Neutral Citation Number: [2016] EWHC 1076 (Ch)

Petition No: 4695 of 2014

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

IN THE MATTER OF THE SHERLOCK HOLMES INTERNATIONAL SOCIETY LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

On appeal from Registrar Derrett

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 May 2016

Before Mark Anderson QC

Between :

The Sherlock Holmes International Society Limited	**Appellant**
- and -	
Mr John Aidiniantz	
	Respondent

- -

Mr Thomas Roe QC and Mr Robert Strang (instructed by **Pinder Reaux and Associates**) for the **Appellant**
Mr Hugh Sims QC and Mr Christopher Brockman (instructed by **Gordon Dadds LLP**) for the **Respondent**

Hearing dates: 3, 4 November 2015, 11 – 14 January 2016

- -

JUDGMENT

Mark Anderson QC :

Introduction

1. This application is made within an appeal against a winding-up order in respect of the Sherlock Holmes International Society Limited ("**the Company**"). The application is for a declaration that the Company has not authorised the appeal and that its name should be struck out and the appeal dismissed.

2. The current litigation arises in the context of a family dispute between the petitioner John Aidiniantz ("**Mr Aidiniantz**") on one side, and on the other his three half-siblings, Linda Riley, Jennifer Decoteau and Stephen Riley ("**Ms Riley**", "**Ms Decoteau**" and "**Mr Riley**" respectively, collectively "**the Riley siblings**"). Their mother Grace (sometimes known as Aidiniantz and sometimes as Riley, to whom I shall refer as "**Grace**") died on 28 November 2015. She was also involved in the dispute before she fell ill.

3. The dispute has given rise to litigation on several fronts since December 2012. The application bundle before me contains no fewer than six fully reasoned judgments dealing with various aspects of the family feud, and I believe there are others. This appeal alone, including all the applications within it, occupied the court for some eleven days.

The issue before me

4. The Company is a company limited by guarantee, incorporated on 14 July 2004, which until 2012 was involved in running the Sherlock Holmes Museum in Baker Street.

5. It is agreed for the purpose of this application that the Company's only members since incorporation have been Mr Aidiniantz and Grace, whose demise therefore left Mr Aidiniantz as the sole member.

6. The only director of the Company recorded at Companies House is Mr Riley.

7. On 1 July 2014, Mr Aidiniantz presented a petition to wind up the Company on the insolvency ground. The petition debt was £112,449 under a default costs certificate which forms part of the more detailed history to follow.

8. The issue raised in this application is whether Mr Riley was properly appointed and remains properly in office as a director; and whether, therefore, he is capable of authorising the Company to bring this appeal, and to instruct Pinder Reaux and Associates, solicitors, to act on its behalf. Where I speak hereafter of the Company's actions or submissions, I mean the actions and submissions of those claiming to act on its behalf.

9. The basis of the Company's unsuccessful opposition to the petition was that the petition debt was genuinely disputed on substantial grounds, and that it also had a valid cross-claim against Mr Aidiniantz which exceeded the petition debt.

10. Although the parties agree for the purpose of this application that Mr Aidiniantz is the sole member and therefore has the only vote, and although Mr Aidiniantz wants the Company to be wound up and does not want Mr Riley as a director, Mr Aidiniantz chose not to pass a resolution to that effect until the morning of the hearing of this application, which resolution was subsequently withdrawn to avoid an adjournment. I will have more to say about this and the consequences below.

11. One of the conspicuous features of this application is that no one has given sworn evidence about any of the controversial issues, despite there having been a direction for exchange of witness statements and for a trial with cross examination. The absence of sworn evidence tested in cross examination requires me to make such findings as I can from hearsay statements and pleadings and by inference from the parties' recorded actions and sometimes inaction.

The background

12. Mr Aidiniantz controls and is a director of Rollerteam Limited, The Sherlock Holmes Museum Limited and Sherlock Holmes Limited ("**the Museum Companies**") which between them own and operate the Sherlock Holmes Museum in Baker Street. The Company also played a role in the Museum between July 2004 and September 2012 as will be seen below.

13. The Company was formed in July 2004 to take the benefit of a VAT exemption. The Museum had been running successfully for some 14 years by then. The Riley siblings and Grace all participated in the business to some degree until 2012. Ms

Riley was at one time a director of Rollerteam. The family remained on good terms until the events of September 2012 related below.

14. The Company was granted a right by Rollerteam to receive admissions income from the Museum. In paragraph 19 of his defence dated 7 March 2013 in subsequent litigation concerning the terms of that agreement (the "**2013 Defence**"), Mr Aidiniantz said that its terms were agreed between him and Grace in 2004.

15. The Memorandum of Association provides that the Company's objects include promoting the Sherlock Holmes legend and managing the Museum on a non-profit making basis, and prohibits the payment of any dividend to members or any remuneration to directors. Mr Aidiniantz's understanding was that the Company could receive admission fees without charging VAT so long as it made no profits and its directors were not financially interested in the Museum. That meant that Mr Aidiniantz could not be a director, but it was no bar to any other members of the family.

16. The articles of association upon incorporation provided as follows:

> "3. The subscribers to the Memorandum of Association and such other persons as the Board shall admit to membership in accordance with the Articles shall be members of the Company. No person shall be admitted as a member of the Company unless he is approved by the Board. Every person who wishes to become a member shall deliver to the Company an application for membership in such form as the Board shall require executed by him.
>
> 5. Unless the Company has elected by Elective Resolution to dispense with the holding of Annual General Meetings the Company shall hold a General Meeting in every calendar year as its Annual General Meeting . . .
>
> 30. Until and unless otherwise determined by the Company in General Meeting, there shall be no maximum number of members of the Board and the minimum number shall be one.

32. The Board may from time to time and at any time appoint any member of the Company as a Director, either to fill a casual vacancy or by way of addition to the Board, provided that the prescribed maximum be not thereby exceeded. Any member so appointed shall retain his office only until the next Annual General Meeting, but he shall then be eligible for re-election.

33. Only persons who are members of the Company shall in any circumstances be eligible to hold office as a Director.

38. The Office of a Director shall be vacated:

. . . (c) if he ceases to be a member of the Company.

39. The Board may meet together for the dispatch of business, adjourn and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business. Unless otherwise determined, two shall be a quorum."

17. The subscribers to the Memorandum were company formation agents. There is no record or minute of any resolution admitting Mr Aidiniantz and Grace to membership, nor of the original subscribers' resignations, but the parties are agreed for the purpose of this application that Mr Aidiniantz and Grace became members upon incorporation and were the only members thereafter.

18. Grace and Ms Riley were appointed as directors on the date of incorporation. Thereafter the directors changed as follows:

- 24 March 2005: Ms Decoteau was appointed and Grace resigned
- 1 August 2008: Grace was re-appointed and Ms Decoteau and Ms Riley resigned
- 1 April 2011: Mr Riley was appointed and Grace resigned
- 22 August 2011: Mr Riley resigned and Grace was re-appointed.

19. All of these appointments, except those of Grace, were inconsistent with the requirements of articles 32, 33 and 38(c) that only members could be directors

("**the membership requirement**") because the Riley siblings were not members. I have no evidence as to why the various appointments were made nor about what, if anything, changed on the ground when the directors changed. Later appointments and resignations, after the family feud had broken out, are related below.

20. The feud broke out in September 2012. It involves allegations and counter-allegations about misappropriation of the admission fees to the Museum. Acting on behalf of the Museum Companies, on 7 September 2012 Mr Aidiniantz terminated the Company's right to receive the admission fees, so that it no longer had any role to play in the Museum business. The family then split into the two factions in which it still finds itself: Mr Aidiniantz on the one side and the Riley siblings on the other. Both Mr Aidiniantz and the Riley siblings have claimed Grace's allegiance from time to time, but in the litigation she sided with the Riley siblings.

21. Various proceedings ensued in late 2012. In summary:

    i. Rollerteam brought a claim against the Riley siblings in respect of £175,000 taken from Rollerteam's bank account by Ms Riley.

    ii. Grace and Ms Decoteau (who had become a director as related in paragraph 22 below) caused the Company to bring a claim against Mr Aidiniantz and the Museum Companies claiming that a large sum of money had been misappropriated from entrance fees. I have already mentioned Mr Aidiniantz's 2013 Defence, which was filed in this claim.

    iii. Grace brought a claim against Mr Aidiniantz claiming a declaration that she owned the entire share capital of Rollerteam.

    iv. Ms Riley brought proceedings against Mr Aidiniantz for possession of the house in which he lived.

22. A filing at Companies House on 28 October 2012 recorded that Ms Decoteau had been appointed a director of the Company. The Riley siblings' position was (and is) that Grace appointed her pursuant to article 32.

23. Mr Aidiniantz adopted an ambivalent attitude to that appointment. In an affidavit sworn on 16 January 2013 he made the point that Ms Decoteau was not a member of the Company, but appeared to contemplate (in paragraphs 43 and 50) that she could have been lawfully appointed as a director by Grace, and was only challenging whether she *had* been. In his 2013 Defence, he made the following assertions:

    i. The Company's only members, and the only persons entitled under its articles to be appointed as director, were he and Grace.

    ii. At all material times, and notwithstanding that he was not a de jure director, he had been in control and a de facto director with the consent of Grace and the other directors from time to time.

    iii. Mr Aidiniantz caused Grace and Ms Riley to be appointed as the initial directors in 2004, "(and for the limited purpose of this appointment Mr Aidiniantz and Grace Aidiniantz waived their right to insist that all directors of the Society should be members of it)".

    iv. Grace, Ms Decoteau, Ms Riley and Mr Riley "acted as directors of the Society from time to time".

24. The possession action was compromised by a deed of trust made on 11 April 2013 and the other litigation by a series of consent orders, the last of which was made on 29 May 2013. In addition, a document dated 11 April 2013 headed "Company Resolution" provided that Grace and Ms Decoteau would cease to serve as directors of the Company, to be replaced by Mr Aidiniantz with effect from the date of filing the relevant forms at Companies House by Mr Aidiniantz. The Resolution also said "For the avoidance of doubt it is confirmed that Mr Aidiniantz has been the founder member of the Society along with Grace Aidiniantz at all time since incorporation. We hereby certify that the above resolution is in accordance with the Company's articles of association." It was signed by Grace and Ms Decoteau.

25. However Mr Aidiniantz did not file any forms with Companies House to give effect to this resolution. He was later to explain (in evidence in a trial in April

2015) that he thought it "would be better for Ms Decoteau to stay a director for a little while longer."

26. According to records filed with the registrar of companies, on 17 October 2013 Grace ceased to be a director of the Company leaving Ms Decoteau as the sole director.

27. By this time the parties had fallen out again. It was alleged by the Riley siblings that the consent orders did not reflect the true intentions of the parties. They alleged that although the consent orders did not say so, Mr Aidiniantz had agreed to pay the Company's costs of the claim against him and Rollerteam, and to account for missing admission fees. In addition Ms Riley and Ms Decoteau claimed that Mr Aidiniantz was liable to pay them substantial sums in respect of certain properties. Litigation ensued between Ms Decoteau and Ms Riley on one side, and Mr Aidiniantz and Rollerteam on the other ("**the Riley Proceedings**"). The allegation that the 2013 consent orders did not reflect the true agreements made was in issue, though the Company was not a party to the Riley Proceedings.

28. In May 2014 Mr Aidiniantz commenced detailed assessment proceedings in relation to the costs order against the Company contained in the consent order of 29 May 2013. He obtained a default costs certificate for £112,449.73 on 16 June 2014.

29. At about the same time Mr Riley was re-appointed as a director of the Company. Shortly after that, Ms Decoteau resigned leaving Mr Riley as the sole director.

30. On 1 July 2014 Mr Aidiniantz presented this winding-up petition against the Company based on the default costs certificate. The Company opposed the petition on the basis that the debt was disputed, and that it had a cross-claim for its own costs and for the unpaid fee income which exceeded the petition debt. In effect the Company was asserting the Riley siblings' version of the settlement which they say was reached in April and May 2013 and which was already in issue in the Riley Proceedings.

31. On 1 October 2014 the Company began its own proceedings to enforce what the Riley siblings claimed were its rights under the May 2013 compromise – in other

words to enforce the claim which it had invoked in opposition to the petition. The issues in this claim overlapped with those in the Riley Proceedings. It was agreed that the Company's claim would be stayed pending the outcome of the petition. That remains the position.

32. Mr Aidiniantz knew that Mr Riley had been appointed as a director. He referred to the fact (without objection) in an affidavit sworn in support of the petition in September 2014. Although he was now litigating against the Company on two fronts Mr Aidiniantz did not challenge Mr Riley's appointment as a director, nor his authority to give instructions to Pinder Reaux to oppose the petition or to commence and prosecute the Company's claim against him. Mr Aidiniantz conducted the litigation on the basis that Pinder Reaux were acting for the Company.

33. The hearing of the petition took place before Registrar Derrett on 15 January 2015. She handed down judgment on 11 March 2015, holding that the Company should be wound up. She later ordered that Ms Decoteau and Mr Riley be joined as respondents for the purpose of costs only, pursuant to CPR Rule 46.2. In a witness statement made on 29 April 2015 in opposition to the application for a personal costs order, Mr Riley expressly asserted that he was not a member. Still no point was taken about his authority to cause the Company to bring the appeal.

34. On 4 June 2015 Mr Robert Englehart QC handed down his judgment in the Riley Proceedings. The Deputy Judge found that an agreement had been reached as contended for by Ms Riley and Ms Decoteau in April 2013.

35. Permission to appeal the winding-up order was granted by Henderson J on 19 June 2015 on the ground that the appeal is arguable and has a real prospect of success.

36. On 10 July 2015 Mr Aidiniantz filed a respondent's notice in the petition appeal, which included an application which for present purposes may be summarised as an application for security. Again, no point was taken about Mr Riley's authority to cause the Company to bring the appeal. Indeed in their skeleton argument for the hearing of that application, counsel for Mr Aidiniantz asserted that Mr Riley was the sole director of the Company.

37. The application for security was dismissed with costs by Henderson J in a reserved judgment handed down on 14 October.

This application

38. Only then did Mr Aidiniantz begin his current attack against Mr Riley's status. On 16 October 2015 Mr Aidiniantz's solicitors wrote a letter to the effect that Mr Riley was not properly appointed because he did not satisfy the membership requirement. This was just over two weeks before the appeal was due to be heard. On 27 October Mr Aidiniantz issued the application which is now before me. The application was supported by a short witness statement from Mr Yapp, Mr Aidiniantz's solicitor, which sets out the basis of the application. There is no evidence from Mr Aidiniantz nor, as will be seen below, from the Riley siblings.

39. In response to the application notice, Pinder Reaux served witness statements from Sophie Hacker-Waels, who was a consultant to the Company and was appointed Company secretary in July 2014, and from Mr Riley and Ms Decoteau. These statements took the line that Mr Riley had been in error in saying that he was not a member, and that in fact he had been a member since his first appointment as a director in 2011. Pointing out that she is a practising solicitor and asserting that her aim was to "try to assist the court . . . following my analysis of the books and records" of the Company, Ms Hacker-Waels gave evidence that the issue of the admission of the Riley siblings as members had been confirmed at board meetings on 27 October 2012 and 21 January 2013. She exhibited what she claimed to be the minutes of those meeting, signed by Ms Decoteau. She drew specific attention to the minute of 21 January 2013 which concerned Mr Riley's status, quoting the following words: "The Chairman reminded the meeting that Ms Riley and Mr Riley were members of the Company as of their first appointment as directors of the Company." In reliance on this her statement observed that the Company was "confirming past events and circumstances and is helpful to the current issue". She exhibited, too,

    i. minutes of a board meeting of 17 October 2013, again signed by Ms Decoteau, which recorded Ms Decoteau's view that Mr Aidiniantz was not a member of the Company;

ii. minutes of a board meeting of 9 June 2014 approving the appointment of Mr Riley as a director;

iii. "the current register of members", showing Grace and the Riley siblings as members, but not Mr Aidiniantz.

40. On 4 November 2015 a second witness statement was adduced from Ms Hacker-Waels in which she confirmed that she had created the minutes of 21 January 2013 on that day, on a computer which Mr Aidiniantz had subsequently interfered with in some way, as a result of which interference she was unable now to extract the metadata associated with the file.

41. When it came on for hearing on 3 November 2015 the parties agreed that the appeal could not proceed until the recently-issued application had been resolved. In view of the timing of the application the parties had not had sufficient time to investigate the issues and prepare their evidence about them. I was therefore constrained to adjourn the appeal with directions for statements of case followed by an exchange of witness statements to deal with the issue now raised. At the hearing on 3 November, it emerged that Mr Aidiniantz had additional objections to Mr Riley's appointment, namely that the board was inquorate when he was purportedly appointed and that anyway his appointment, even if valid, had expired. These points were duly taken in the points of claim subsequently served on Mr Aidiniantz's behalf as well as the membership qualification point.

42. The Company's points of defence, served on 25 November 2105, did not advance the case foreshadowed in the witness statements served on 3 and 4 November, and the board minutes exhibited to them (that those appointed as directors had been admitted as members). The evidence of Ms Hacker-Waels in support of the contention that the board had expressly recognised the Riley siblings as members was abandoned, as were the witness statements of Mr Riley and Ms Decoteau. Instead the case now advanced was that the articles had been amended, by an informal agreement to be inferred from the conduct of the members, to permit the appointment of any person as a director.

43. When the time came for service of evidence, Pinder Reaux indicated that no witnesses were to be called to support the position which the Company now

adopted. Instead they served a bundle of documents consisting largely of evidence, pleadings and submissions from earlier stages of this and other litigation which were said to evidence the amendment of the articles for which the Company now contended.

44. Following amendment on 17 December, the defence admitted, "for the purposes of this application only", that the Riley siblings had never been members and that the only members had ever been Grace and Mr Aidiniantz. By the time of the amendment, Grace had died. So the application has proceeded on the basis that Mr Riley has never been a member and that the only living member is Mr Aidiniantz.

45. Despite the Company's abandonment of Ms Hacker-Waels' evidence, at hearings on 9 December and 22 December I ordered that further information be provided about it because the evidence might still be relevant. By further information provided on 17 December and a further witness statement from Ms Hacker-Waels on 23 December, it emerged that the minutes of all the board meetings which she had adduced in her earlier statements had been altered, and had been signed by Ms Decoteau in their altered form, *after* Mr Aidiniantz had raised the issue of Mr Riley's qualification to be a director on 15 October 2015. Moreover the alteration had involved adding in the very passages which she had quoted in her earlier statements "to assist the court". She said that those passages were based on her view, in October 2015, "of what must have happened at those meetings". She acknowledged, also, that the metadata of the minutes of 21 January 2013 were not inaccessible for the reason she had previously given (interference by Mr Aidiniantz), and finally she acknowledged that the register of members which she adduced in evidence had also been drawn up after this issue had been raised.

The events of 11 January 2016 and their consequences

46. The application came on for hearing before me on 11 January 2016. Mr Aidiniantz was represented by Mr Hugh Sims QC and Mr Christopher Brockman, and the Company (subject to paragraph 8 above) by Mr Thomas Roe QC and Mr Robert Strang.

47. In the early stages of his opening Mr Sims produced a new document, dated that day, of which no warning had been given. It was headed "Minute of Extraordinary

General Meeting" and recorded resolutions (i) that the articles, if they had ever been amended, should revert to the original and (ii) that Mr Riley, if he was a director, should be removed. It was submitted that in light of the admission that Mr Aidiniantz was the only living member of the Company, these resolutions put an immediate end to Mr Riley's authority to act for the Company (if he had ever had any) and effectively disposed of the application, and of the appeal.

48. The timing of this step was unfortunate. The hearing in November had been lost as a result of Mr Aidiniantz's late application and now the hearing of that application was itself threatened by a step which could have been taken much sooner. The resolution amounted to a new ground in support of Mr Aidiniantz's application which had not yet been pleaded so I adjourned the hearing overnight to enable Mr Sims and Mr Brockman to formulate a draft amended pleading and Mr Roe and Mr Strang to formulate the Company's response so far as they were able in the time available.

49. The draft amended pleading was prepared overnight, as was a short supplemental skeleton on behalf of the Company. Mr Aidiniantz's amendment was not opposed by the Company, which sought an adjournment to enable an amended defence and supporting evidence to be served. Mr Roe indicated that the amendment would be to withdraw the admission that Mr Aidiniantz was the only living member. He pointed out that the admission had been made for the purpose of this application only, in which it had not thus far been necessary for his clients to contest the issue whether Mr Aidiniantz was in fact the sole surviving member, because they had chosen to defend the application on another basis. He submitted that his clients should have the opportunity of revisiting their admission if it was now to be relied upon as having consequences which it could not have had when made. The Company's proposed amended case was that Ms Decoteau had, after all, been admitted to membership.

50. I have already observed that the timing of Mr Aidinantz's deployment of his resolution of 11 January 2016 was unfortunate. I think it no less unfortunate that the Company chose not to bring forward Ms Decoteau's claim to be a member or even to mention it. To store up the issue whether Mr Aidiniantz is in fact the sole member, having expressly admitted it for the purpose of this application, was a

recipe for yet more litigation. It was always foreseeable that if I declare Mr Riley's appointment to be valid, Mr Aidiniantz would pass a resolution to remove him.

51. However, faced with the prospect of an adjournment Mr Aidiniantz agreed to rescind the resolutions which he had produced the previous day, and to abandon his application to amend. On this basis the hearing proceeded on the unsatisfactory basis that it was agreed for present purposes that Mr Aidiniantz was the sole surviving member, but with the prospect of yet further litigation if my decision upholds Mr Riley's appointment and Mr Aidiniantz subsequently purports to exercise the powers of a single member.

Summary of the cases advanced by the parties

52. Mr Aidiniantz takes four points. The first is his original point that Mr Riley is not a member and so is not qualified to be a director. Secondly, it is also argued that since Mr Riley was purportedly appointed by a single director, the Board was inquorate and the appointment was therefore invalid. Thirdly, Mr Sims submits that under article 32 a director appointed by the Board only retains office until the last date upon which the next AGM could be held. That date was 31 December 2014. Finally, Mr Sims submits that the Riley siblings have so abused the process of the court by adducing false documents that their defence to this application should be struck out.

53. To the first of these points, the Company responds:

    i. that the articles were amended, by an informal agreement to be inferred from the conduct of the members, to permit the appointment of any person as a director; alternatively

    ii. that Mr Aidiniantz is estopped from relying on the membership requirement to impeach Mr Riley's appointment as a director.

54. To the second point, the Company responds that the minimum number of directors is one and that the articles are to be construed to mean that where there is only one director, the quorum is one.

55. To the third point, the Company responds with a plea of laches.

56. As to the application to strike out the defence, the Company acknowledges that Ms Hacker-Waels' evidence was misleading and should not have been given, but says that it was withdrawn before it could do any damage and that a full explanation and apology have been provided.

57. By way of rejoinder, Mr Aidiniantz submits that the Company should be denied the benefit of any equitable relief (estoppel or laches) because it does not come to court with clean hands. It is said that the board minutes adduced by Sophie Hacker-Waels were forgeries and that the Company has still not told the whole truth about them, nor properly apologised for having created and deployed them.

58. Consideration of an application to strike out a defence would normally come before consideration of the merits of the defence. But Mr Sims advanced this application at the end of his submissions and did not seek to persuade me to consider it before I had heard both sides' submissions on the merits. I will therefore deal with the issues in the same order, namely:

    i. Were the articles amended and if so, how?

    ii. If not, is the application defeated by estoppel?

    iii. If not, was Mr Riley's appointment ineffective because the board was inquorate?

    iv. If not, did his tenure of office cease on 31 December 2014 or is consideration of that issue barred by laches?

    v. Should the defence be struck out as an abuse of process?

Were the articles amended?

Submissions

59. Mr Roe QC accepted that membership is a condition precedent to appointment as director and also accepts on the authority of **Barber's Case** (1877) 5 Ch D 963 and **Jenner 's Case** (1877) 7 Ch D 132 that the appointment of a person not so qualified is invalid.

60. He submits that where the articles render an appointment invalid, the appointment cannot be ratified except by amending the articles. He cited **Boschoek Proprietary Company Ltd v Fuke** [1906] 1 Ch 148, although I think that the higher authority upon which that decision was based was **Imperial Hydropathic Hotel v Hampson** (1882) 23 Ch D 1.

61. By section 9 of the Companies Act 1985, which was in force until 30 September 2009, and by section 21(1) of the 2006 Act thereafter, the requisite majority of the members of a company may alter the articles by special resolution. Although there has been no formal resolution in this case, Mr Roe invokes the well-known principle derived from **Re Duomatic Ltd** [1969] 2 Ch 365 that where all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be. That principle was applied in **Cane v Jones** [1980] 1 WLR 1451, where the articles were held to have been amended by an agreement made by all the shareholders notwithstanding the absence of a formal resolution at a general meeting.

62. Acknowledging that he has no evidence that Grace and Mr Aidiniantz made an express agreement to alter the articles, Mr Roe argues on the authority of **Sharma v Sharma** [2013] EWCA Civ 1287, [2014] BCC 73 that mere acquiescence may constitute sufficient assent even where the shareholders cannot be shown to have known that their assent was being sought. He submits that the assent of shareholders is given to a state of affairs if they acquiesce in it in circumstances where it would be unconscionable for them to raise objection later.

63. Mr Roe also relies on **Re Home Treat Ltd** [1991] BCC 165, where the court inferred an agreement to amend the Memorandum of Association from the fact that the business was conducted in accordance with the amended version without objection from either shareholder.

64. Finally, to reinforce the point that contracts (and not just terms within a contract) may be inferred from conduct, Mr Roe cited **Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council** [1990] 1 WLR 1195 and **Modahl v British**

Athletic Federation [2002] 1 WLR 1192. He says that I should infer from their conduct that Grace and Mr Aidiniantz agreed to amend the articles. Mr Roe's argument is that Mr Aidiniantz and Grace appointed Ms Riley, Ms Decoteau and Mr Riley as directors in 2004, 2005 and 2011 respectively knowing that they were not members and in circumstances where they can be taken to have known of the membership requirement. He relies on Mr Aidiniantz's pleading in his 2013 Defence that he and Grace waived their right to insist on the membership requirement. He says on the authority of **Boschoek** that such waiver is impossible in law and that what Mr Aidiniantz and Grace should be taken to have actually done is to assent to an amendment of the articles to permit the appointments. The most obvious amendment, he says, is simple removal of the membership requirement. He says that if an officious bystander had asked Mr Aidiniantz and Grace, when making these appointments, whether they intended to amend the articles to enable them to take effect, they would have replied with a dismissive "of course".

65. In response, Mr Sims QC accepts that the articles of association of a company may be amended by an informal agreement, but says that this requires an offer and an acceptance which must be clearly identified. He says that where the agreement is to be inferred from conduct alone, the conduct relied upon must unambiguously show the agreement and its terms. He says that for this reason, it is difficult to conceive of circumstances where conduct would be taken to amount to an agreement to amend the articles. Acts which may have been done in ignorance of the articles would not suffice, and neither is it enough that the shareholders act inconsistently with the articles even if they do know their terms. Even if it can be inferred that the shareholders intend to change the articles in some way, it must be shown that they agreed to the particular change contended for.

66. Mr Sims also reminded me of the words of Neuberger J in **EIC Services v Phipps** [2004] 2 BCLC 589 at paragraphs 133 to 136 and in particular the following passage:

> "Before the **Duomatic** principle can be satisfied, the shareholders who are said to have assented or waived must have the appropriate or 'full' knowledge. If a shareholder is not even aware that his 'assent' is being sought to the matter, let

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

67. Mr Sims argues that there is no conduct in this case which could come anywhere near to demonstrating an unequivocal agreement to a variation of the articles. On the contrary, he points to the fact that as recently as October 2015 at least some amongst those purporting to run the Company produced false board minutes to show that the unamended articles had been complied with. Moreover, he submits that there is no evidence that Grace even knew that she was a member of the Company, let alone that she was ever asked to consent to an amendment of its articles of association. On the contrary, he points to a version of the board minutes dated 21 January 2013, which appears to be a genuine draft pre-dating the October 2015 falsifications, which recorded that she was only then being admitted as a member.

Discussion

68. It is unfortunate, to say the least, that minutes of board meetings from 2012 and 2013 were adduced in evidence as being contemporaneous, and that passages were referred to at the November hearing before me as supporting the Company's case, when the reality was that those passages had been inserted, and the minutes signed, in October 2015 and only after the issue had been raised. Although Ms Hacker-Waels insists that the altered minutes do represent the intention of those present at the meetings, that does not answer the point that counsel, who were of course unaware of their true provenance, were caused to adduce the minutes as a contemporaneous record of the meetings, which they were not.

69. However the Company's case is that the articles were amended by an agreement between the members of the Company, namely Mr Aidiniantz and Grace. Accordingly the understanding of Ms Hacker-Waels and the Riley siblings in October 2015 provides no real assistance in discerning whether such an agreement was made between Mr Aidiniantz and Grace between 2004 and 2011. It is to their conduct that I must look.

70. I have already mentioned that none of the protagonists has given evidence before me even though they might all have been thought able to assist with details of Grace's involvement in the Museum and in the Company's affairs, and the circumstances of the various changes of directorships which are central to the case. As it is, I have to do the best I can on the materials I have, bearing in mind that it is for those asserting an agreement to prove it.

71. The articles of association of a company are a species of contract between its members (Companies Act 1985 section 14, Companies Act 2006 section 33). They can be amended by agreement (Companies Act 2006, section 21). That agreement may be reached informally (**Cane v Jones** [1980] 1 WLR 1451).

72. Agreements can be inferred from conduct (**Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council** [1990] 1 WLR 1195; **Modahl v British Athletic Federation** [2002] 1 WLR 1192), and there is no reason in principle why that cannot apply to an agreement to amend the constitution of a company (as in **Re Home Treat Ltd** [1991] BCC 165). Moreover the conduct from which agreement may be inferred may include acquiescence in circumstances where the members knew that their assent was being sought or where there was some reason why conscience demanded that they object sooner rather than later (**Sharma v Sharma** [2014] BCC 73). However conduct may be ambiguous. A court should not infer an agreement from conduct where such an agreement is only one of several equal possibilities. Where conduct alone is relied upon, that conduct must lead to the conclusion that on the balance of probabilities the members intended to amend the articles and, further, intended to make the particular amendment contended for.

73. Bearing these considerations in mind, I turn to consider what intentions on the part of Mr Aidiniantz and of Grace, if any, can be objectively discerned from the fact that the Riley siblings were appointed as directors on three occasions (2004, 2005 and 2011) when they did not satisfy the membership requirement.

74. Mr Aidiniantz cannot have intended to admit the Riley siblings to membership upon their appointments as directors. That conclusion would be inconsistent with the agreed fact that the Riley siblings were never members. Neither do I accept that it is a realistic explanation of his conduct that Mr Aidiniantz *believed* that Mr

Riley (in particular) was a member. It is an agreed fact that he never was. I have no basis for attributing to Mr Aidiniantz a false belief to the contrary. Indeed, he has always asserted that he and Grace were the only members.

75. One possibility is that Mr Aidiniantz believed he could just waive the articles. That was the explanation of Ms Riley's 2004 appointment given in his 2013 Defence (see paragraph 23(iii) above). However that defence did not rely on any outward expression of his and Grace's actual intentions in 2004, nor indeed on any evidence of any overt conduct (beyond the appointment itself) from which their objective intention could be discerned; so "waiver" was merely an explanation, in 2013, of unexpressed subjective intentions in 2004 and is of no help in ascertaining objective intentions. Moreover the "waiver" explanation was legally incorrect since the articles' provisions as to the appointment and removal of directors bind the company in general meeting unless and until they are amended (see **Imperial Hydropathic Hotel v Hampson** (1882) 23 Ch D 1). The issue of who was or were the director(s) was important because of the VAT exemption and I infer that it was therefore important to Mr Aidiniantz to make sure that the appropriate person was properly appointed. I therefore think a more credible objective explanation of his conduct to be that he intended to do whatever was required to allow the Riley siblings to be validly appointed, rather than that he made an error of law and made a series of invalid appointments. Since it was in fact necessary to amend the articles, I think his conduct is explicable only as evincing an intention to do so. For reasons discussed below at paragraphs 79 to 85 below I conclude that Grace shared that intention.

76. In my judgment, when Mr Aidiniantz and Grace allowed Ms Riley to be appointed in 2004, the obvious inference is that they intended that Ms Riley be thenceforth qualified to be a director, and likewise Ms Decoteau in 2005 and Mr Riley in 2011. I do not think it a credible explanation that they intended a one-off exception to the membership requirement for each appointment on an ad hoc basis, so that a further amendment would be necessary to appoint the same person again in the future. Whilst it is in theory possible to amend the articles to cater for a one-off event, the more natural amendment is one which changes the rules for the future as well. The family were on good terms and there was no reason to

think that if Mr Riley was suitable in 2011, he would not be suitable in the future as well. A bystander seeing Mr Riley appointed in 2011, with knowledge of the appointment of Ms Riley in 2004 and Ms Decoteau in 2005, and with knowledge of the original articles, would conclude that the articles had been amended to allow Mr Riley to be qualified to serve as a director.

77. In the course of argument I suggested that it may be that the members' conduct is best explained by an intention to insert the words "Except with the unanimous consent of the members" at the beginning of article 33. I now doubt that, because at the relevant time (2004, 2005 and 2011) the parties were on good terms and the consent of the members was not an issue. Be that as it may, even if this amendment were the correct inference, for reasons analogous to those given in paragraph 76 above I consider that in making and assenting to each appointment the members gave their consent to that person indefinitely, at least until it was revoked. If a reasonable bystander, at the time of Ms Decoteau's appointment by Grace in October 2012, had asked himself whether Mr Aidiniantz intended Ms Decoteau to be qualified, he would have regarded it as a complete answer that Mr Aidiniantz had already caused her to serve between 2005 and 2011. Of course he intended that she be qualified. The same answer would have been given to the equivalent question about Mr Riley's appointment in 2014.

78. I have given careful consideration to the question whether Grace assented to the amendment, bearing in mind in particular the passage from **EIC Services** quoted in paragraph 66 above.

79. I have no sworn evidence about the extent of Grace's involvement in the affairs of the Company. She made an affidavit in February 2013 which stated that before September 2013 she left legal and accountancy matters to Mr Aidiniantz. She said that she would sign documents put in front of her by Mr Aidiniantz without knowing their significance, and that she was unaware even of her own appointments and resignations as a director from time to time. However I cannot place reliance on that affidavit because in August 2013 Grace signed a letter which said that she had not read it before signing it and that its contents were not accurately represented to her. The affidavit was made with an eye to the issues in the litigation then current, its veracity has never been tested in court and it was

subsequently disclaimed by its maker (a point emphasised by Mr Aidiniantz in his points of reply).

80. Mr Sims relies on a draft board minute of 21 January 2013, which purported to record that Grace was only then admitted to membership. He submits that Grace cannot have assented to anything between 2004 and 2011 if she did not even consider she was a member. Again, context is important. Grace and Ms Decoteau had caused the Company to instigate proceedings against Mr Aidiniantz and obtained a freezing order. On 16 January 2013 Mr Aidiniantz applied to discharge this order by an affidavit in which he brought into question whether Ms Decoteau was a properly appointed director and whether she was duly authorised to conduct the proceedings. In those circumstances it suited Grace and Ms Decoteau to assert that Grace had never been a member, since to impugn Grace's status as a member was to impugn that of Mr Aidiniantz, which appears to me to have been the aim of that draft minute. I do not take it as reliable evidence that between 2004 and 2013 Grace was unaware that she was a member. That conclusion would be at odds with Mr Aidiniantz's own case as pleaded in his 2013 Defence, paragraphs 8 and 9.

81. The assertion in paragraph 9 of the 2013 Defence that Mr Aidiniantz was in control of the Company with the consent of Grace does not tell me much about the extent of her participation in relevant decisions but it does indicate that their dealings were on the basis that Mr Aidiniantz needed Grace's consent. The assertion in paragraph 17(b) of the same defence, that he and Grace both waived their right to insist on the membership requirement when appointing Ms Riley in 2004, contains the implicit assertion that they both knew of the requirement. Although an assertion in 2013 of Mr Aidiniantz's subjective intention in 2004 is not admissible, his implicit assertion about his and Grace's state of knowledge is. I see no reason not to accept the assertion at face value.

82. I also note the assertion contained in paragraph 19 of the 2013 Defence that the terms upon which the Company was granted a licence to collect admission fees were agreed orally between Mr Aidiniantz and Grace in 2004. That is evidence that Grace actively participated in management of the business.

83. Moreover the fact that Grace resigned as a director on the occasions in 2005 and 2011 when Ms Decoteau and Mr Riley were appointed, suggests that she was involved in the arrangements. Given the paucity of evidence about what was going on when those resignations and appointments were made, I have no reason to conclude that Mr Aidiniantz was pulling everyone's strings without their assent or even knowledge. The far more natural conclusion is that when Grace became a director in 2004 jointly with her daughter; and when she resigned as a director in 2005 to be replaced by her other daughter; and when she resigned again in 2011 to be replaced by her son, she knew about the arrangements and participated in them and assented to them; and that she did so with knowledge of the membership requirement. I have no reason to conclude that all that was done without her knowledge or that she did not assent to the identity of her replacement or that she did not know that her assent was required.

84. I bear in mind that the burden of proving an amendment of the articles lies with the Company. However I also bear in mind that there was never likely to be abundant evidence available. This is not a case like **Blackpool and Fylde** or **Modahl** where the issue was whether the parties intended to acquire and assume legally binding rights and obligations in the context of a substantial history of commercial dealings at arm's length. My task is to discern whether the members of a family assented to a technical amendment to the constitution of a company established for tax purposes. That does not mean that the court can act on inadequate evidence, and the question remains whether the members' words and conduct give rise on objective analysis to the conclusion that they intended to amend the articles. But the context of the inquiry is such that the amount of evidence is likely to be sparse. That point is underlined where the only living person alleged to have participated in the amendment has chosen not to give any evidence at all.

85. In light of the matters mentioned in paragraphs 79 to 84 I have no basis to depart from what I consider to be the natural conclusion that Grace participated in the decision to be replaced as a director by Mr Riley in 2011 as well as in the earlier changes of directors, and that an objective bystander would have concluded that she intended, like her son, to assent to amendment of the membership requirement

to permit Mr Riley and his siblings to be directors. I have seen no evidence that she lacked "appropriate or full knowledge" and there is positive evidence, outlined above, that she did have it.

86. In **Dixon v Blindley Heath Investments Limited** [2015] EWCA Civ 1023 at [108] the Court of Appeal gave brief obiter consideration to the question whether the **Duomatic** principle could apply where a decision was taken at a meeting attended by only some shareholders in circumstances where the interests of those absent were represented by those present. The Court had "some reservations" about extending the **Duomatic** principle to "proxy or representative assents". I do not conclude that Grace's assent was merely to authorise her son by way of proxy to make such decisions as he chose. I have no basis for such a conclusion other than Grace's own affidavit of February 2013 which she later retracted at Mr Aidiniantz's own instigation. The other evidence, slender as it is, leads on balance of probabilities to the conclusion that she participated in the decisions.

87. I am reinforced in this conclusion by the course of the proceedings which the Company brought against Mr Aidiniantz in late 2012. I have already set out (at paragraph 23 above) Mr Aidiniantz's attitude to Ms Decoteau's appointment as a director by Grace in October 2012. Although Mr Aidiniantz made the point that Ms Decoteau was not a member in his affidavit of 16 January 2013 and in his 2013 Defence, he clearly recognised that she was a director and went so far as to assert an estoppel against the Company on the basis of Ms Decoteau's actions and subsequently settled the claim by consent orders which Ms Decoteau signed on behalf of the Company. The petition which gives rise to this appeal is based on a costs liability arising from that consent order. Moreover Mr Aidiniantz chose not to file Ms Decoteau's resignation as a director at Companies House but chose to allow her to continue to serve notwithstanding that she was not a member. That is not consistent with the proposition that the membership requirement remained unamended.

88. Grace clearly assented to Ms Decoteau's appointment (she made it) and she also signed the Resolution of 11 April 2013 which recognised that Ms Decoteau was a director and would remain a director until Mr Aidiniantz filed notice of her resignation. In my view that provides evidence that she too assented to the

proposition that Ms Decoteau should be qualified to be a director. She is highly likely to have had knowledge of the membership requirement by this stage, since she had been involved in litigation in which that very issue had arisen. The most cogent explanation is that she, too, intended that the membership requirement be relaxed to permit her children to serve as directors.

89. So in assenting to Ms Decoteau's status as a director in the 11 April 2013 resolution and thereafter, Grace, too, evinced an intention that a non-member should once again, as in 2004, 2005 and 2011, be (or remain) a director.

90. For these reasons I conclude that the most compelling inference to be drawn from their conduct is that the members intended that the articles be amended to make Mr Riley, Ms Decoteau and Ms Riley eligible to serve as directors without becoming members. That intention had been evinced, in Mr Riley's case, by 1 April 2011. If I am wrong that the members' conduct up to 2011 gave rise to an inference that they intended to amend the articles to permit any of the Riley siblings to become a director, I would nevertheless conclude that that intention does appear from their cumulative conduct by May 2013.

Estoppel

91. In view of my finding on the second issue, I will deal with this issue very briefly.

92. Mr Aidiniantz has been involved in litigation with the Company, on and off, since 2012. He settled a claim in 2012 by a consent order signed by Ms Decoteau. By the time of this petition in July 2014 Mr Riley had been registered as the only director. The petition was opposed but Mr Aidiniantz took no point about Mr Riley's authority to do so. In October 2014 Mr Riley caused the Company to issue proceedings against Mr Aidiniantz. Mr Aidiniantz's response to those proceedings did not include any objection that the Company cannot have properly authorised them. In April 2015 Mr Riley gave evidence that he was not a member of the Company, which Mr Aidiniantz had known all along to be the case. Yet still Mr Aidiniantz did not take any point about his eligibility to serve as a director. He did not do so until three weeks before the appeal against the winding-up order was to be heard.

93. In my judgment, Mr Aidiniantz has conducted himself on the assumption that Mr Riley was validly appointed as a director in June 2014.

94. It is common ground that the following passage from Chitty on Contracts at §4-108 accurately summarises the law:

> "Estoppel by convention may arise where both parties to a transaction 'act on assumed state of facts or law, the assumption being either shared by both or made by one and acquiesced in by the other.' The parties are then precluded from denying the truth of that assumption, it if would be unjust of unconscionable (typically because the party claiming the benefit has been 'materially influenced' by the common assumption) to allow them (or one of them) to go back on it."

95. The case advanced in the Company's points of defence is that the Company has acted to its detriment in reliance on its own members' acquiescence in the appointment of Mr Riley as a director. The detriment is alleged to be the expenditure of legal fees in the litigation mentioned above. However I am not satisfied that the Company (as opposed to the Riley siblings) has incurred any such expenditure. Moreover when I asked Mr Roe who was claiming the benefit of this estoppel, he replied that the Company was. That cannot be right. The question of estoppel only arises if Mr Riley is not in fact properly appointed, yet it is only he who wishes to assert the estoppel. If he is not actually a director of the Company, he cannot have the Company's authority to claim the benefit of an estoppel on its behalf.

96. The reality is that if anyone is to claim the benefit of an estoppel, it could only be some or all of the Riley siblings. No one has applied to have them joined to this application. No one has given any evidence to establish the facts necessary to raise an estoppel in their favour. As a result of their remaining in the background, I have little idea who has incurred what ultimate liabilities for legal fees, nor on what (if any) assumptions they relied when doing so.

97. Moreover the conduct of the defence to this application has been tainted by the introduction of falsified board minutes. If anyone had come forward to claim the benefit of an estoppel, I would have wanted to take considerable care to examine whether they had clean hands in relation to that matter. It would have been necessary to investigate very carefully what, if any, role they played in this unfortunate episode and whether they had now come clean.

98. For these reasons I do not think that the plea of estoppel could have succeeded but in the event it does not arise.

Quorum

99. Article 30 states expressly that the minimum number of directors is one. Article 39 says that "The Board may . . . determine the quorum necessary for the transaction of business. Unless otherwise determined, two shall be a quorum." In my view it is obvious that (i) upon the true construction of article 39, a determination that one be a quorum is unnecessary where there is only one director, or (ii) that where one person serves as a single director, that person implicitly determines, every time he or she decides to transact any business, that one shall be a quorum for the purpose of taking that decision. I do not therefore think that Mr Riley's appointment can be impugned on this ground.

Failure to renew Mr Riley's appointment

100. Having found that Mr Riley was properly appointed a director, I must deal with Mr Aidiniantz's contention that that appointment came to an end on the last date for holding an AGM, namely 31 December 2014. It is common ground that no AGM was held in 2014. I have already quoted article 32. It was not suggested by Mr Roe that it was not the relevant article under which Mr Riley was appointed. The only other possibility would have been that he was appointed by the Company in general meeting, which Mr Riley has never suggested. He was appointed by the only director at the time, Ms Decoteau.

101. Mr Roe's first answer to this point (taken in the points of defence) was that article 32 should be construed to mean that the director remains in office until an AGM is held, and not only until the last day upon which it should have been held.

102. However that pleaded case was abandoned at the hearing. Mr Roe now accepts that since the articles provide for a director only to hold office until the next AGM, that director is deemed to leave office on the last possible date upon which the AGM could lawfully be held, whether or not it is in fact held: **New Cedos Engineering Co Ltd** [1994] 1 BCLC 797 at 803, following **Re Consolidated Nickel Mines** [1914] 1 Ch 883.

103. Neither does Mr Roe submit that the articles were amended by conduct as he successfully submitted on the membership requirement point.

104. In the end Mr Roe's only argument was that it was too late for Mr Aidiniantz to rely on the failure to renew Mr Riley's appointment at an AGM. He pointed out that Mr Riley had authorised the Company's opposition to the petition at the hearing before Registrar Derrett, had caused the Company to seek and be granted permission to appeal Registrar Derrett's order, and that as recently as 14 October 2015 Henderson J gave judgment upon an application within this appeal which the Company had opposed on Mr Riley's authority. It was not until 3 November 2015, on the morning of the appeal itself, that Mr Sims questioned whether there had been an AGM in 2014 and raised the possibility that Mr Riley was no longer in office even if originally validly appointed.

105. As a result of the way in which the Company's case has evolved, it is not set out in any statement of case. I have only a short skeleton argument from which it is clear that the Company relies on **Villatte v 38 Cleveland Square Management Limited** [2002] EWCA Civ 1549 as authority for the proposition "that a member of a company should not in the particular circumstances be permitted at the eleventh hour to challenge, in reliance on **Re Consolidated Nickel Mines**, the ability of directors (or former directors) to cause the company to bring a claim against him." Mr Roe submitted that the question is whether it is "practically unjust" to allow a challenge to the validity of Mr Riley's continued tenure of office in the particular circumstances of this case. In oral submissions Mr Roe accepted that this was a plea of, or equivalent to, laches.

106. In **Airways Limited v Bowen** [1985] BCC 355, the defendants were purportedly sued in an action which (it was conceded on appeal) the corporate plaintiff had not authorised. The judge at first instance had refused an application to strike out the claim without hearing the merits of the application. The Court of Appeal allowed the appeal. Kerr LJ, with whom Croom-Johnson LJ agreed, said this:

> "The important point . . . which the judge must have overlooked is that a contention that an action is not properly constituted, due to lack of authority from the named plaintiffs to bring it, is one which cannot be raised by way of

> defence. It must be raised at the outset, and it must therefore be dealt with at the outset. The only qualification is that even if it is not raised at the outset, but if it then comes to the notice of the court or of the defendants in the course of the proceedings, then it can still be raised as an issue at that stage, but not by way of defence to the action. In the present case it was properly raised at the outset. The judge should therefore have borne in mind that this issue had to be decided at the outset, subject only to the possibility of adjourning the application. Once the issue has been raised, it is, with respect, plainly wrong to decline to decide the issue on the ground that the rights and wrongs as to the control of the company and the propriety of the proceedings may be in doubt, and then to allow the action to go on by dismissing the application without having decided it on the merits. . .
>
> Once it is clear . . . that the action was improperly constituted, this action could not be allowed to proceed. Whatever the form of the order made in that regard, whether the action is dismissed, struck out or stayed, the effect must be, in the words of Viscount Cave, that the proceedings must be brought to an end."

107. Mr Sims cited that case as authority for the proposition that an action (or here, an appeal) cannot be allowed to proceed if it is brought without the authority of the alleged claimant (or, here, appellant); and that that issue must be decided before the action or appeal can proceed, regardless of when or by whom it is first raised.

108. In **Villatte v 38 Cleveland Square Management Ltd** [2002] EWCA Civ 1549, an application was brought in the Lands Tribunal in the name of the company, whose directors' appointments had not been renewed at AGMs as required by the articles. The Court of Appeal dismissed an appeal against the Tribunal's refusal to dismiss the application as improperly constituted. Jonathan Parker LJ, with whom Mummery and Ward LJJ agreed, cited (at [69]) the following passage from the speech of Lord Blackburn in **Erlanger v New Sombrero Phosphate Co** (1878) 3 App Cast 121 at 1279, himself citing from **Lindsay Petroleum Co v Hurd** (1874) LR 5 PC 221, 239:

> "The doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case if an argument against relief which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

109. Lord Blackburn went on:

> "I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry."

110. Notwithstanding anything said in **Airways Limited v Bowen** [1985] BCC 355, I take **Villatte** as authority for the proposition that the doctrine of laches can be invoked to preclude a challenge to the authority of directors to cause the company to bring proceedings if it would be "practically unjust" to allow the challenge.

111. I agree with Mr Roe that the AGM point was taken very late in the day – only on the morning of the hearing of the appeal. I also accept, however, that the lateness was not deliberate or tactical. Mr Yapp has made a witness statement to the effect

that he and counsel had not thought of the point until just before it was taken. Moreover those who claim to be in control of the Company are at least equally responsible for this point being noticed at so late a stage. I assume that they, like Mr Aidiniantz and his team, did not notice the point sooner. The alternative scenario would be much less attractive - that they mistakenly thought that they could prolong Mr Riley's tenure by deliberately failing to hold an AGM. Those in control of a company are under a duty to manage it in accordance with its constitution (a statutory duty – section 171 Companies Act 2006). They cannot complain, when others notice that they are not doing so, that they should have noticed it sooner.

112. In my view practical justice requires that Mr Riley's status be ascertained and declared authoritatively so that everyone dealing with this company, including those who are acting as its solicitors, and its officers, and its members, should all know where they stand. It would not make for practical justice if I were to dismiss an application for a declaration that Mr Riley is not a director when there is not a single argument to be deployed in opposition to it except that it was made late. In **Villatte**, to allow the application to the Tribunal to proceed was of real benefit to everyone except Mr Villatte, who did not want to pay his fair share of the service charges. Here, to allow this appeal to proceed would cause chaos and would benefit no one. First, it would lead inevitably to further litigation on, I would expect, two fronts: Ms Decoteau would bring a claim to be a member, and Mr Aidiniantz would petition that the Company be wound up on the ground that it would be just and equitable to do so (on the basis that either he is the only member and desires it, or alternatively that there are two members in deadlock). Secondly I cannot see how Mr Riley could continue to perform the functions of a director in the full knowledge that his appointment had expired. If he were to decide, for example, to make an offer to settle any of the litigation to which the Company is or may become a party, no one would safely accept that offer. I do not see how he could even continue to prosecute this appeal or how Pinder Reaux could continue to accept instructions from him to do so. A rejection for laches of this application today could not validate anything done by Mr Riley tomorrow or prevent a future office-holder from holding him to account for doing it.

113. I appreciate that the reality behind this application and this appeal is a bitter family feud, that a great deal of money has been spent on the appeal, that the appeal may have real merit, and that I am being asked to shut out one side of that dispute on a technical point taken very late. But I cannot ignore that the Company has no director and neither can Mr Riley or anyone else ignore it. I should add that Mr Roe did not rely on section 161(1)(c) of the Companies Act 2006, because that section could not have validated Mr Riley's instructions after the issue of his authority had been brought into question.

114. I will not allow laches, an equitable doctrine, to bring about a situation whereby a company appeals against a winding-up order when it has no directors, where I know that it has given no valid instructions for its future participation in the appeal, and where, if the appeal were to succeed, it would generate a further petition to wind it up and further litigation as to the identity of its members.

115. For these reasons I reject the plea of laches and allow the application for a declaration that Mr Riley ceased to be a director on 31 December 2014.

Abuse of process

116. I have set out above a summary of the false evidence which was given on behalf of the Company and the circumstances in which it was first adduced and then abandoned. The answer to this application upon which the Company now relies is different from its first answer, and I am left with the strong impression that the decision not to contest the proposition that Mr Aidiniantz is the sole surviving member was at least in part informed by a desire to avoid scrutiny of the false evidence, the circumstances in which it was created and which individual(s) were responsible.

117. However the fact that the Company's new case may have been adopted for tactical reasons does not mean that it must be wrong. Neither does the new case depend on the credibility of anyone who can have been involved in the production of false evidence. I think it obvious that if the new case turns out to be correct, then it cannot become an abuse of process because it was adopted for tactical reasons, even cynical ones.

118. Despite the change of case by the Company, the minutes do continue to have some relevance. For example, the minute of 21 January 2013 is relevant to the issue whether Grace knew that she was already a member of the Company. Moreover I am not satisfied, and make no finding either way, that the Company has yet given a full account of the totality of the wrongdoing. However I do not consider that the falsification of the minutes has had any impact on my ability to find relevant facts and I do not consider that it has had any impact on the fairness of the trial of the application except by increasing costs, a matter which can be addressed in due course.

119. Moreover the application to strike out would not, even if successful, have achieved any practical benefit. The court's time would not have been saved because the full hearing went ahead anyway. Moreover this is an application for a declaration, and it is difficult to see how I could have approached it any differently even if the defence had been struck out.

120. The application to strike out the defence to this application therefore fails.

Declaration

121. I declare that Mr Riley ceased to be a director of The Sherlock Holmes International Society Limited on 31 December 2014.