ultimate shareholders, have validly bound the company because they have failed to disclose their personal interest in a proposed transaction or arrangement which is both substantial and outside of the ordinary course of routine business. The pivotal finding on this appeal is that neither (1) the sale by EACL of its shares in BEL to PT Satria, or (2) the share transfer by BEL to PT Satria, was validly approved. This finding is based primarily on the failure to disclose the directors' substantial personal financial interest in the relevant transactions at the respective Board meetings.

180 I agree that the judge was right to accept Mr White's submission that, in effect, the insolvency of BEL trumped all other considerations so far as BEL was concerned. However, he failed to adequately distinguish the different character of the directors' duties at the BEL and EACL levels. In reaching this conclusion, my view of the law and facts have been significantly shaped by my framing of the limited role Joenoes and Hata should be viewed as enjoying in relation to these closely held trading companies.

181 The judge made the following crucial finding on the insolvency issue with which I agree as a matter of broad principle:

> "*59. BEL was insolvent in that it was unable to pay its debts as they fell due. In those circumstances its directors' duty to act in the best interests of the company required them to act in the best interests of the creditors, and the wishes of the shareholders became all but irrelevant. See Re First Virginia Reinsurance Ltd [2003] Bda LR 47 SC per Kawaley J (as he then was) at 7 ll 43 – 46. There was no other proposal which offered a viable future for BEL on the table and I regard the Defendants' position that there was a better deal to be had as fanciful.*"

182 On the facts of the present case, however, it is impossible to draw a clear demarcation line between the <u>substantive</u> decision of EACL, which was <u>not</u> itself insolvent, to sell its shares in BEL to meet BEL's liabilities, and the <u>supplemental</u> decision of BEL to approve the transfer of the shares consequential upon that sale. The governing commercial decision to sell EACL's main asset was very much a matter in which the interests of EACL's sole shareholder were still alive. The conundrum which faced Joenoes and Hata, as directors of BEL, was not unique. They properly requested a capital injection and one was not forthcoming. Neither EACL nor AOL could be compelled to provide the capital injection sought. The *raison d'être* of limited companies is to permit shareholders to chance their arms at receiving the upside benefit of profits without being exposed to the downside of liability for the company's debts. The directors were indeed in these circumstances entitled to have regard to the best interests of BEL's creditors, but their proper recourse was limited to making decisions on behalf of BEL itself. Legitimate and well recognised responses to the quandary of BEL's insolvency

and the lack of shareholder support which were available to Joenoes and Hata included the options of:

(i) resigning or threatening to resign as directors, if the ultimate shareholder declined to provide the requested capital injection;

(ii) petitioning or threatening to petition (in the name of the company or in their own names as creditors) to wind up BEL on the grounds of insolvency, if the ultimate shareholder declined to provide the requested capital injection;

(iii) petitioning to wind up BEL and appointing a provisional liquidator to see whether a restructuring was possible and new sources of capital could be found.

183 It was not for employee directors of a solvent company to decide without recourse to the shareholder what course of action was in the shareholder's best interests. At the EACL board level where the only substantive decision was actually made, the relevance of the personal interest of the two directors of being paid their outstanding salary by BEL and the extent of their apparent authority was fundamentally different to the corresponding position at the BEL level. At this corporate level, the insolvency of BEL could not justify employee directors liquidating the intermediate holding company's principal asset over the objections of the sole shareholder to satisfy the subsidiary's debts. It mattered not that the relevant asset might, on one view, have been valueless because of the insolvency of the underlying company.

The validity of the BEL resolution prior to BMA approval for the share transfer

184 In light of the primary findings on this appeal recorded in the Judgment of Clarke JA with which I agree, the validity of the BEL resolution purportedly approving the implementation of the share transfer, prior to the requisite BMA approval being obtained, appears to me only to be of marginal significance. I would be

inclined to accept in general terms Mr White's assertion in the course of argument that it is standard corporate practice in Bermuda for such transactions to be prospectively approved without the need for any further resolution being minuted by the board of directors after BMA approval has been obtained. Such resolutions, to my mind, would ordinarily properly be read as taking effect from the date of BMA approval, as the judge found, even though the relevant minutes are not expressly stated in conditional terms. The different view Clarke LJ took of this issue has no impact on the final result and so I express no concluded view on it. For my part, however, any existing general corporate administration practice whereby share transfers are impliedly (rather than explicitly) approved with effect from the date of subsequent BMA approval is in no way affected by the present decision, which is confined to the peculiar facts of the present case.

Whether the right to refuse to register the transfer was lost

185 Mr White relied heavily on my first instance decision in *Capital Partners Securities Co Ltd v Sturgeon Central Asia Balanced Fund Ltd* [2016] SC (Bda) 68 Com as supporting his submission that the statutory time for refusing to register the transfer had expired. Clarke JA accurately captured the limited scope of that decision when he said in the present case:

> "*150. I doubt that the Chief Justice intended to decide (obiter) that, if a decision to refuse was taken within the 3 months, registration could not, absent exceptional circumstances, be refused if notice of refusal was not given within that period.*"

186 The correct legal position in the context of the facts of the present case was accurately summarised in the 'Additional Submission of the Appellant' by Mr Hargun and Mr Williams as follows:

> "6. *The sole repercussion of a failure to make a decision under Bye-law 62 within the three month period is the loss of the right of BEL to refuse registration under Bye-law 62. It does not result in an automatic registration of the shares, or even an automatic right to such registration. It would still be necessary for an application to be made under Section 67 of the Act for rectification of the register, and for the applicant to satisfy the Court that it ought to use its discretion and order rectification.*
>
> *7. In an application for rectification the transferee would need to prove that there was a valid and binding contract for the purchase of the shares, and that a proper share transfer instrument had been presented to the board. While the directors of the board of BEL would not be able to oppose registration under the wide discretion of Bye-law 62, they would still be required to refuse registration and oppose an application for rectification on other grounds, for example, on the ground that the underlying contract was invalid.*"

187 The factual and legal matrix in *Capital Partners Securities Co. Ltd.* case could not be more different to that in the present case. There, no legal basis for challenging the validity of the relevant share transfer existed and the company made no discretionary or other decision at all on the transfer request within the three months' period mandated by section 50(1) of the *Companies Act 1981*. The delay in registration occurred in circumstances where the transferee wished to register the transfer so as to present a just and equitable winding-up petition against the company. The central question in *Capital Partners Securities* was whether the broad discretion to refuse to register a transfer under the bye-laws had been lost.

188 In the present case, the Respondent was expressly put on notice that the validity of the share transfer was being challenged within days of the impugned transactions occurring on 1 March 2015. It was or ought to have been manifestly apparent to the Respondent, within the statutory period, (1) that the registration request had been refused by the newly constituted BEL Board, and that (2) this refusal was based on substantive legal grounds. The Respondent's director Mr Suhardono stated in his Witness Statement:

> "*22… on 2 March 2015, ISIS wrote to PT Satria, stating that AOL did not regard the share transfer as being either 'valid or effective'…After the alleged appointment of new directors on 4 March, their position was repeated in a further letter* [on behalf of BEL's new Board] *to us dated 6 March 2015…*"

189 The dominant purpose of the statutory time limit is to facilitate administrative efficiency in relation to registering uncontroversial transfers so that legally valid share rights can be effectively exercised, not to impose formal requirements in relation to the communication of refusal decisions. Section 50 of the Companies Act provides as follows:

> "***Notice of refusal to register transfer***
> *(1) If a company refuses to register a transfer of any shares or debentures, the company shall,* ***within three months after the date*** *on which the transfer was lodged with the company, send to the transferor and transferee notice of the refusal.*"

190 Section 50 must be read in conjunction with section 48(2), which makes it unlawful for a company to register a transfer "*unless a proper instrument of transfer has been delivered to the company*". In the present case, BEL's position was that the resolution purportedly approving the share transfer was invalid and EACL's position was that the share sale agreement and the share transfer instrument executed pursuant to it were both invalid. It is also important to remember that the Court's jurisdiction to rectify the register includes the power to substantively resolve disputes about refusal to register and registration of transfer decisions. Section 67, so far as is material, provides as follows:

> "(3) *On an application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for rectification of the register.*"

191 Of course, section 67 is not intended to be used to resolve substantial factual disputes and is intended to be a summary remedy: *Nilon Ltd v Royal Westminster Investments SA* [2015] UKPC 2 (per Lord Collins at paragraph 37). Nevertheless in my judgment it would be inconsistent with both the statutory regime and commercial good sense if a technical failure to comply with what is primarily a procedural provision could confer a substantive right to rectification which did not otherwise exist. This conclusion finds judicial support in a decision upon which Mr Hargun relied, *Popely v Planarrive Ltd* [1997] 1 BCLC 8, which supports the view that on a rectification application the main concern is whether or not a

valid refusal decision was actually made, <u>not</u> whether the decision was communicated in a timely manner.

192 A related point upon which Mr White relied was the submission that because the new BEL Board never formally resolved to refuse to register the share transfer, the right to refuse to do so was lost. In *Re Hackney Pavilion* [1924] 1 Ch 276, Astbury J found that the right to refuse to register was lost because no formal resolution recording the discretionary decision under the bye-laws to decline to register a transfer had been made. The *ratio* of this case was that a widow had the right under the bye-laws to be registered in place of her late husband as a shareholder unless a decision to refuse was made. Two directors met to consider the application, one supported registration and the other opposed. Registration was held to have been wrongfully refused on the grounds of the absence of an affirmative resolution <u>accepting</u> the transfer request; the applicant was in fact positively entitled (under the bye-law dealing with succession on death or bankruptcy) to be registered unless the Board positively refused. BEL Bye-law 65 (Registration on death or bankruptcy) clearly did not apply in the present case; but even if it did, it is expressed in language which does not in terms confer a positive right to be registered unless the Board refuses.

193 Mr White also relied on the House of Lords decision in *Moodie v Shepherd (Bookbinders) Ltd.* [1949] 2 All ER [1949] 2 All ER 1044, which approved *Re Hackney Pavilion*. But *Moodie* was also a case concerning a bye-law which conferred a right of registration by way of succession unless the board refused and where the board's deadlock prevented any positive refusal decision being made. These cases, to my mind, illustrate the importance of a decision being made by a majority of the board rather than an immutable general requirement that any decision should be formalised in a board resolution. While the 7 May 2015 BEL Board resolution is clearly relevant to the question of whether the right

to refuse to register was lost, it was not in my judgment dispositive of this issue being resolved in favour of the Appellant.

194 The uncontested facts of the present case did not in my view support a finding that, after the changing of the guard which occurred shortly after the impugned transactions were consummated, BEL delayed making a decision to refuse to register the share transfer in circumstances which would have (1) attracted a default penalty under section 50(2) of the Act, and (2) resulted in the right to refuse thereafter being lost. This was essentially because registration was refused on substantive legal as opposed to discretionary grounds. The newly constituted BEL Board clearly decided not to register the transfer, and in my judgment it mattered not whether or not this was recorded in a formal resolution, because the Bye-laws did not in terms confer a positive right to for the transfer to be registered in the absence of a refusal decision.

The test for admitting fresh evidence and admitting the 7 May 2015 BEL Board resolution on appeal

195 Mr White for the Respondent objected to the admission on appeal of evidence relating to the 7 May 2015 meetings which was in the trial bundle but not formally admitted into evidence at trial. His objections essentially assumed that the principles governing the admission of fresh evidence on appeal in Bermuda corresponded to those in England and Wales and derived from the test formulated in *Ladd v Marshall* [1954] 3 All ER 745. Clarke JA rejected these objections, implicitly finding that this Court was not bound by the constraints of that case (which is, in any event, no longer wholly determinative in England). He stated:

> "*145… I would, however, order that the 7 May 2015 EACL and BEL Board resolutions be admitted in evidence. There seems to me to be no reason whatever to suppose that these documents were never executed on*

7 May 2015, as is vouched in the affidavits, and it would be highly artificial to determine the case on the footing that they had never been executed."

196 It is important to record that this broad discretionary approach (with which I fully concur) is entirely consistent with the distinctive Bermudian statutory test for the admission of fresh evidence on appeal. Section 8 of the *Court of Appeal Act 1964* provides:

> "*(2) The powers of the Court of Appeal to admit additional evidence shall correspond to the power of the Supreme Court to admit fresh evidence in the exercise of its appellate jurisdiction in a civil or criminal cause, as the case may be.*"

197 The relevant authority on this issue is the decision of this Court in *Interinvest (Bermuda) Ltd. v Black and Dobie* [2010] Bda LR 41 where Ward JA opined as follows:

> "*8…it was conceded that in Bermuda the test with respect to fresh evidence is less restrictive than that which operates in England following Ladd v Marshall [1954] 3 All ER 745. This is because the language of Section 8 (2) of the Court of Appeal Act 1964 and section 14 (5) of the Civil Appeals Act 1971 confers on the Court full discretionary power to admit fresh evidence on appeal without the constraints of the English Order 59 Rule 10 (2) of the Rules of the Supreme Court 1999 under which further evidence on appeal would only be admitted 'as to matters which have occurred after the date of the trial or hearing except on special grounds.' So*

> *the question now before the Court is not whether fresh evidence can be admitted but rather whether leave should be granted for its admission in the circumstances of this case.*"

Summary

198 Despite the fact that the first instance hearing involved live witnesses and cross-examination, the central findings which have resulted in this appeal being allowed are either (a) points of law, or (b) inferences drawn from documents. This is one of those not infrequent cases, it seems to me, where the appellate tribunal has received the benefit of more distilled and focussed arguments than the trial judge, and this to my mind explains to a material extent the different result.

BAKER, P

199 I accept with gratitude Clarke JA's exposition of the facts and his statement of the issues in paragraph 77.

The validity of the Board's decision 1 March 2015

200 I agree that the HOA and subsequent share transfer agreement were entered into without the actual authority of EACL, albeit the Bye-laws were purportedly satisfied by the Board's retrospective ratification on 1 March 2015. However, since Hata and Joenoes had a conflict of interest, which they failed to disclose, the decisions of the Boards of BEL and EACL on 1 March were inquorate and without effect.

Ostensible authority of Hata and Joenoes

201 For the reasons set out by Clarke JA in paragraph 103 I agree that Hata and Joenoes did not have ostensible authority to communicate to PT Satria that the Board had authorised the contract on behalf of EACL or to enter into the HOA on its behalf. I do not feel it necessary to express an opinion on the issues of law discussed by my Lord in paragraphs 106 – 125. Nor is it necessary for me to

express a concluded view upon whether PT Satria was put on notice or inquiry that Hata and Joenoes might lack authority, although I incline to the view that it was.

Summary

202 As to the true composition of the Boards of EACL and BEL, the approval of the sale and transfer of the shares and registration, I agree with the reasoning and analysis of Clarke JA in paragraphs 141-173.

203 Accordingly, I too would allow the appeal and make the order proposed by Clarke JA. I too emphasise the need in this kind of appeal for a core bundle of documents and a chronology. This is a matter that should ordinarily be addressed on the preparation of the record.

Signed

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Clarke JA

Signed

____

Kawaley AJA

Signed

____

Baker P