Neutral Citation Number: [2019] EWHC 2181 (Ch)

Claim No. CR-2019-004205

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF OXFORD HOUSE (WIMBLEDON) MANAGEMENT COMPANY LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT 2006

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

Before:

DEPUTY HIGH COURT JUDGE LANCE ASHWORTH QC

(1) MR STUART KAYE
(2) MR MURRAY PICKERING

Claimants

- and -

(1) OXFORD HOUSE (WIMBLEDON) MANAGEMENT COMPANY LIMITED
(2) MR TIMOTHY DRAKE
(3) MR JOHN SCOTT
(4) MRS SUSAN SCOTT

Defendants

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- -

Andrew Blake (instructed by **Gregsons Solicitors**) for the **Claimants**
Simon Goldstone (instructed by **Rradar Limited**) for the **2nd to 4th Defendants**

Hearing date: 30th July 2019
Judgment: 8th August 2019

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JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

Lance Ashworth QC:

Introduction

1. This is judgment on the trial of a Part 8 claim issued on 25th June, 2019 relating to the affairs of Oxford House (Wimbledon) Management Company Limited ("**the Company**") brought by the Claimants, 2 of the members of the Company, against the 2nd to 4th Defendants, also members of the Company.

2. The issues on this claim arise out of a general meeting of the Company held on 1st June 2019 and what occurred then, in particular as to whether the meeting was effective to remove the 2nd to 4th Defendants as directors of the Company and/or to appoint others in their place.

Background

3. The Company was incorporated on 8th December, 1995 under the Companies Act 1985. It has its own articles, which incorporate Table A of the Companies (Table A to F) Regulations 1985 ("**Table A**") except as excluded or varied.

4. It is the management company for a block of 18 flats known as Oxford House located on Parkside, Wimbledon. This is a very desirable residential development.

5. As is not unusual in such situations, the owner of each flat is a shareholder in the Company, each holding in his/her own name (or jointly with his/her co-owner) 1 share. In this case, they are B shares of £10 each. The 2 A shares which were originally issued are not relevant to this dispute as they carry no voting rights.

6. The shareholders of the Company have the power to appoint a board of directors. Under article 12 of the Articles of Association, it is provided that:

> *"(b) ... the number of Shareholder Directors may be determined by Ordinary Resolution of the Company but unless so fixed there shall be no maximum number of Shareholder Directors and the minimum number of Shareholder Directors shall be five."*
>
> *"(c) In the event of the minimum number of Directors fixed by or pursuant to clause ... (b) ... being less than the prescribed minimum, such Director(s) shall have authority to exercise all the powers and discretions by Table A or these Articles expressed to be vested in the Directors generally and the quorum for the transaction of the business of the Directors shall be reduced. Regulation 64 in Table A shall not apply to the Company."*

7. Article 13 says that a Shareholder Director must hold at least 1 B share either solely or jointly and further that once all the B shares have been issued, there may be appointed no more than 2 additional directors, who need not hold any B shares.

8. Article 15 provides that the Directors shall not be required to retire by rotation so that Regulations 73, 74 and 75 in Table A shall not apply to the Company and Regulations 76, 77, 78 and 79 in Table A shall be modified accordingly.

9. Article 17 provides:

> *"The quorum for the transaction of the business of the Directors may* (sic) *fixed by the Directors and unless so fixed at any other number shall be two."*

10. Regulations 36 following of Table A set out the rules for general meetings, the calling of general meetings, the proceedings at general meetings and the votes of members. I do not set those out in full here, but it is worth setting out Regulation 45:

> *"The chairman may, with the consent of a meeting at which a quorum is present (and shall if so directed by the meeting), adjourn the meeting from time to time and from place to place, but no business shall be transacted at an adjourned meeting other than business which might properly have been transacted at the meeting had the adjournment not taken place. …"*

11. Reference has also been made before me to Regulation 76 of Table A in the section on Appointment and Retirement of Directors, which provides:

> *"No person other than a director retiring by rotation shall be appointed or reappointed a director at any general meeting unless –*
> *(a) he is recommended by the directors; or*
> *(b) not less than fourteen nor more than thirty-five clear days before the date appointed for the meeting, notice executed by a member qualified to vote at the meeting has been given to the company of the intention to propose that person for appointment or reappointment stating the particulars which would, if he were so appointed or reappointed, be required to be included in the company's register of directors together with notice executed by that person of his willingness to be appointed or reappointed."*

12. Regulation 78 of Table A provides for the Company "*subject as aforesaid"* by ordinary resolution to appoint a person who is willing to act as a director either to fill a vacancy or as an additional director. Regulation 79 gives the directors power to appoint a person who is willing to act to be a director, either to fill a vacancy or as an additional director, until the next annual general meeting.

13. As will become apparent, the Company's shareholders have proceeded without complying with Regulation 76(b) of Table A, alternatively on the basis that it does not apply, for some time.

The Parties

14. Each of the Claimants is the owner of a flat at Oxford House, as is the 2nd Defendant jointly with his wife and as are the 3rd and 4th Defendants jointly. Accordingly, they are each holders of B shares either jointly or with their co-owners.

15. The 1st Claimant, Mr Kaye, is a retired solicitor. The 2nd Claimant, Mr Pickering, is a retired QC and arbitrator. The 2nd Defendant, Mr Drake, is a partner in the solicitors' firm gunnercooke LLP, and specialises in corporate law and partnership law. The 3rd and

4th Defendants are husband and wife, each experienced business people. There is clearly a clash of personalities between the Claimants and the 2nd to 4th Defendants.

16. The Claimants are represented by Andrew Blake of Counsel. The 2nd to 4th Defendants are represented by Simon Goldstone of Counsel. I have been greatly assisted by Counsel's Skeleton Arguments and well-argued oral submissions in this case.

The Patio Litigation

17. Mr Drake and his wife initially owned flat 6 until January 2014 when they purchased flat 1. They then purchased flat 3 in mid-January 2015. They therefore currently own flats 1 and 3 and therefore between them have 2 B shares in the Company. Mr Drake's witness statement records that Mr Zahir Nasser, who rents flat 2 from his mother, bid against the Drakes on the purchases of both flats 1 and 3.

18. In June 2016, Mr and Mrs Drake moved from flat 1 to flat 3. They placed a table and chairs, which they had previously had on the patio of flat 1, on the patio outside flat 3. Approximately a year later, they received a letter dated 18th October, 2017 from the managing agents of the block of flats, stating that it was sent on behalf of the board of the Company. In that letter, it was said that the patio outside flat 3 was part of the garden area of Oxford House and was therefore in common ownership of the Company. The letter referred to earlier correspondence when the issue of not leaving personal belongings on communal property had apparently been raised. The letter said that the board of the Company was not prepared to allow the then current state of affairs to continue and said that if the Drakes did not remove the garden furniture on or before 18th November, 2017 it would be collected by the Company and put into storage at the Drakes' expense. It is suggested by Mr Drake that this was instigated at Mr Nasser's request.

19. This issue was not resolved and the furniture remained on the patio. At some point, access to the patio was controlled by a locked gate to which the Company did not have a key. It is not clear whether the Drakes had any part in this initially, but in 2017 the Company changed the lock, which led to the Drakes changing the lock back and additionally padlocking the gate "to prevent further incursion" by the Company.

20. On 15th March, 2018 proceedings were brought by the Company against the Drakes ("**the Patio Litigation**"). The board of directors at the time were Mr Pickering, Mr Ambrose, Mr Nasser, Mr Borysoglebski, Mr Cochrane and Mr Williams ("**the Old Board**") and they were the directors who authorised the bringing of the proceedings. The proceedings sought a declaration that the patio is part of the gardens to Oxford House and is not part of the premises demised to the Drakes.

21. The Drakes responded by serving a 9-page Defence and Counterclaim in which they accepted that the lease as executed did not extend to the patio, but sought (1) rectification of their lease to reflect what must have been agreed, namely that the patio was included in the demise and (2) in the alternative sought a declaration that they held the patio as an accretion to their demise under the doctrine of encroachment, (3) an order that they be granted exclusive possession of the patio to satisfy an equity arising under the doctrine of proprietary estoppel and (4) a declaration that they had the benefit of an easement over the patio entitling them to use it as a private terrace.

22. I am not asked to decide any issues in the Patio Litigation, but it is clear in my judgment that all of the issues in that litigation arise from the Defence and Counterclaim, the claim effectively being admitted subject to those issues.

Events leading to Extraordinary General Meeting of 20th December, 2018

23. It appears that the members of the Company had become used to litigation being brought by the Company against leaseholders. In 2013 the then board of directors (noting I was not told who they were) issued proceedings against a lessee of one of the flats for having a cat in breach of the Lease. According to Mr Drake, the Company, which settled the case at mediation, incurred costs of £13,000 in relation to the action, which only became apparent at the AGM in November, 2014. Mr Pickering attended that AGM as chairman of the board of directors. He apparently reported that he had investigated the conduct of the board and concluded that the board had done nothing wrong.

24. Mr and Mrs Drake requested an EGM in July 2015 seeking the removal of the then board of directors and the appointment of 5 new directors, including himself, Mr Scott and Mr Kaye. At the EGM none of the resolutions was passed, leaving the then board in place, following which Mr Cochrane and Mr Nasser were also appointed as directors. This put in place the Old Board.

25. It is clear from Mr Drake's witness statement that he did not agree with what they were doing and he makes a number of criticisms of the then directors in relation to other matters. However, it is not open to, or necessary for, me to decide whether they acted properly or not for the purposes of this claim.

26. One of his complaints is that the Old Board did not seek the consent of the shareholders before issuing the Patio Litigation. He says that matters came to a head in early November, 2018 when the Company's costs budget for the Patio Litigation was revealed at being in excess of £112,000 "*without any discussion on how these costs and those which would be incurred by the Company would be financed*". While that appears to be a not insignificant sum, it is to be seen against the background that the Company was, in reality, defending a claim brought by Mr and Mrs Drake. Mr Drake did not say what his costs budget was, although given he had instructed his own firm to act on his behalf, it may well have been less.

27. I do not need to go through the various pieces of correspondence between shareholders and the company directors, and in particular Mr Pickering, but it is clear that Mr Drake formed the opinion that Mr Pickering disliked Mr and Mrs Drake on a personal level and had done so for years.

28. On 8th November, 2018 Mr Kaye (at this stage on Mr Drake's "side") requisitioned an EGM proposing 5 resolutions to appoint a new board, comprised of Mr Drake, Mrs Corrett, Mrs Corscadden, Mr Kaye and Mr Scott and 5 resolutions to remove the 5 remaining members of the Old Board, Mr Williams having already resigned.

29. It appears to be common ground that the requirements of Regulation 76(b) were not complied with in respect of any of the proposed new board of directors. No one has ever taken a point on this.

30. Those seeking to become the new board did so on the basis, among other matters, that they wanted to seek a resolution to the Patio Litigation, there having been concern expressed as to the level of fees being expended or likely to be expended on that litigation.

31. The EGM took place on 20th December, 2018 and all 10 resolutions were passed.

Events leading to the requisitioning on 11th April 2019 of the EGM

32. The effect of the appointment of the 5 new directors was (subject to the Regulation 76(b) point to which I will return below) that Mr Drake was both a director of the Company and also in a personal capacity one of the 2 defendants to the Patio Litigation.

33. On the day following the EGM, Mr Kaye, as a newly appointed director, instructed Gregsons who had been acting for the Company in the Patio Litigation to seek a stay of those proceedings. Gregsons' response was to resign as solicitors to the Company on the basis that they were acting on behalf of Messrs. Ambrose, Borysoglebski and Nasser, and also for Mr Nasser's mother, following their application to be joined to the Patio Litigation, although it is not entirely clear in what capacity they were seeking to be joined, either as co-claimants with the Company or as co-defendants to the Counterclaim.

34. At the first meeting of the new board of directors on 5th January, 2019, Mr Drake declared his interest in the Patio Litigation. Subsequently, on 14th January, 2019 a committee of the board of directors, consisting of Mr Scott and Mr Kaye was appointed by written resolution to "*negotiate and settle*" the Patio Litigation, which had been stayed by order of the court on 11th January 2019 for settlement discussions. It was suggested in one of Mr Drake's emails to Mr Kaye of 21st January, 2019 that Mr Scott had at some point resigned from that committee.

35. In the course of January 2019 advice was sought from Howard Kennedy LLP on the merits of the Patio Litigation and on company law matters. In one of Mr Drake's emails to Mr Kaye of 21st January, 2019 he said that advice should not be sought from Howard Kennedy stating "*I am more qualified that anyone at Howard Kennedy to give that advice* [on company law matters] *and residents would legitimately view that as an unnecessary expense. Too much money is being spent on dealing with the* [Patio Litigation]. *The board was appointed to settle it, so settle it it needs to do.*"

36. On 27th and 28th January, 2019, 2 of the newly appointed directors, Mrs Corrett and Mrs Corscadden, resigned, leaving only 3 directors in place, namely Messrs Drake, Scott and Kaye. This was less than the prescribed minimum number of 5 Shareholder Directors, but it has not been suggested by anyone that this in any way impacted on the authority or ability of the remaining directors to conduct the business of the Company.

37. Mr Kaye resigned on 7th March 2019 because, he says, Howard Kennedy LLP had advised the Company that Mr Drake's claims in the Patio Litigation were without merit, but Mr Drake strongly disagreed, Mr Kaye saying that Mr Drake and Mr Scott made it impossible for him to work with them. Mr Kaye tried to requisition a general meeting of the Company to have Messrs Drake and Scott removed as directors, but was met by a response via email from Mr Drake dated 12th March 2019 suggesting that what he was seeking to do was "*an abuse of process*" and therefore his attempt to use the procedure

under section 305 Companies Act 2006 ("**CA 2006**") was invalid and a general meeting would not be called.

38. On 12th March 2019 advice was received by the Company from a James Brenan of Cubism Law (a firm which has subsequently gone into administration), who had been instructed by Mr Scott on behalf of the Company. That advice was copied to all shareholders apart from Mr and Mrs Drake, who received a redacted copy dated 11th March 2019 with references to the merits of the Patio Litigation and some other matters redacted. This was a 12-page letter addressing matters which included "Aggrieved Lessee funding", being a reference to the ability of the Company under clause 8(1) of the leases of the flats to call for a lessee who wishes the Company to take action against another lessee to indemnify the Company for any costs incurred in the Company taking action against that other lessee.

39. The letter of advice also addressed in an unredacted part the value of the claim to the Company, which was said to be "*probably nil*". It was assumed that the Patio Litigation was being funded using service charges, which the letter said was permitted under paragraph 14 of the second schedule to the leases. However, the letter implied that the spending of this money, especially in light of the creation of a risk of adverse costs, would not be viewed as reasonable under section 19 of the Landlord and Tenant Act 1987. It was express in saying that any application to the Court for authorisation to spend trust money (that being the character of service charge monies) would have nil prospects. It then went on to suggest that those who authorised the monies to be spent on the Patio Litigation might be held liable for breach of fiduciary duty and to reimburse the Company's loss, as could Gregsons as knowing recipients of the money.

40. The letter of advice was clear in saying that the further spending of money had to stop immediately. Mr Brenan also opined that there was no possibility of indemnity costs being recovered from the Drakes (this was in a non-redacted part of the letter) and that a "*judge is more likely to make no award of costs, which is known as the 'curse on all your houses' approach, given how all parties have taken unrealistically aggressive positions – and worst of all – flouted the lease's prescribed system of inter-lessee dispute resolution*". Mr Brenan concluded by offering his services to the Company so that the Patio Litigation could be ended by negotiation with the Drakes or failing that by strike out of their counterclaims and discontinuance of the claim. He said that thereafter he would act "*in advising on a claim for return of sums wrongly spent on past solicitors' fees*."

41. The unredacted version of the letter, which Mr Scott has exhibited (and therefore is clearly now known about by Mr Drake) appears to have rather more paragraphs than the redacted version. No explanation has been provided for the differences. In the unredacted version, Mr Brenan said that the rectification counterclaim was doomed to lose, he suggested that the counterclaim should be struck out. He also suggests that the Company suing the Drakes "*was unwise and served only to goad and encouraging* (sic) *the Drakes in their folly*".

42. Following Mr Kaye's resignation, Mr Drake and Mr Scott purported to appoint Mrs Scott (Mr Scott's wife) to the board of the Company on 29th March, 2019. From this point until at least 1st June, 2019 there were only 3 directors, not the minimum 5 Shareholder Directors stipulated by the Articles.

43. By this time, there were apparent concerns on the parts of a number of the residents at the actions of Mr Drake and Mr and Mrs Scott and the way in which the Company was being managed.

44. This led to the requisition on 11th April 2019 by Mr Cochrane, Mrs Nasser and Mr Pickering (each a holder of a B share and together 3 out of 18 shareholders) for a general meeting of the Company under section 303 CA 2006. The requisition listed 10 resolutions which sought the removal as directors of Mr Drake and Mr and Mrs Scott and the appointment as directors of Mr Cochrane, Mrs Corscadden, Ms Davasaz, Mr Kaye, Mr Nasser, Mr Pickering and Mr Shephard.

The calling of the meeting

45. On 2nd May 2019, being the 21st day after the meeting had been requisitioned and the last day for compliance with their duty under section 304 CA 2006 the directors called a general meeting to take place on Saturday 1st June 2019 at 6.30 pm.

46. The Notice of Meeting included an agenda and a proxy form for use by shareholders if they were unable (or did not want) to attend the meeting, which was required to be returned not less than 48 hours before the meeting. The agenda included at item 2 "*To hear any representations from existing or potential new directors regarding the proposed resolutions"*. Item 3 only included 9 of the 10 resolutions, that in respect of the appointment of Mr Nasser not being included, it appears on the basis that if all 10 resolutions were approved that would lead to 3 non Shareholder Directors being appointed when the maximum number allowed by the Articles was 2 non Shareholder Directors. It is plain that the directors carefully considered the requisition before coming to this view. It was certainly arguably wrong given that it assumed that the 2 other non shareholders would be appointed, but no complaint is made about that at this point.

47. Of the 6 people therefore included in the resolutions to be appointed as directors were 2 non shareholders, namely Ms Davasaz and Mr Shephard and 4 B shareholders, namely Mr Cochrane, Mrs Corscadden, Mr Kaye and Mr Pickering. Of these Mr Cochrane and Mr Pickering had been members of the Old Board.

48. In respect of none of the proposed replacement directors were the requirements of Regulation 76(b) of Table A complied with. Neither at this stage nor any stage thereafter did anyone take issue with this.

Mr Drake's taking of further advice

49. On 20th May 2019, that is some 18 days after the notice of the general meeting had been served and 12 days before the meeting was due to take place, Mr Drake spoke to Mr David Eaton Turner, counsel of New Square Chambers, and following that discussion, instructed him to advise on a direct access basis.

50. There is a lengthy email dated 21st May, 2019 from Mr Drake to Mr Eaton Turner headed "Company Issue: Vexatious in section 303 Companies Act 2006". Because of the reliance that Mr Drake and Mr and Mrs Scott seek to put on the Opinion which Mr Eaton Turner provided in response, it is necessary to review that email in some detail.

51. In the email Mr Drake referred to the Patio Litigation stating that in early 2018 "*the previous board of directors of the company issued proceedings against a resident/shareholder over a table and chairs. They did so without seeking the sanction of shareholders, they refused to discuss the matter with shareholders and they never answered any questions from shareholders about the likely costs of this action*".

52. It is in my judgment remarkable, especially in light of the tenor of the rest of the email, that Mr Drake did not see fit to tell Mr Eaton Turner that the "resident/shareholder" against whom proceedings had been issued was Mr Drake and his wife or that Mr Drake had brought a counterclaim asserting that he owned the patio. I would have expected anyone instructing counsel to make this clear and especially a director who is in addition a Solicitor of the Senior Courts.

53. The email went on to accuse the Old Board of having acted in their own interests and not in the interests of the Company and purported to summarise the contents of Mr Brenan's letter of advice. It seems to me that the email somewhat overstated the contents of that letter, as well as its tone. The email did not state that Mr Drake had only seen part of the letter because he was the opposing party to the litigation or that Mr Brenan had advised that Mr and Mrs Drake's claim had no merit, albeit it may be that Mr Drake had not seen that part of the letter of advice, although I have little doubt that Mr Drake must have known from the rest of the letter (and possibly also from his co-director Mr Scott) that this was the advice.

54. In his email instructions to Counsel, Mr Drake said that the Old Board, "*faced with the clear prospect of being investigated for their actions*", had sought to attack the current board, and had requisitioned a general meeting to remove the current board of directors and to appoint themselves back as directors of the Company. He set out a number of things that he said that the Old Board had expressly stated that they would be doing and a list of steps which he said the Old Board had done. I was not taken to contemporaneous evidence proving each of these claims. Mr Drake did not say in his email that the board of directors had already called a meeting of the Company to consider the resolutions.

55. At paragraph 5 of his email, Mr Drake said this:

> "*The current board wish to stop the resolutions proposed in the resolution notice from being put to shareholders in general meeting on the grounds that they are vexatious in accordance with section 303(5)(c) of the Companies Act 2006. The board have asked me, being a company lawyer of thirty years' experience, to seek your advice on this point. The company's current solicitors are primarily litigators and the board feels that my experience as a company lawyer would help in better framing the issues and explaining the circumstances. As a company lawyer, my views are that these resolutions are clearly vexatious for the following reasons*" [and he then set out his reasoning]

56. And then at paragraph 6 he went on to say:

> *"I have rarely met in my legal career a board of directors so out of control and so contemptuous of the proper duties and obligations of directors. I have no doubt that these proposed resolutions are vexatious, but your help in confirming my views would be much appreciated. If I may adapt the standards*

> *of criminal and civil litigation, your advice need not be given on the basis that the resolutions are vexatious "beyond a reasonable doubt", but on the basis of them being so "on the balance of probabilities". The [Old Board] must be made aware of the legal consequences of misusing the monies held on trust by the company for the maintenance and upkeep of the property for their own selfish purposes and of then seeking to prevent the company from taking the necessary steps to recover those monies by a cynical abuse of company law. My aim is to deal with this issue about vexatious as smoothly as possible, but if you are able to help, the company will look to appoint you in relation to other issues."*

57. It would be an understatement to say that these instructions were far from impartial and were seeking to lead Mr Eaton Turner to a particular conclusion. Rather, they were in my judgment, misleading. They repeatedly sought to impress upon Mr Eaton Turner Mr Drake's experience as a company lawyer, to steer Mr Eaton Turner to the answer that Mr Drake wanted without providing to Mr Eaton Turner the full background facts, let alone an impartial assessment of those facts. Mr Drake did not tell Mr Eaton Turner that of the 6 directors whom the resolutions in the notice of meeting sought to be appointed, only 2 (namely Mr Cochrane and Mr Pickering) had been members of the Old Board and that the other 4 had not been. The offer of further work from the Company if Mr Eaton Turner was able to help was a yet further attempt to influence the outcome of his advice. I make it absolutely clear that there is no suggestion whatsoever that Mr Eaton Turner was so influenced.

58. Mr Eaton Turner provided an Opinion in writing on 29th May, 2019. In paragraph 1, he recorded that he was asked to advise Mr Drake, a director of an unnamed company, urgently whether certain resolutions proposed by some of its shareholders could be regarded as "vexatious" within the meaning of section 303(5) CA 2006. In paragraphs 2 to 10 he repeated in short form the information supplied to him by Mr Drake. He sets out incorrectly, but in accordance with his instructions, the proposed resolutions in paragraph 11 of his Opinion and then in paragraphs 12 to 14 his instructions as to threats by the Old Board and steps alleged to have been taken by the Old Board, all again in accordance with his instructions.

59. At paragraph 15 he then says:

> "*I am asked to advise whether the resolutions proposed in the requisition notice need not be put to shareholders in general meeting on the grounds that they are vexatious within the meaning of section 303(5) of the Companies Act 2006*."

60. It is to be noted that he did not say that he had been asked how the meeting, which had then been set for 1st June 2019 should be conducted, which is not surprising as he had not been told that a meeting had been called.

61. Mr Eaton Turner correctly recorded that there is no definition of either of the expressions in section 303(5)(c) as to a resolution being "frivolous or vexatious". The provision is a new one and has not been considered in the company law context in any reported case. He referred to the Oxford English Dictionary of "vexatious" as "causing or tending to cause annoyance, frustration or worry". He next quoted what *Kosmin and Roberts:*

Company Meetings and Resolutions: Law, Practice and Procedure (2nd edition) says in respect of the identical wording in section 292(2)(c) CA 2006, before going on to consider how the word "vexatious" has been interpreted in different contexts. He went on to consider the power to appoint directors within the context of unfair prejudice petitions referring to one English case and 3 Australian cases, 2 of which he had not had time to consider.

62. Mr Eaton Turner quite properly recorded that he had not seen evidence relating to the intentions which Mr Drake had said were those of the Old Board if re-elected, but assuming those were a correct summary said that they strongly suggested that the intentions of the Old Board were as Mr Drake had said they were in his instructions. In those circumstances, he said at paragraph 29 that it was:

> *"… difficult to see how voting in favour of resolutions intended to achieve these ends can be regarded as voting on resolutions intended to achieve proper purposes, or purposes in the best interests of the Company as a whole. Rather, they are more realistically to be seen as purposes intended to protect the narrow position of those shareholders who were members of the Old Board in their capacities as former directors facing investigation and possible claims by the Company to which they owed duties while in office as directors."*

and continued at paragraph 31:

> *"In the circumstances, even though there is no authority on the meaning of 'vexatious' in the context of s. 303(5) CA 2006, there is I consider an entirely respectable argument, which has a better than evens chance of being upheld by the Court, that the proposed resolutions can properly be regarded as vexatious within the meaning of that section."*

63. Mr Drake, having received this Opinion, shared it with Mr Scott, who recorded in an email of 30th May 201 that he was impressed by it and "*especially inspired*" by the paragraphs based on the unfair prejudice cases. Mr Scott asked if it was Mr Drake's intention to send the advice to shareholders in advance of the meeting on 1st June 2019 or to hand it out there and then. Mr Scott expressed his views that as Mr Eaton Turner's advice provided a sufficient basis to disqualify Messrs. Cochrane, Kaye and Pickering, then the general meeting itself had become moot and it should be called off. He also suggested that if only 3 directors were to be elected that would not be effective as a minimum of 5 directors were required to replace the existing ones. He went on to express the view that:

> *"If there are those shareholders who want to call another EGM for the purpose of removing and electing directors, with non-vexatious directors being put forward, let them do so, but that would take another 2 months at least to requisition. Besides who would they select to run so as to have 5? Finally, we can offer seats to Miles* [Shephard] *and Marjan* [Devasaz], *should they be keen to become directors, after all, we do not require people who totally agree with us, just people who are honest and non-vexatious."*

64. It is plain from this that Mr Scott had conflated the concept of a "vexatious" resolution with a "vexatious" director. Section 303(5) CA 2006 only talks about resolutions being "vexatious", and says nothing about directors.

65. Mr Drake says at paragraph 59 of his witness statement that he was able to discuss Mr Eaton Turner's opinion with him on 31st May, 2019 the day before the general meeting. He says that by the time of that call, he had realised that the proposed resolutions caused a further issue to arise, namely that the removals of Mr Drake and Mr and Mrs Scott and the proposed appointment of the new directors, only 4 of whom were shareholders, would have prolonged the shortfall of Shareholder Directors contrary to Article 12(b). He says that he therefore raised with Mr Eaton Turner the question of whether the proposed resolutions were also ineffective for the purposes of section 303(5)(a). Mr Drake says that Mr Eaton Turner agreed but his formal written opinion did not extend to this point. Mr Drake, notwithstanding that he is a solicitor presumably accustomed to making attendance notes of important discussions, has not produced any such attendance note in relation to his discussion with Mr Eaton Turner, nor have I seen any email correspondence between him and his co-director Mr Scott referring to this discussion. Further, as will be seen below, the pre-prepared statement made by Mr Drake at the meeting on 1st June 2019 did not refer to having had counsel's opinion on the question of ineffectiveness, whereas by contrast it did in respect of the question of 'vexatious" resolutions. However, in the absence of any cross-examination of Mr Drake, while I might harbour some doubts on this, it seems to me that I am bound to accept Mr Drake's evidence on this point for the purposes of this trial.

<u>The meeting on 1st June 2019</u>

66. Notwithstanding Mr Scott's question about when Mr Drake was going to circulate Mr Eaton Turner's Opinion, Mr Drake decided not to disclose it either before or at the meeting. He seeks to justify this in paragraph 63 of his witness statement on the basis that there was no point in raising these issues with the requisitioners prior to the general meeting. It is, in my judgment, extremely difficult to understand on what basis he thought it appropriate not to do so, or having failed to do so in advance of the meeting to continue not to disclose this Opinion at the meeting. He says in paragraph 64 of his witness statement, with what in my judgment can only be described as a huge degree of understatement, that he can see how his decision not to explain in full the basis for the decision, that is the decision effectively to shut down the general meeting on 1st June 2019, "*might have been inflammatory*". While he suggests that the decision was taken on Counsel's advice, there is nothing in the evidence put before me and drawn to my attention to support any claim that Counsel advised him not to disclose this Opinion or that Counsel gave any advice as to the conduct of the meeting.

67. Mr Drake says that he was asked by Mr and Mrs Scott on 31st May 2019 to act as chairman of the general meeting. There is no real dispute as to what occurred on 1st June, 2019. There is a minute of the meeting as prepared and signed by Mr Drake recording that 16 of the 18 shareholders were present in person or by proxy. Also in attendance was a Sean Finnan, who Mr Drake had apparently asked to come along as a witness. Mrs Scott was not present.

68. After the meeting was declared open, it is recorded in these minutes Mr Drake read out a pre-prepared statement to the meeting:

> *"As the effect of the proposed resolutions would be, if passed, to appoint only four Shareholder Directors when Article 12(b) of the Company's Articles of Association prescribes a minimum of five Shareholder Directors, the resolutions are ineffective for the purposes of Section 303(5)(a) of the Companies Act 2006. In addition, we have had counsel's opinion that the proposed resolutions to appoint Messrs Cochrane, Kaye and Pickering as directors are vexatious for the purposes of Section 303(5)(c) of the Companies Act 2006. For these reasons, none of the proposed resolutions will be put to the meeting."*

69. Mr Drake then declared the meeting closed.

70. As prefaced above, it is to be noted that the reference to counsel's opinion was only in respect of the allegedly "vexatious" resolutions and not the allegedly "ineffective" resolutions. It is also to be noted that the first reason he advanced was the allegedly "ineffective" resolutions, not the allegedly "vexatious" ones in respect of Messrs Cochrane, Kaye and Pickering. Mr Kaye was not a member of the Old Board and so Mr Drake had not had any advice in respect of the resolution appointing him.

71. Mr Drake records in his witness statement that at no time during the meeting were any interventions made by shareholders. This is hardly surprising given that immediately following the reading out of the pre-prepared statement, Mr Drake purported to close the meeting without any further discussion. However, Mr Drake states that while he and Mr Scott were leaving, Mr Pickering announced that Mr Drake's wording was ineffective and that the remaining shareholders would hold the meeting on their own.

72. There is a minute of what occurred thereafter. That minute records 15 of the shareholders present in person or by proxy, that is to say everyone other than Mr Drake who held 2 shares with his wife and Mr Scott who held one share. There is a discrepancy of one shareholder with the minute prepared by Mr Drake in that in Mr Drake's minutes he records Albion Property Company as being absent, whereas in the other minute, it is recorded that it had appointed Mr Pickering as its proxy.

73. The shareholders there are recorded as having discussed what had happened and how they felt it had been wholly unsatisfactory for them not to have had the opportunity to vote on each of the resolutions. They unanimously agreed that the general meeting should continue and that they should vote on the resolutions. Mr Shephard was unanimously appointed to chair the meeting. Each of the 9 resolutions was then put to the meeting and each was separately voted on and passed. Resolutions 1, 2, 3, 5, 6 and 9 were passed by 14 votes to nil and resolutions 4 (in respect of Mr Cochrane), 7 (in respect of Mr Kaye) and 8 (in respect of Mr Pickering) were passed by 13 votes to 1. Mr Shephard advised that the resolutions had duly passed, so that Mr Drake and Mr and Mrs Scott were forthwith removed and the 6 new directors were forthwith appointed.

<u>The attempts to discontinue the Patio Litigation</u>

74. The general meeting took place on a Saturday evening. On the following Tuesday 4th June, 2019 Mr Scott purporting to act on behalf of the Company i.e. as a director of the Company filed a Notice of Discontinuance of the Company's claim in the Patio

Litigation. On the same day Mr Drake served a Notice of Discontinuance of his and his wife's counterclaim in the Patio Litigation. In Mr Drake's evidence he has referred to a signed consent order in the Patio Litigation, although I have not seen it. I have assumed it makes provision for costs, and in particular that it provides for no order as to costs to be made. There has been a subsequent request made to His Honour Judge Parfitt in the Central London County Court, he apparently being the docketed judge for that matter, to stay the Patio Litigation until 20th October, 2019 so that it can be decided whether the Notice of Discontinuance filed by Mr Scott and the consent order was validly signed by the Company in light of the dispute as to who the directors are. It must follow that if Mr Scott had been validly removed as a director on 1st June 2019 he would have had no authority in respect of those matters and they are not binding on the Company. It would be for His Honour Judge Parfitt to decide what that meant, both as regards the Company's position and as regards Mr and Mrs Drake's position, although there is no doubt that Mr Drake had the necessary authority to sign the Notice of Discontinuance on his side of the Patio Litigation.

75. Additionally Mr Drake sent the 6 people purportedly appointed as directors in the continued meeting on 1st June 2019 an email on 10th June 2019 in forthright terms stating that they had not been validly appointed, that Mr Drake and Mr and Mrs Scott continued to be the only directors of the Company, that the others claiming to be directors were committing criminal offences and would be personally liable for all expensed incurred by the Company. He further threatened to take action to restrain them from holding themselves out as directors of the Company.

This Litigation

76. In the circumstances where 2 sets of individuals are each claiming to be the validly appointed directors of the Company, the Claimants who are shareholders and 2 of the group of directors who claim that they were appointed on 1st June, 2019 issued this claim, seeking an order pursuant to section 306 CA 2006 that the Company should hold a general meeting for the purpose of constituting the Company's board of directors, ancillary and consequential orders as to the conduct of the meeting, including the appointment of the chairman and declarations as to the effect and consequences of the removal of the 2nd to 4th Defendants at that meeting. This litigation is being funded by the 14 shareholders who voted on the resolutions, that is to say 14 of the 18 B shareholders.

77. Mr Drake and Mr and Mrs Scott resist this claim on the basis that the general meeting was declared closed after Mr Drake read out his pre-prepared statement and what occurred after that and after Mr Drake and Mr Scott had left was of no effect at all and was not a valid continuation of the general meeting.

The relevant provisions of the Companies Act 2006

78. Under section 168 CA 2006, a company may by ordinary resolution at a meeting remove a director before the expiry of his period in office. Special notice is required of a resolution to remove a director under section 168 or to appoint somebody instead of a director so removed at a meeting at which he is removed.

79. The law relating to general meetings is governed by Chapter 3 CA 2006 and in particular sections 301 to 306 inclusive. I do not set those out here in full, however any resolution

of the members of a private company is validly passed at a general meeting if (a) notice of the meeting and of the resolution is given and (b) the meeting is held and conducted in each case in accordance with the provisions of Chapter 3 and the company's articles.

80. Directors are empowered to call a general meeting of the company at any time. But under section 303, the members of a company may require the directors to call a general meeting of the company. Sub-section (2) sets out the circumstances in which the directors are required to call the meeting. Sub-sections (4) and (5) provide:

> *"(4) A request –*
> *(a) must state the general nature of the business to be dealt with at the meeting and*
> *(b) may include the text of a resolution that may properly be moved and is intended to be moved at the meeting.*
>
> *"(5) A resolution may properly be moved at a meeting unless –*
> *(a) it would, if passed, be ineffective (whether by reason of inconsistency with any enactment or the company's constitution or otherwise),*
> *(b) it is defamatory of any person, or*
> *(c) it is frivolous or vexatious"*

81. Section 304 provides that directors required under section 303 to call a general meeting must call the meeting within 21 days from the date on which they become subject to the requirement and the meeting must be held not more than 28 days after the notice convening the meeting. By sub-sections (2) and (3) it is provided that:

> *"(2) If the requests received by the company identify a resolution intended to be moved at the meeting, the notice of the meeting must include notice of the resolution.*
>
> *"(3) The business that may be dealt with at the meeting includes a resolution of which notice is given in accordance with this section."*

82. Section 306 gives the Court power (of its own motion or on the application of a director of a company or a member who would be entitled to vote at the meeting) to order a meeting to be called, held and conducted in any manner the Court thinks fit, in the event that for any reason it is impracticable to call a meeting in any manner in which meetings of the company may be called or to conduct the meeting in the manner prescribed by the company's articles.

<u>The Arguments</u>

83. The Claimants submit that:
    (a) section 303(5) is a very limited carve out to the circumstances in which the directors are obliged to call a meeting which has been requisitioned by the necessary proportion of members; however,
    (b) once the general meeting has been called, section 303(5) has no further application and matters then lie in the hands of the members, there being no power, under the CA

2006, the Articles or at common law for the chairman of a meeting to refuse to put resolutions to the meeting; accordingly

(c) once the meeting has been called, if the chairman purports to close the meeting without conducting the business for which it was convened without obtaining the consent of the members present, such an action would be invalid; and therefore

(d) it is open to the members present to continue the meeting to consider the business for which the meeting was called.

84. In the alternative, the Claimants submit that if section 303(5) does continue to apply to a general meeting, it is unarguable that the resolutions were either vexatious or ineffective. Accordingly, Mr Drake could not have declined to put the resolutions to the meeting and the remaining members were entitled to continue the meeting to consider the resolutions.

85. Further, it is submitted by the Claimants that as members have an inalienable statutory right to remove the board by ordinary resolution and a right under the Articles to appoint whoever they chose as director, it cannot be a matter of negotiation with the 2nd to 4th Defendants as to who should be appointed, nor can the 2nd to 4th Defendants have any form of veto.

86. The Claimants submit that in this case, the actions of Mr Drake as chairman were invalid on any basis, so that the remaining members were entitled to continue the meeting as they did. Therefore the resolutions to remove the 2nd to 4th Defendants as directors of the Company were valid. Further, subject to the point below as to Regulation 76(b) of Table A, the resolutions to appoint the 6 directors were valid, so that those 6 are the directors of the Company.

87. However, the Claimants draw to the Court's attention that Regulation 76(b) of Table A was not complied with in respect of the 6 directors proposed to be appointed at the meeting on 1st June, 2019. It was equally not complied with when Mr Drake and Mr Scott were appointed in December, 2018. However, the Claimants are concerned as to whether the failure to comply with this means that the appointments of the 6 directors at the general meeting was ineffective. If that is the case, they submit that there are no directors and the Court should make an order pursuant to section 306 CA 1986 for a meeting of the Company to take place to allow the members to appoint directors, after compliance with Regulation 76(b).

88. The 2nd to 4th Defendants submit that:

(a) Mr Drake was entitled to declare the meeting closed; because

(b) in doing so, he relied on the advice of Mr Eaton Turner that the resolutions were vexatious or ineffective; therefore

(c) he believed in reliance on that advice that there were no resolutions that could properly be put to the meeting; and

(d) whether or not that advice was right, in the absence of bad faith on Mr Drake's part, which it is said is not alleged and has not been put to Mr Drake, his actions cannot be impugned; accordingly,

(e) it was not possible for the meeting to be continued after the meeting had been closed; therefore

(f) the purported passing of the 9 resolutions by the remaining shareholders after he and Mr Scott had left were of no effect; so that

(g) the 2nd to 4th Defendants remain as the directors of the Company and the 6 directors purportedly appointed were not validly appointed and are not directors of the Company.

89. As to Regulation 76(b) the 2nd to 4th Defendants say that it seems that none of the appointments of directors have ever complied with this regulation and that it could therefore be said that the Company has never had any directors. They say that this would be an undesirable outcome and that it can be avoided on the basis that since incorporation each member has been willing to waive the procedural formalities of Regulation 76(b). Accordingly, they submit that on the basis of the *Duomatic* principle, the members should be taken to have given their approval to those formalities not being complied with.

Discussion

90. As was observed by Cotton LJ in *Isle of White Railway Company v. Tahourdin* (1883) 25 Ch D 320 (at 329):

> *"It is a very strong thing indeed to prevent shareholders from holding a meeting of the company, when such a meeting is the only way in which they can interfere, if the majority of them think that the course taken by the directors, in a matter which is intra vires of the directors, is not for the benefit of the company."*

91. It is necessary to consider the purpose of the scheme in sections 303 and 304 CA 2006 in order to determine the role of directors and in due course whether the chairman of a general meeting of a company has the power not to put resolutions to the meeting for consideration. Counsel tell me that there is no English authority on section 303(5) CA 2006.

92. In my judgment, the purpose of the scheme is to allow the requisite percentage of members of a company to serve notice requiring the directors of the company to call a general meeting to consider business of the company, the general nature of which they must identify. The members are also permitted to set out the particular resolutions that they wish to be considered.

93. Once the request is received by the directors, they then have a period of 21 days to decide whether to call a meeting as requested. The purpose of that 21 day period is for the directors to consider the proposed business and text of the particular resolutions. The directors must consider if any resolution proposed may properly be moved and is intended to be moved at the meeting. If a particular resolution is not intended to be moved or if it may not properly be moved because it falls within one of sub-section 303(5)(a) to (c), that is to say if passed would be ineffective, is defamatory or is frivolous or vexatious, the directors are not required to call a meeting.

94. The learned editors of *Kosmin & Roberts: Company Meetings and Resolutions (2nd edition)* state (at paragraph 5.15), the purpose of section 303(5) is to offer some protection to companies from activities of what might be described as "*the lunatic*

fringe", that is to say those individuals whether alone or in concert with others, who wish to abuse the requisition process as a means of causing trouble, or making themselves a nuisance or trying to obtain the oxygen of publicity for causes that are only indirectly associated with the business and affairs of the company. In my judgment, that states correctly the purpose of section 303(5). In such circumstances, the directors would not be required to call a general meeting.

95. Support for this approach is to be found in the judgment of Neuberger J (as he then was) in *Rose v. McGivern* [1998] 2 BCLC 593 (a case before there was any equivalent to section 303(5)) where he said at 605:

> *"It seems to me that if the extraordinary general meeting called pursuant to the resolutions could only be for the purposes of passing ineffective resolutions, then, as a matter of commercial common sense, the directors need not call such an extraordinary general meeting."* (emphasis added)

96. If the requisitioner is dissatisfied with the decision of the directors not to call the meeting or not to put a particular resolution to the meeting, he/she can challenge that decision by bringing an application under section 306 CA 2006 asking the Court to order that a meeting be called and held. At that stage the Court would consider whether the particular resolution was intended to be moved at a meeting and whether it may be properly moved. The Court would not, in my judgment, be restricted to considering the directors' reasons for not calling the meeting, but would be deciding the issue itself.

97. If, on the other hand, having considered each proposed resolution, the directors do not take the position that the resolution is not intended to be moved or that it may not properly be moved, the directors are required to call a general meeting of the company to consider the resolution.

98. In this case, the Mr Drake and Mr and Mrs Scott did consider the 10 proposed resolutions and (as set out above) considered that they should not include on the agenda the resolution to appoint Mr Nasser a director, apparently on the basis that if the other 2 proposed non-shareholder directors were to be elected, there would be more than the permitted number of non-shareholder directors on the board. Whether or not that was a correct basis, the directors had plainly considered what resolutions could properly be moved, and that was the only resolution excluded. There was no challenge to this, just as there had been no challenge to the decision of the directors not to call a meeting in response to Mr Kaye's earlier requisition.

99. In my judgment, Mr Blake is correct in his submission that once the directors have called the general meeting, the only people who can then consider the proposed resolutions included in the notice convening the meeting are the members of the company. There is no residual power remaining in the directors further to consider section 303(5) and determine that any particular resolution or resolutions should not be put before the members in general meeting. Rather, the directors have performed their role and what happens next is down to the members.

100. This is supported by case law dealing with postponement or cancellation of meetings. Once a meeting has been duly called, in the absence of something in the articles of the company allowing for a meeting to be postponed by a subsequent notice, it cannot be so

postponed (*Smith v. Paranga Mines* [1906] 2 Ch 193 at 197). Further such a meeting cannot be cancelled, that being a matter going even further than a postponement, unless the articles permit (*Bell Resources Ltd v. Turnbridge Pty Ltd* (1988) 13 ACLR 429 SC (WA)).

101. There is nothing in the Articles (including Table A) of the Company in this case which permits the postponing or cancellation of a meeting once duly called. If the meeting cannot be postponed or cancelled once duly called, it is difficult to see why the directors should have any power to prevent tabled resolutions being considered at the meeting.

102. I reject Mr Goldstone's submissions that the directors have a continuing power to act, which he described as a safety net if a vice had not been spotted prior to the calling of the meeting. He advanced the proposition also on a hypothesis of something changing between the calling of the meeting and the meeting itself which caused a proposed resolution to become defamatory. That appears to me to be contrary to authority and also to the proper purpose of the scheme of this part of CA 2006.

103. Accordingly, there was no power on the part of the directors to seek to postpone or cancel the meeting. If the directors considered matters further and took the view that one or more of the proposed resolutions could not properly be moved, they could and should have attended the meeting (they were entitled to do so both as directors and shareholders) and explained fully why they considered that resolutions could not properly be moved. They could then have sought to persuade the shareholders of their position, but it would be up to the meeting to decide the appropriate course of action, not the directors.

104. In my judgment, therefore, in this case once Mr Drake had received the advice from Mr Eaton Turner, it would not have been open to the directors to serve a notice, or otherwise to postpone or cancel the meeting. The meeting had to go ahead.

105. At the general meeting, the chairman is, according to Regulation 42 of Table A, to be the chairman of the board of directors, or in his absence some other director nominated by the other directors. In this case, there is no evidence that there was a chairman of the board of directors, hence it was open to Mr and Mrs Scott to ask Mr Drake to act as chairman.

106. It is the duty and function of the chairman to preserve order and to take care that the proceedings are conducted in a proper manner and that the sense of the meeting is properly ascertained with regard to any question which is properly before the meeting. However, he does not have power to stop the meeting at his own will and pleasure (*National Bank v. Sykes* [1894] 3 Ch 159 at 162). As is said in *Kosmin & Roberts: Company Meetings and Resolutions* (supra) at paragraph 7.17, the chairman is not running the general meeting for his own benefit, but for the benefit of the company as a whole. The chairman must therefore act at all times in good faith and for proper purposes, remembering at all times that the authority to preside over the meeting does not confer dictatorial power.

107. Once the meeting commences, Regulation 45 of Table A gives the chairman power to adjourn the meeting with the consent or on the instruction of the meeting. The meeting did not consent to any adjournment or instruct Mr Drake to adjourn it.

108. There is in addition, in circumstances where the views of the majority cannot be validly ascertained, a residual common law power vested in the chairman to adjourn the meeting so as to give all persons entitled a reasonable opportunity of speaking at the meeting and of voting (*Byng v. London Life Association Ltd* [1990] 170 at 188C-D). That was not the case here.

109. Beyond that, there is no English authority which was drawn to my attention to suggest that there is any greater power vested in the chairman, in particular not a power to decide that resolutions on the agenda cannot be put to the meeting. Rather there is long established authority in *National Bank v. Sykes* [1894] 3 Ch 159 at 162 that the chairman:

> *"... presides with reference to business which is there to be transacted. ... he cannot say, after the business has been opened, 'I will have no more to do with it; I will not let this meeting proceed; I will stop it; I will declare the meeting dissolved, and I will leave the chair.' ... that is not within his power. The meeting by itself ... can resolve to go on with the business for which it is convened, and appoint a chairman to conduct the business which the other chairman, forgetful of his duty or violating his duty, has tried to stop because the proceedings have taken a turn which he himself does not like."*

110. If this remains the law, in my judgment what Mr Drake did in refusing to allow the resolutions to be put to the meeting and closing the meeting, was not within his power as chairman. That was akin to cancelling the meeting. Accordingly, it would follow that it was open to the members remaining to appoint a new chairman, which they did, and to continue with the meeting to conduct the business for which the meeting had been called.

111. However, Mr Goldstone says that is not the law, properly understood, and he relies on an Australian authority, *Corpique (No 20) Pty Ltd v. Eastcourt Ltd* (1989) 15 ACLR 586, a decision of Cohen J sitting in the Supreme Court of New South Wales. Mr Goldstone referred me to paragraph 12B[5] of *Gore Browne on Companies* which, having referred to the power of the members to continue a meeting under another chairman if the chairman has wrongly declared a meeting closed or abandoned it (referring to *Arcus v. Castle* [1955] NZLR 122), goes on in reliance on *Corpique* to say:

> *"... but if his decision to do so is justified (eg because it is based on legal advice, even if erroneous) the meeting cannot be continued in order to discuss the same matter."*

112. That is what Mr Goldstone says happened here, namely that Mr Drake closed the meeting, but his decision was justified because it was based on legal advice that the resolutions were ineffective or vexatious, so that it was not open to the remaining members to continue with the meeting to discuss the resolutions. He goes on to say that I do not need to consider whether Mr Eaton Turner's advice was wrong, because even it was, that does not alter the lack of power of the remaining members to carry on with the meeting.

113. It is clear that *Corpique* is not binding on me. Mr Blake submits that in so far as it decides what Mr Goldstone submits it does, it is inconsistent with *Sykes* and does not represent the law of England and Wales.

114. I do not set out in minute detail the facts of *Corpique*, but can summarise them briefly. Corpique had requisitioned a meeting, which was convened by the company, Eastcourt. The meeting was to consider resolutions to remove 2 directors and to replace them with 2 other directors and also to re-elect a director who had been appointed to fill a casual vacancy. The company's articles provided for the removal of directors by ordinary resolution and the appointment of another person in their stead (effectively the equivalent of Regulation 78 of Table A, save that it was not expressed to be "subject as aforesaid" as Regulation 78 is) and by a different article for the provision by nominee directors of notice signed by the nominee, giving his consent to the nomination (equivalent in part to Regulation 76(b) of Table A). In *Corpique* none of the proposed directors had given their consent to the nomination before the general meeting. The board of directors of the company took counsel's advice who said that the requirement for consents applied, that since the article requiring these has not been complied with, the resolutions to appoint the 2 new directors should not be put, that this could not be cured by adjournment and therefore the resolutions for the removal of the 2 directors should not be put, because in the absence of new directors, the number of directors would be below the statutory minimum in contravention of the Companies (NSW) Code.

115. There were 43 members present at the beginning of the meeting. After the opening of the meeting, the company's chairman announced he had counsel's advice that the meeting could not properly consider any of the proposed resolutions, and he was closing the meeting. This was challenged by Corpique's solicitor, who said there were no grounds to close the meeting. The board and a number of shareholders left. Those remaining, who numbered "about 25" elected a new chairman and continued the meeting, passing the relevant resolutions, albeit only about 18 members voted.

116. Cohen J held that Counsel's advice had been wrong and the resolutions could have been put. However, he went on to consider *National Dwellings Society v. Sykes*, a Victorian state case *Oliver v. North Nuggetty Ajax Co NL* [1912] VLR 416 and *Catesby v Burnett* (referred to in the report as *Gatesby v Burnett)* [1916] 2 Ch 325 (1916) 114 LTT 1022 in order to consider the effect of what the chairman had done in purporting to close the meeting.

117. In the *Sykes* case, as is apparent from the notes of the arguments at page 161 of the report, the defendants in that case submitted that if the chairman makes a mistake and declares the meeting adjourned or dissolved, the meeting cannot remedy it by going on with a fresh chairman, rather a new meeting must be called. This was rejected by Chitty J in his judgment.

118. The *Oliver* case followed and applied *Sykes* in holding that the meeting was not over so long as there was business reasonably and properly pertinent to business on the paper. The judge, Madden CJ, was plainly of the view that the chairman who had refused to accept forms of nomination for new directors, could not have been puzzled or embarrassed by the forms and he had had no right whatever to reject the nominations, carry on with other resolutions not putting these nominations to the meeting and then declare the meeting closed. It was therefore open to the shareholders who remained to continue the meeting, elect a new chairman and carry out the elections again. In *Corpique* Cohen J does not record any finding by Madden CJ that the chairman in *Oliver* had acted in bad faith or neglectfully.

119. In the *Catesby* case, the arguments appear not to have been about whether the meeting could continue when the chairman had wrongly closed the meeting, but who should have continued to be chairman. Again there is nothing in Cohen J's judgment in *Corpique* recording any finding by Eve J in *Catesby* that the original chairman had acted in bad faith or neglectfully.

120. Having considered these authorities, Cohen J said at page 596:

> *"It may be taken from these authorities that in order that members can continue a meeting notwithstanding that the chairman has closed it or at least abandoned it, the acts of the chairman should have been other than bona fide, or at least neglectful."*

121. Cohen J then sought to distinguish a decision of the Supreme Court of New Zealand in *Arcus v. Castle* [1955] NZLR 122 in which notwithstanding that there was no finding of neglect and there was reference to the chairman having obtained a legal opinion and to a presumption that he had acted bona fide, the court had held that he had wrongly closed the meeting and left the room with a number of members of the board, with the result that the meeting could be and was validly continued by the remaining members and the resolutions were validly passed. He did so on the basis that he could not follow an observation of the court as to the possibility of the chairman taking further legal advice, saying that the true reason for the decision may have been that the meeting was never allowed to commence and the members were entitled to have that happen. After this Cohen J said:

> "*In my opinion the authorities do not go so far as to permit a general rule to be laid down that if a chairman closes a meeting following a ruling made by him bona fide and upon independent expert advice on the only business available to be dealt with, then notwithstanding that his view may have been wrong, it is open to some of the members of the meeting to seek to continue it after others of the persons present have left in apparent reliance upon the correctness of the decision which was made."*

122. In my judgment, the decision in *Corpique* is inconsistent with *Sykes* and does not represent the law of England and Wales. I do not see that there is anything in Cohen J's analysis of the cases referred to above which limits the circumstances in which members can continue a meeting after it has been wrongly closed by a chairman to those where the chairman has acted other than *bona fide* or neglectfully. There is no such express limit in *Sykes* and I do not read the reference in that case to the chairman having been "*forgetful of his duty or violating his duty*" as imposing such a limit. Further, Cohen J's decision appears to be directly contrary to the decision in *Arcus v. Castle*.

123. Additionally, in my judgment the decision in *Corpique* is inconsistent with the principle of the decision of the Court of Appeal in *Byng v. London Life Association Ltd* (supra), which binds me, in which the actions taken by the chairman of the meeting were taken in good faith and on counsel's erroneous advice, but nonetheless were not held to be valid. While in that case what was sought was a declaration as to the validity of resolutions passed at an adjourned meeting and the question was whether the adjournment was valid because the chairman had not taken into account matters that he should have

done in deciding as to when and to where the meeting should be adjourned, the effect of the decision had been to deprive a substantial number of members of the company from taking part at the meeting because they could not attend the adjourned meeting. If that decision taken by the chairman was not valid, in my judgment, a decision the effect of which was to deny all the members the chance of voting on resolutions would equally not be valid and would not become so by reason of the chairman having acted *bona fide* on counsel's opinion, so as to deprive the members of the opportunity of voting.

124. Accordingly, I reject Mr Goldstone's initial narrow submission that if a chairman of a duly convened meeting closes the meeting following a ruling by him based on independent legal advice, whether that advice is right or wrong, unless he is acting other than *bona fide*, the closing of the meeting is effective, such that it is not open to the remaining members to continue the meeting and vote on the resolutions which were to be put to the meeting.

125. I also reject Mr Goldstone's somewhat wider oral submission that if the chairman so acts other than neglectfully, the closing of the meeting is effective, such that it is not open to the remaining members to continue the meeting and vote on the resolutions which were to be put to the meeting.

126. However, if I am wrong to do so, in my judgment on the facts of this case the 2nd to 4th Defendants could not rely on such a doctrine. Mr Drake in this case did not seek Mr Eaton Turner's opinion as to how the meeting should be conducted. To the contrary what Mr Eaton Turner's opinion was sought on was the question of whether the proposed resolutions were "vexatious" within section 303(5) CA 2006. The very firm impression given in the Instructions was that this was for the purposes of considering whether the directors should call a meeting. Despite Mr Goldstone urging me to the contrary, in my judgment, it cannot be inferred from the Instructions and the Opinion that the advice was being sought as to the conduct of the meeting.

127. By contrast to the facts in *Corpique*, where counsel was expressly asked to, and did, advise on whether the resolutions should be put to the meeting which was about to be held, Mr Eaton Turner was not asked and did not opine on that question in this case. He did not say that the resolutions should not be put but rather only that there was an entirely respectable argument which had a better than evens chance of being upheld by the Court that the proposed resolutions can properly be regarded as vexatious within section 303(5) CA 2006. He did so on the basis that he was instructed that the resolutions were to reinstate the Old Board, whereas only 2 members of the Old Board were included among the 6 proposed new members. In my judgment, it is highly improbable that Mr Eaton Turner would have advised that the resolutions to appoint the other 4 proposed directors were "vexatious", especially had he known that it was Mr Drake who was the other party to the Patio Litigation. It follows that it is highly unlikely that even if he had maintained the view that the resolutions in respect of the appointment of the 2 former members of the Old Board were vexatious, he would have advised that the resolutions in respect of the other proposed appointees should not have been put to the members.

128. Similarly, the advice he is said to have given orally as to the ineffectiveness of the resolutions has to be considered in light of the written Opinion he had given on the issue of the "vexatious" resolutions. One does not know what advice he might have given had he been told the whole story, including Mr Drake's involvement as the defendant to the

Patio Litigation and that only 2 of the nominees were members of the Old Board. It seems highly unlikely to me that he would have advised that the remaining resolutions were ineffective and should not be put to the meeting.

129. In those circumstances, unlike the situation in *Corpique*, Mr Drake as chairman of the meeting was not actually relying on advice (erroneous or otherwise) to take the course of action that he did, namely to refuse to put any of the resolutions and to declare the meeting closed. Accordingly, even if *Corpique* does (contrary to my judgment) represent the law of England and Wales, it would not assist on these facts to prevent the remaining members continuing the meeting and voting on the resolutions.

130. Further, even if *Corpique* does correctly state the law and it were possible to construe Mr Eaton Turner's advice as being wide enough to extend to the steps taken by Mr Drake as chairman of the meeting, Mr Drake's actions were, in my judgment, "*other than bona fide, or at least neglectful*".

131. Mr Goldstone reminded me that there is no allegation of bad faith made expressly by the Claimants against Mr Drake and that I have only the benefit of written evidence which has not been subject to cross-examination. As I do not need to go as far as making a finding of bad faith on the part of Mr Drake, while I entertain grave doubts as to his motivation and conduct, I do not make any such finding. However, any attempt by Mr Drake to rely on advice provided by Mr Eaton Turner in the circumstances set out above, where the instructions were substantially misleading to Mr Drake's knowledge, would in my judgment be at least "neglectful". Accordingly, it could not prevent the remaining members validly continuing the meeting after Mr Drake had purported to close the meeting, but was wrong to do so.

132. There is a further point of distinction between this case and *Corpique* in that in this case it was made plain before Mr Drake and Mr Scott left that the remaining members were intending to continue the meeting and no other members left. Therefore, unlike *Corpique*, this was not a case where some members had left in apparent reliance on the correctness of the decision which was made. It may well be that Cohen J was influenced by the fact that 18 of the 43 members had left the meeting in that case. That concern does not arise on the facts of this case.

133. Accordingly, in my judgment the members were entitled to continue the meeting after Mr Drake had declared the meeting closed. They did so and the resolutions passed are (subject to the effect of the Regulation 76(b) point) valid.

134. I do not need for the purposes of this judgment to consider whether Mr Eaton Turner's advice as to "vexatious" was right or wrong. However, recognising that any comments I might make are strictly *obiter*, in my judgment his advice went too far in holding that the proposed resolutions were "vexatious". I agree with what the editors of *Kosmin & Roberts: Company Meetings and Resolutions* (supra) say at paragraph 23.92 that in this context "vexatious" may properly be applied to a resolution which has the characteristics of being troublesome, burdensome or is proposed for no proper purpose connected to the company, provided that one interprets troublesome or burdensome from the standpoint of the company, as opposed to directors of the company. I do not follow how a resolution by members to remove directors and appoint new directors, which is a fundamental right of members, could be described as burdensome or troublesome or

being for no proper purpose connected to the company. That is not to say that in the totally different context of unfair prejudice petitions, it cannot amount to prejudicial conduct for majority shareholders to appoint directors for the purpose of securing some ulterior advantage. But that does not mean that a resolution seeking to change the directors would fall into the category of being "vexatious". In my judgment, Mr Eaton Turner erred in paragraph 29 of his Opinion in eliding the resolutions with the actions that those validly appointed on such resolutions might subsequently take. Those subsequent actions that might or might not be taken do not, in my judgment, make the resolutions for their appointment "vexatious".

135. It may be that some of the directors who were proposed would wish to avoid finding themselves being investigated on the grounds of alleged improper use of trust funds. However, once appointed as directors, they owe fiduciary duties to the company and would or might find themselves in a position of conflict which would stop them voting on such issues. It is not for the chairman of a general meeting to pre-judge this issue. It is precisely the sort of thing which could have been raised at the general meeting and on the basis of a full discussion, the members would then be free to decide whether notwithstanding this was a possibility, they still wanted to appoint such a person as director.

136. This leaves the question of the effect on the validity of the resolutions to appoint the 6 new directors by reason of the non-compliance with Regulation 76(b). It seems likely that no one spotted this until counsel for the Claimants became involved and pointed out the apparent need to comply with this Regulation.

137. Unlike the situation in *Corpique*, it is not possible in my judgment to say that the appointment of directors instead of those being removed is an alternative route which does not require compliance with the requirement of Regulation 76(b). This would be to have to disregard the opening words of Regulation 78 "Subject as aforesaid".

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

139. It follows, in my judgment, that the resolutions to remove the 2nd to 4th Defendants as directors were validly passed, as were the resolutions to appoint the 6 new directors.

140. The effect of this is that there are 6 directors in office, albeit that the minimum number of Shareholder Directors is less than the minimum number of 5 provided for by article 12(b) of the Articles. However, the articles make express provision that the directors appointed shall have all the powers and discretions that directors have generally notwithstanding that there are fewer than the minimum number of prescribed directors. Further by article 17, the quorum for the transaction of the business of directors shall be two unless fixed otherwise by the directors.

141. In my judgment, having fewer than 5 Shareholder Directors is of no material effect and does not prevent the appointments made at the general meeting on 1st June, 2019 being effective. The directors appointed at the general meeting have the power under Regulation 79 to appoint a further Shareholder Director.

Section 306 meeting

142. In light of my judgment, this issue does not arise. Given that the resolutions to remove the 2nd to 4th Defendants were valid, had I held that the appointments of the new directors were invalid because of the effect of Regulation 76(b), so that there were no directors in office, I would have directed the calling of a meeting under section 306 CA 2006 in very short order for the purposes of considering once more the resolutions to appoint these 6 as directors. I would have ordered either that the provisions of Regulation 76(b) should be disapplied, alternatively that the time limits be disapplied so that the required particulars could be given at any time prior to the holding of the meeting. As there would be no directors in place, I would have directed that the members should elect a chairman.

143. It may well be that the directors that I have determined are in office think it desirable that a general meeting should be called to address the question of the minimum number of Shareholder Directors and any other matters arising from this judgment, such as a possible amendment to the Articles to remove the technical requirements in Regulation 76(b) to reflect the basis on which the members have been proceeding, but that is a matter for them.

Conclusion

144. In my judgment, the 2nd to 4th Defendants have been removed from office as directors of the Company and Mr Cochrane, Mrs Corscadden, Ms Davasaz, Mr Kaye, Mr Pickering and Mr Shephard have been validly appointed as directors of the Company.

145. I will make declarations to reflect my finding and will hear counsel on the form of the order more generally.