Neutral Citation: **[2024] UKUT 00285 (TCC)**

Case Number: UT/2023/000025

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Hearing venue: Rolls Building
Fetter Lane
London
EC4A 1NL

INCOME TAX – dividend income – date when dividend became due and payable – whether the articles of association of the company were amended – whether shareholder waived right to enforce payment of the dividend

Heard on: 16th July 2024
Judgment date: 17th September 2024

Before

JUDGE JONATHAN CANNAN
JUDGE VIMAL TILAKAPALA

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Appellants

and

PETER GOULD
Respondent

Representation:

For the Appellants: Charles Bradley, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

For the Respondent: David Yates KC, instructed by Rooks Rider Solicitors LLP

DECISION

INTRODUCTION

1. This is an appeal against a decision of the First-tier Tribunal (Tax Chamber) ("the FTT") released on 1 November 2022 ("the Decision"). The FTT held that an interim dividend paid to Peter Gould ("PG") was "paid" for income tax purposes in tax year 2016-17 when PG was non-resident in the UK, notwithstanding that the dividend had been paid to another shareholder in the previous tax year. As such, no income tax was payable by PG on the dividend and the FTT allowed PG's appeal. The FTT rejected HMRC's case that the dividend was paid for income tax purposes in tax year 2015-16.

2. There was no dispute between the parties as to the relevant tax legislation. Section 383(1) Income Tax (Trading and Other Income) Act 2005 ("ITTOIA 2005") imposes a charge to income tax on '*dividends...of a UK resident company*'.

3. Section 384(1) ITTOIA 2005 provides that '*[t]ax is charged under this Chapter on the amount or value of the dividends paid...in the tax year*'.

4. Section 1168(1) Corporation Tax Act 2010 provides that '*[f]or the purposes of the Corporation Tax Acts dividends are to be treated as paid on the date when they become due and payable*'. Section 384(1) ITTOIA 2005 falls within the definition of the Corporation Tax Acts because it is an enactment relating to the taxation of company distributions (see Schedule 1 Interpretation Act 1978).

5. The issue before the FTT was when the dividend became due and payable to PG. The context in which that issue arose and the background facts can be stated quite briefly.

6. PG and his brother Nicholas Gould ("NG") were the principal shareholders in Regis Group (Holdings) Limited ("Regis"), each holding some 28.3% of the voting A shares and 50% of the non-voting B shares. The remaining 43.4% of the A shares were held by a family settlement of which they were joint life tenants ("the Settlement"). The trustees of the Settlement were PG, NG and Mr Keith Bell, a longstanding adviser.

7. PG and NG were directors of Regis at all material times, together with Mr Paul McFadyen, Mr Sydney Taylor and Mr Michael Pearson.

8. In 2004, Regis had expanded its business from the UK to the United States and it established an office in Dallas, Texas. PG worked in the United States. In 2013 he rented a property in Jamaica which was convenient for flights to Dallas and New York. He relocated there in 2015 and bought the rented property.

9. By 2015, Regis had surplus cash from property disposals and Mr Taylor, who was the chief financial officer, recommended that it should distribute the surplus cash by way of dividend. On 31 March 2016 the board of directors resolved to pay an interim dividend of £40m. Payment of the interim dividend followed various discussions as to which the FTT made the findings of fact described below. Prior to payment of the interim dividend, the trustees of the Settlement had directed Regis to pay its share directly to PG and NG. It was common ground between the parties that dividends paid to PG and NG in respect of the Settlement's shares fell to be taxed on PG and NG in the same way as dividends paid in respect of their own shareholdings.

10. An interim dividend of £20m was paid to NG on 5 April 2016. However, the interim dividend of £20m to PG was not paid until 16 December 2016.

THE FTT'S FINDINGS OF FACT

11. The FTT made the following findings of fact in relation to the payment and structure of the dividends:

> 15. Part of the reasoning for delaying the payment of the dividend to the appellant was that he was experiencing difficulties opening a bank account in Jamaica, principally because they did not accept large transfers and the risk of fraud.
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> 16. Another part of the thinking was tax planning for both brothers. If the appellant was non-resident for tax purposes in the year in which the dividend was taxed he would not be liable to tax in the UK. Following his move to Jamaica in 2013, the appellant had anticipated being non-resident for tax purposes in tax year 2015-16 but the death of his mother in December 2015 required him to be in the UK for more time than he had intended. Accordingly, there was some doubt as to whether he was non-resident in that tax year. It was therefore decided that out of caution the appellant should receive his dividend in tax year 2016-17.
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> 17. Nicholas Gould was UK resident for tax purposes but due to changes in the taxation of dividends introduced by Finance Act 2016 he would be taxed at an effective tax rate of 30.56% if he was taxed on the dividend in 2015-16 and at 38.1% in tax year 2016-17.
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> 18. Accordingly, the brothers' tax planning required them to be paid the dividend in different tax years.
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> 19. There were a number of discussions with the brothers and with advisers as to how to make the dividend and these discussions continued up to March 2016. Sydney Taylor led the exercise and first took advice from tax specialist Chris Cooke at solicitors Rooks Rider. The brothers and Sydney Taylor then had discussions with Michael Bell at Rickard Luckin, Regis' auditors and tax advisers. Stephen Hanlon at Shipleys was also consulted. In several discussions with the brothers, particularly around mid-February and early March the issue of enforceability of any delayed interim dividend was discussed, that is to say it might never be paid to the appellant if something went wrong in the business.
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> 20. The advice culminated in an email of 29 March 2016 from Keith Bell to Sydney Taylor and Michael Pearson, advising that an interim dividend would be taxed on the date of payment in contrast to a final dividend which would be taxed on the date it was declared. The advice in the email was:
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>> "there is no doubt that any dividend should be an interim dividend, as you have already indicated"
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> 21. As Sydney Taylor said, this advice confirmed that an interim dividend should be declared, what followed was about the mechanics.
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> 22. We find that there were five factors influencing the payment and structure of the dividend:
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>> (1) Sydney Taylor's opinion that there was surplus cash in the business
>>
>> (2) The appellant was finding it difficult to open a bank account in Jamaica
>>
>> (3) The tax advantage to be secured in paying Nicholas Gould in the tax year 2015-16
>>
>> (4) The tax advantage to be secured in paying the appellant in the tax year 2016-17
>>
>> (5) The Settlement did not have a bank account

23. We also find that immediately prior to the meetings on 31 March, as a result of the extensive discussions, both brothers were fully advised and understood the proposed dividend arrangements. Specifically, they understood that Nicholas Gould's dividend would be paid in the 2015-16 tax year and the appellant's dividend would be paid later. The precise timing of the payment of the appellant's dividend was not agreed, save that it would be after the end of the 2015-16 tax year and most likely once the appellant had identified a suitable bank account and had advised Regis that he was happy for it to be paid.

24. Further, the appellant accepted that he would not be able to enforce payment of the dividend and so was reliant for its payment on the directors of Regis and principally his brother to make the payment. However, the appellant was content to take that risk given his relationship of trust with his brother, the solid financial position of Regis and the practical and tax advantages to him of delaying the payment.

25. Further, we find that at no point did anyone give any consideration as to whether the proposals were permitted by Regis' articles of association or more generally.

12. Regis' articles of association were in the form of Table A, as contained in the Companies (Tables A to F) Regulations 1985 (SI 1985/805). In relation to dividends, Table A provides as follows:

Dividends

102. Subject to the provisions of the Act, the company may by ordinary resolution declare dividends in accordance with the respective rights of the members, but no dividend shall exceed the amount recommended by the directors.

103. Subject to the provisions of the Act, the directors may pay interim dividends if it appears to them that they are justified by the profits of the company available for distribution...

104. Except as otherwise provided by the rights attached to shares, all dividends shall be declared and paid according to the amounts paid up on the shares on which the dividend is paid. All dividends shall be apportioned and paid proportionately to the amounts paid up on the shares during any portion or portions of the period in respect of which the dividend is paid; but, if any share is issued on terms providing that it shall rank for dividend as from a particular date, that share shall rank for dividend accordingly.

13. HMRC opened enquiries into PG's tax returns for 2015-16 and 2016-17. Closure notices were issued on 13 March 2020, amending the returns to show the dividend as taxable in 2015-16. PG's appeal against the conclusion in the closure notices was allowed by the FTT in the Decision.

THE DECISION

14. HMRC's case before the FTT relied on the effect of article 104 and also on the principle that shareholders in a company holding the same class of shares must be treated equally. As a result, HMRC submitted that once Regis had paid a dividend to NG it became indebted to pay the dividend to PG and PG could enforce that debt immediately.

15. The FTT rejected HMRC's case at [74] – [78] of the Decision. It held that article 104 and the principle of equal treatment of shareholders did not mean that PG's dividend became payable on 5 April 2016. A shareholder who is not paid an interim dividend at the same time

as other shareholders might have other remedies, but did not have a debt claim against the Company.

16. That was sufficient for the FTT to decide the appeal. However, it went on to accept alternative arguments which had been raised by PG in the event that an enforceable debt had been created. In relation to those alternative arguments the FTT held as follows:

(1) The principle in *re Duomatic Limited* [1969] 2 Ch 365 was engaged. All the shareholders had agreed to vary the articles of association so that the directors were permitted to pay dividends at different times without creating a debt ([99] – [102] of the Decision).

(2) Prior to the directors resolving to pay the interim dividend, PG waived his right to enforce payment of the dividend when the dividend was paid to NG. That waiver was supported by consideration and was therefore binding on PG and Regis ([111] – [114] of the Decision).

17. The FTT also rejected an argument of HMRC that PG would have been entitled to payment of the dividend as at 5 April 2016 by way of remedy for unfair prejudice if Regis had refused to pay on that date.

GROUNDS OF APPEAL

18. The FTT granted HMRC permission to appeal on four grounds. We are concerned with three of those grounds which for convenience we re-number as follows:

(1) The FTT erred in law in holding that, where a company with articles of association in the form of Table A pays an interim dividend to one shareholder but not to a second shareholder of the same class, no debt is owed to the second shareholder.

(2) The FTT erred in law in holding that the effect of the discussions set out at [15] – [25] of the Decision was to vary Regis' articles of association pursuant to the '*Duomatic*' principle.

(3) The FTT erred in law in holding that the effect of the same discussions was a binding contract under which PG waived his right to be paid his share of the dividend at the same time as NG.

19. The fourth ground of appeal concerned the FTT's rejection of HMRC's submissions based on unfair prejudice. In the event, HMRC do not pursue that ground of appeal.

GROUND 1

20. It is common ground between the parties that a dividend is "due and payable" for the purposes of section 1168(1) CTA 2010 where the shareholder entitled to the dividend has a right to enforce payment.

21. A company can only pay what is often described as a final dividend where it is declared by ordinary resolution of the members in general meeting (article 102, Table A). In the present appeal, we are concerned with an interim dividend, which a company can pay where the directors resolve to pay an interim dividend (article 103, Table A). An interim dividend is treated as paid on account of the next final dividend. It is not unusual for reference to be made

to the declaration of an interim dividend, but where the articles are in the form of Table A this is strictly incorrect.

22. In *Lagunas Nitrate Company Ltd v Schroeder and Co and Schmidt* (1901) 85 LT 122, the directors resolved to pay an interim dividend. Shortly afterwards, in light of pending litigation, the directors resolved to postpone payment of the interim dividend. Joyce J noted that *Lindley on Company Law* and *Buckley on the Companies Acts* stated that "*where a dividend is declared it becomes a debt due from the company to the shareholders*". However, he distinguished the declaration of a dividend and a resolution for payment of an interim dividend. He held that prior to payment of an interim dividend, the company was not obliged to pay it. The directors could reconsider whether it ought to be paid at all.

23. The distinction between the declaration of a dividend by a company in general meeting, and a directors' resolution for payment of an interim dividend, was also considered by Brightman J in *Potel v Commissioners of Inland Revenue* 46 TC 658. That case, like the present, involved identifying the tax year in which certain dividends were taxable. On 31 March 1965, the directors resolved to pay interim dividends expressed to be payable on 29 May 1965. It was held that the dividends were taxable in tax year 1965-66 because on its true construction the resolution provided that they were payable on 29 May 1965. Brightman J said at p667G that the directors could stipulate that an interim dividend would be payable at a future date and in those circumstances there was no enforceable right to demand payment:

> In my view it follows from these principles that in the case of an interim dividend which the directors resolve shall be paid, they can at or after the time of such resolution decide that the dividend shall be paid at some stipulated future date. If a time for payment is so prescribed, a shareholder has no enforceable right to demand payment prior to the stipulated date.

24. Brightman J also held that in any event, following *Lagunas Nitrate*, a resolution to pay an interim dividend did not create a debt before the dividend was paid. He stated at p668I:

> Even if I had not formed the view that payment on 29th May 1965 was an integral part of [the resolution] I would still have concluded that the dividends in question were part of the total income of the taxpayer for that year, and for the following reasons. There is a difference between declaring a dividend and paying a dividend. The declaration of a dividend by a company in general meeting creates a debt enforceable immediately or in the future, according to whether the dividend is or is not expressed to be payable at a future date. The payment of the dividend is a different operation. It is an actual distribution of part of the assets of the company. The two processes, declaration and payment, are quite separate. Article 125 in the present case did not in terms authorise the directors to declare a dividend, that is to say, to create the relationship of debtor and creditors between the company and its members. It only authorised the act of payment. This is usual in the case of an interim dividend: see, for example, article 115 of Table A of the Companies Act 1948, and compare the wording of article 114. I have been referred to no authority that the resolution of a board of directors pursuant to such an article creates the relationship of creditor and debtor between a member and the company. In fact, the law is stated to be precisely the contrary in Buckley's Company Law, 13th edn. (1957), at page 897, and I am told that this is a reflection of what appeared in earlier editions. The note in Buckley reads:
>
> > "Where the directors are authorized to pay interim dividends, a mere resolution to pay does not create a debt as between the company and the member so as to prevent the directors from subsequently rescinding the resolution."
>
> I think that is a correct conclusion from the decision in the *Lagunas Nitrate* case, which establishes that an interim dividend is, as it were, subject to the will of the directors until it is actually paid.

25. There is no issue as to the principles to be derived from *Lagunas Nitrate* and *Potel.* It is also common ground that shares of the same class confer the same rights on all holders of the shares and impose the same liabilities on the company, in the absence of any agreement to the contrary. That principle was recently described by the Supreme Court in *Marex Financial Ltd v Sevilleja* [2021] AC 39 at [103]:

> It is a significant principle of company law that, in the absence of agreement to the contrary such as that expressed in the terms of a share issue, shares confer the same rights and impose the same liabilities: see for example section 284 of the 2006 Act and *Birch v Cropper* (1889) 14 App Cas 525, 543, per Lord MacNaghten.

26. The FTT identified the issue before it at [74] of the Decision in terms of what remedy an unpaid shareholder would have against the company if it paid an interim dividend to one shareholder but not to another. Mr Bradley for HMRC accepted that the FTT was correct to identify the issue in this way. He submitted that the answer was that the unpaid shareholder would have a claim against the company for an unpaid debt. Such a claim would arise pursuant to the articles of association which operate as a contract between members and the company (see section 33 Companies Act 2006). In support of his submissions, Mr Bradley relied on a decision of a sheriff principal in the Scottish case of *Doherty v Jaymarke Developments (Prospecthill) Ltd* 2001 SLT (Sh Ct) 75. The decision does not bind us, but as a decision of a sheriff principal it is persuasive.

27. In *Doherty*, the company had adopted Table A articles. It resolved to pay an interim dividend in April 1998 and paid the dividend to the majority shareholder by way of credit to his director's loan account. The resolution provided that payment in respect of the minority shareholders, who were unaware of the dividend, would not be payable until 31 December 1999. In February 1999, on becoming aware of the dividend, the minority shareholders brought actions for payment and obtained a judgment by consent. The issue before the sheriff's court concerned the minority shareholders' entitlement to interest on the unpaid dividend. The shareholders claimed interest from April 1998. The sheriff held that interest could be awarded at the judicial rate, but only from the date of commencement of the action.

28. The sheriff took the view that the minority shareholders had enforceable debts when the interim dividend was declared, or at least from April 1998 when the dividend was paid to the majority shareholder. However, they were not entitled to interest from that date because article 107 provided that no dividend shall bear interest unless otherwise provided by the rights attached to the shares.

29. On appeal by the company, the sheriff principal recorded that the company sought to rely on a new argument not put to the sheriff. It relied on *Potel* and argued that regulations 102 – 104 of the Table A articles did not apply to interim dividends. Hence the sheriff had been wrong to find that the declaration of an interim dividend gave rise to an obligation to make payment of the interim dividend. The earliest date by which such an obligation could have come into existence was 31 December 1999, which was the date for payment provided in the resolution.

30. The sheriff principal accepted that a date for payment of an interim dividend could be set down, and that nothing would be due until that date arrives. However, he did not accept that regs 102 and 104 applied only to final dividends. He rejected the new defence in the following terms:

> … the argument advanced on behalf of the defenders totally ignores the fact that the appropriate share of the interim dividend was in fact paid to Mr Shaw on 28 April 1998. It may be that, as

> was submitted on behalf of the defenders, the sheriff was technically wrong to conclude that the resolution of that date postponing payment until 31 December 1999 was ultra vires of the company. In mv view, however, that resolution was at least of no effect given that payment was simultaneouslv being made to one of the shareholders. I was not referred to any authority to support a proposition that a company can discriminate between shareholders of the same class: and in any event any such discrimination appears to me to be at odds with the general import of reg 104 which in my view applies to the payment of dividends of any kind.

31. The sheriff principal went on to find that interest was not payable from the date the action commenced, but only from the date on which the company consented to judgment for the principal sum.

32. We note that the editors of *Buckley on the Companies Acts* at [A104.6] in considering article 104 have adopted the reasoning of the sheriff principal in *Doherty* which is referenced by way of footnote to the following passage:

> The company has no power to make any difference as to methods or times of payment as between different shareholders, unless there is a difference between the types of shares or the terms of issue. The company does have power to say when the dividend becomes payable, but when the dividend becomes payable all shareholders entitled to that dividend are entitled to payment.

33. The editors of *Gore-Browne on Companies* treat *Doherty* as a dividend declared by the company in general meeting rather than as an interim dividend, but the reason for that treatment is not clear from the decision. The sheriff principal records at p75L that "*the company declared an interim dividend*". We take that to refer to a resolution for an interim dividend by James Shaw as director. Mr Shaw was described as effectively controlling and operating the company. There is no suggestion that any general meeting of the company took place to declare a dividend or that the minority shareholders were given notice of such a meeting.

34. The FTT did not accept the reasoning in *Doherty* because it held that article 104 Table A applied only to final dividends and not to interim dividends. The FTT stated as follows at [74] – [77]:

> 74. We accept and understand it is common ground in this appeal that shareholders of the same class must be treated equally. The question is as to what is the remedy for breach of this principle.
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> 75. HMRC's reading of Article 104 treats the requirement that "all dividends shall be declared and paid" (in effect) equally, as applying to both final and interim dividends. Both declaring and paying a dividend would appear to apply to final dividends. However, as interim dividends are not declared but only paid. For Article 104 to apply "declared and paid" must be read as several requirements or with the addition of "insofar as relevant" or similar wording. This is not a clear reading of Article 104.
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> 76. No guidance was provided to us on the purpose of Article 104, indeed one might speculate that it is intended only [to] cover the payment of dividends when shares are part paid. Whatever its purpose and even if Article 104 can be read as applying to interim dividends, we do not accept that whether by reading Article 104 in isolation or by taking into account a universal principle of equal treatment of shareholders, Article 104 is to be read as creating a debt (as opposed to any other remedy) in the circumstances of the delayed payment of an interim dividend to some but not all the shareholders of the same class.
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> 77. We therefore decline to follow *Doherty* in the circumstances of this appeal and reject HMRC's principal argument that by virtue of the principle of equality and Article 104, the

> payment of the interim dividend to Nicholas Gould on 5 April 2016 made the dividend to the appellant due and payable on the same date.

35. Whilst the FTT had reservations as to the application of article 104, it seems to us that it applies both to final dividends pursuant to article 102 and interim dividends pursuant to article 103. Article 102 makes provision for the company in general meeting to declare a dividend. Article 103 makes provision for the directors to pay an interim dividend. Article 104 expressly applies to "all dividends". It then goes on to describe those dividends having been "declared and paid". In our view that is a reference to dividends having been declared pursuant to article 102 *or* paid pursuant to article 103. It may be that the language used might have been clearer, but our construction is consistent with the structure of the three articles. In so far as article 104 requires a proportionate reduction in the amount of dividend payable in respect of a partly paid share we see no reason to think that there should be a different treatment for final and interim dividends.

36. The effect of article 104 is a different question. We agree with the FTT and accept Mr Yates' submission that article 104 is not expressly concerned with creating the relationship of debtor/creditor in circumstances such as the present where an interim dividend is paid to one shareholder but not to another. However, the requirement for interim dividends to be paid equally flows from the principle that shareholders of the same class must be treated equally. We also agree with the sheriff principal in *Doherty* that discrimination between shareholders of the same class of shares would be "*at odds with the general import of reg 104*". Article 104 ensures that in the absence of an agreement to the contrary, dividends on shares which are partly paid are to be paid in proportion to the amounts paid up on the shares. That is consistent with the principle that shares confer the same rights on all holders of shares. If all shares are fully paid, article 104 requires all shareholders to be paid an equal dividend per share, subject to any provision governing the rights attaching to the shares. In our view the FTT was wrong to decline to follow the reasoning of the sheriff principal in *Doherty*.

37. Further, it is clear that in the case of a final dividend, the declaration of a dividend by the company in general meeting gives rise to a debt payable by the company to shareholders. This was recognised by Slade J in *In re Compania de Electricidad de la Provincia de Buenos Aires Ltd* [1980] Ch. 146 at p184E:

> As soon as a dividend has been properly declared by a company and the date for payment of that dividend arrives, the amount due to a shareholder becomes a debt for which he can sue the company: *In re Severn and Wye and Severn Bridge Railway Co.* [1896] 1 Ch. 559.

38. We see no reason to think that a resolution for payment of an interim dividend followed by payment to some shareholders has any different effect. Mr Yates submitted that *Potel* recognises that the articles do not authorise the directors to create a relationship of debtor/creditor in relation to interim dividends which the directors resolve to pay, as opposed to a final dividend declared by the shareholders. He referred to p669B where Brightman J states:

> Article 125 in the present case did not in terms authorise the directors to declare a dividend, that is to say, to create the relationship of debtor and creditors between the company and its members. It only authorized the act of payment.

39. We do not accept Mr Yates' submissions based on *Potel*. Brightman J was concerned with the position where the directors had resolved to pay a dividend but before payment

reconsidered their decision. We see no reason to distinguish between final dividends and interim dividends at the stage where the directors have not only resolved to pay a dividend but have also made payment to some but not all of the shareholders. If a shareholder is not paid their share of an interim dividend then a debt arises at the time the other shareholders are paid. That must follow from the principle that shares of the same class confer the same rights and impose the same liabilities.

40. It follows that we do not accept Mr Yates' submission that an aggrieved shareholder is limited to remedies by way of an action for unfair prejudice, breach of contract or potentially an action in damages against the directors. Mr Yates also referred us to *Routledge v Skerritt* [2019] BCC 812 which involved the hearing of an unfair prejudice petition. In that case, Amanda Tipples QC (as she then was) sitting as a High Court Judge concluded at [48] that the A and B shares ranked *pari passu* for dividends but that the B shares had not received any dividends. Mr Yates submitted that rather than it being "obvious" that the claimant was entitled to his share of the dividends declared as a straightforward debt, the judgment concluded that the "precise form of relief" would be determined at a later date. We do not gain any assistance from *Routledge* for present purposes. The petitioners were not simply seeking payment of the dividends to which they claimed to be entitled, but an order directing the majority shareholders or the company to buy out their shares. The issue of whether there was a debt did not arise.

41. We are satisfied therefore that the FTT did err in law as alleged in Ground 1. Subject to any agreement to the contrary, PG would have an enforceable debt once Regis paid the interim dividend to NG. However, that error will only be a material error of law if HMRC also succeed on Grounds 2 and 3.

GROUND 2

42. Ground 2 becomes relevant because we have found that in the absence of any agreement to the contrary, PG would have an enforceable debt arising at the same time that Regis paid the dividend to NG. However, the FTT found that there was an informal agreement within the *Duomatic* principle whereby Regis' articles of association were amended so that it could pay the dividend to NG without creating an enforceable debt to PG.

43. The *Duomatic* principle was summarised by Neuberger J in *EIC Services Ltd & Anor v Phipps & Ors* [2003] BCC 931 (at [122]) as follows:

> Although the principle has been characterised in somewhat different ways in different cases, I do not consider that that is because its nature or extent is in doubt or the subject of debate. The difference in language is attributable to the fact that the principle will have been expressed by reference to the particular facts of the case. The essence of the *Duomatic* principle, as I see it, is that, where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. Whether the approval is given in advance or after the event, whether it is characterised as agreement, ratification, waiver, or estoppel, and whether members of the group give their consent in different ways or at different times, does not matter.

44. The *Duomatic* principle was also described by the Privy Council in *Ciban Management Corpn v Citco (BVI) Ltd* [2021] AC 122 where Lord Burrows JSC said at [31]:

> 31. The *Duomatic* principle is, in short, the principle that anything the members of a company can do by formal resolution in a general meeting, they can also do informally if all of them

assent to it. See generally Palmer's Company Law, looseleaf ed, vol 2, paras 7.434—7.449; and Peter Watts, "Informal Unanimous Assent of Beneficial Shareholders" (2006) 122 LQR 15. The principle derives its name from *In re Duomatic Ltd* [1969] 2 Ch 365, in which it was encapsulated by Buckley J, at p 373, as follows:

> where it can be shown that 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.

45. The principle is often applied so as to authorise what would otherwise be a breach of duty by the directors or to regularise transactions which are challenged on the basis that directors have not been properly appointed or meetings have not been properly conducted. *Duomatic* itself involved a challenge to payments made to directors on the basis that the payments had not been properly authorised by a resolution of members in accordance with Companies Act requirements.

46. In the present case, the question addressed by the FTT was whether the shareholders, comprising PG, NG and Mr Bell as one of the trustees of the Settlement, had informally agreed that the articles be amended to permit an interim dividend to be paid to NG without at the same time incurring an enforceable debt to PG for his share of the interim dividend. It was not suggested that the articles could not in principle be amended in order to make such provision so as to bind all the members and Regis.

47. We note that if, as we have found, the enforceable debt arises by virtue of the principle that shareholders of the same class must be treated equally rather than pursuant to article 104, then arguably no amendment to the articles was necessary. A shareholders' agreement may have been sufficient. However, the arguments before the FTT and before us approached the question by reference to whether there had been an informal amendment to the articles.

48. The FTT summarised the parties' submissions as to whether there had been any amendment of the articles by way of informal agreement within the *Duomatic* principle and referenced various authorities. It went on to hold at [99] – [102] of the Decision that *Duomatic* was engaged:

> 99. Having heard and considered the evidence it is clear to us that the parties, including all the shareholders, intended the directors to resolve to pay an interim dividend and that payment would be made as to £20m on 5 April 2016 to Nicholas Gould and to the appellant at some date to be agreed but in any event after the start of tax year 2016-17. The parties believed that they were permitted to do so, certainly they did not believe they were acting contrary to Regis' constitution. Indeed, for the brothers they were acting on considered advice.
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> 100. …The question is whether there was an agreement to vary even temporarily the articles so that the directors were permitted to pay dividends at different times without creating a debt. It is not necessary that the parties understand that to do otherwise would be a breach of fiduciary duty (*Sharma* at [47]).
>
> 101. In our view that is what occurred in this instance. The shareholders agreed the appellant's dividend would be delayed into the new tax year and the appellant was at risk of it not being paid. The appellant's evidence was that he accepted the risk but relied upon Regis having substantial cash reserves and the trust he placed in his brother. We do not find any ambiguity in the evidence on this point.

> 102. Even if there were not an agreement, in receiving the clear advice on the point and then following through in the meetings, we find that the brothers assented to the course of action so as "to make it inequitable for them to deny that they have given their approval" (Neuberger J in *EIC Services* at [122]). The appellant could not have demanded payment of the dividend on 5 April 2016, even if he had wanted to and irrespective of whether Regis would in practice have paid him had he asked.

49. The FTT also noted as follows in the context of its findings on the case that HMRC was then arguing based on unfair prejudice:

> 131. … [PG] has clearly agreed to the deferral of his [dividend]: he is an experienced businessman, the consequences of the Regis board declaring an interim dividend in this way were made very clear to him, it was in his interests to do so and he acted on advice.

50. Mr Bradley made two broad criticisms of the Decision which he submitted amounted to errors of law on the part of the FTT in finding that there was an agreement between the shareholders to amend the articles:

(1) the FTT failed to specify what amendment of the articles the shareholders had agreed; and

(2) it was not open to the FTT based on its findings of fact to find that there was any agreement to amend the articles.

51. The first criticism was that the FTT failed to specify what amendment the shareholders had agreed to make. The FTT simply held that the amendment had the effect of permitting the company to discriminate in payment of the dividends. Mr Bradley emphasised that he was not saying that the shareholders were required to have in mind a precise draft of the intended amendment. However, he submitted that PG is required to specify with sufficient certainty, even if only at a high level, what the amendment was. He submitted that whilst an agreement satisfying the *Duomatic* principle may be express or implied, verbal or by conduct, it must be objectively verifiable. That is, an external observer must be able to ascertain from the words or conduct relied on that the members of the company intended to adopt the particular course of action alleged. He relied on a decision of Newey J (as he then was) in *Re Tulsesense* [2010] EWHC 244 (Ch) where it was stated at [41]:

> 41. … I do not accept that a shareholder's mere internal decision can of itself constitute assent for *Duomatic* purposes. I was not referred to any authority in which it had been decided that a mere internal decision would suffice. Further, for a mere internal decision, unaccompanied by outward manifestation or acquiescence, to be enough would, as it seems to me, give rise to unacceptable uncertainty and, potentially, provide opportunities for abuse. A company may change hands or enter into an insolvency procedure; in either event, it is desirable that past decisions should be objectively verifiable. In my judgment, there must be material from which an observer could discern or (as in the case of acquiescence) infer assent. The law applies an objective test in other contexts: for example, when determining whether a contract has been formed. An objective approach must, I think, also have a role with the *Duomatic* principle.

52. That statement of principle was endorsed by the Court of Appeal in *Schofield v Schofield* [2011] EWCA Civ 154 at [32]. It was made in the course of rejecting a submission by counsel recorded at [37] that in the context of the *Duomatic* principle, it was sufficient to establish a shareholder's assent or approval to a course of action if the shareholder had decided in their own mind on the course of action without any outward manifestation.

53. The statement of principle does not take HMRC's case on this appeal any further. We are not concerned with a situation where there was no outward manifestation of the agreed course of action. On the contrary, the FTT relied upon the discussions and agreements between PG, NG and others to support its finding that there had been an informal amendment of the articles. The real question is as to the extent of the discussions and whether the FTT was entitled to find that there was an informal agreement to amend the articles.

54. Mr Bradley submitted that the FTT could not infer an agreement between the members to amend the articles when the evidence and findings were equally consistent with the articles simply being ignored. He relied on *Tulsesense* for the distinction drawn at [66] between circumstances from which it could be inferred that the articles were not always followed and circumstances from which it could be inferred that the articles were modified or disapplied. He submitted that the present case was an example of the former, and noted the FTT's finding at [25] that no-one gave any consideration to the articles of association.

55. In *Tulsesense*, the issue was whether the company had any directors or not. W had been appointed as a director in 2007, but the question was whether he had been appointed pursuant to article 95, which provided for a temporary appointment to be made by the directors until the next general meeting. Alternatively, pursuant to article 94 which provided for the appointment of directors by ordinary resolution of the members until removed by the members. The claimants' case was that in 2007, R was the only director and that she had appointed W pursuant to article 95 only until the next general meeting. The defendant's case was that W should be treated as having been appointed by the members acting informally pursuant to article 94 and the *Duomatic* principle. Alternatively, that article 95 was amended by the members acting informally. As such, W remained a director.

56. Newey J rejected the defendant's arguments that the members had assented to the appointment of W as a director for various reasons. He held on the facts that there was no good reason to suppose that W was appointed as a director by R other than on a temporary basis pursuant to article 95. Newey J went on to consider whether the members had tacitly modified article 95 so that an appointment by the directors should have effect not merely until the next general meeting. The defendant argued that R and another director had themselves been appointed by the board several years earlier and had not been reappointed by the members in general meeting. Yet they had continued as directors until their deaths. It should be inferred that article 95 had been amended in this respect.

57. Newey J rejected the argument at [66] as follows:

> 66. I am unable to accept this argument. The evidence indicates that too little regard was paid to the terms of Tulsesense's articles, not that they were varied. In *Ho Tung* the parties assumed that the company's articles took a particular form; there is no evidence that anyone assumed Tulsesense's articles to be in terms different from their actual terms. There is, more specifically, no evidence in the present case that anyone intended to dispense with the provision in article 95 of Table A to the effect that an appointment under that article should continue, in the first instance, only until the next annual general meeting. In short, this is a case where the articles were not always followed, not one where they were modified or disapplied.

58. In our view, that conclusion was very much fact specific. Newey J was not seeking to lay down any principle that for *Duomatic* to be engaged the shareholders must understand the terms of the existing articles and the amendment they are informally making to those articles. On the facts, the conduct of the parties was not such that it could be inferred that they were intending to amend article 95.

59. In this context it is also instructive to consider the decision of Neuberger J in *EIC Services Ltd*. We were not referred to the case in detail, but one issue in the case concerned a requirement in the articles for an ordinary resolution of the company to capitalise reserves by way of a bonus issue. It is recorded at [120] of the judgment that no resolution was passed because the company's solicitor failed to advise that a resolution was required. At [127] there is a finding that given the directors were unaware of the need for shareholder approval, it was unlikely that any of the shareholders were asked to consent to the bonus issue. Rather, they were simply told that there was to be a bonus issue. The Judge concludes at [133] and [135]:

> 133. If a director of a company informs shareholders of an intended action (or a past action) on the part of the directors, in circumstances in which neither the directors nor the shareholders are aware that the consent of the shareholders is required to that action, I do not think it is right, at least without more, to conclude that the shareholders have assented to that action for *Duomatic* purposes. As a matter of both ordinary language and legal concept, it does not seem to me that, in such circumstances, it could be said that the shareholders have 'assent[ed]' to that action. The shareholders have simply been told about the action or intended action, on the basis that it is something which can be, and has been or will be, left to the directors to decide on, and no question of 'assent' arises.
>
> …
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> 135. 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.

60. It was not the case in *EIC Services Ltd* that the lack of knowledge about the requirement in the articles meant that it could not be inferred that the articles were being modified or disapplied. Rather, it was that the shareholders' consent to the issue of the bonus shares and capitalisation of reserves was not sought which meant that *Duomatic* was not engaged.

61. We were also referred to a decision of Mark Anderson QC sitting as a High Court Judge in *Re The Sherlock Holmes International Society Ltd* [2016] EWHC 1076 (Ch). The relevant articles in that case provided that only members (who were Mr Aidiniantz and Grace) could be appointed as directors. Various appointments were made of persons who were not members. One issue was whether the articles had been amended by informal agreement to be inferred from the conduct of the members. The Judge said at [71] and [72]:

> 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).
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> 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.

62. The respondent's submissions in *Sherlock Holmes* included submissions to the effect that acts done in ignorance of the articles would not suffice to engage *Duomatic* and even if it could be inferred from conduct that the shareholders intended to amend the articles it must be shown that they agreed to the particular change contended for. The Judge found that the two members were aware of the limitation in the articles and at [76] and [77] found that they had assented to various appointments of directors who were not members:

> 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.
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> 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…

63. Whilst the two members in that case were aware of the limitation in the articles, the judgment does not suggest that it is necessary for the members to address their minds to the articles and the specific amendment intended. The Judge did not in the event formulate the specific amendment intended by the members.

64. The principle in *Duomatic* can be engaged in cases where there would otherwise be breaches of procedural provisions of the articles, for example as to the chairman having a casting vote in relation to resolutions passed at a shareholder meeting. That was the case in *Cane v Jones* [1980] 1 WLR 1451, which was relied upon by Mr Yates. The High Court applied *Duomatic* and held that an informal written agreement between the shareholders some years prior to the dispute had the effect of amending the company's articles so as to deprive the chairman of his casting vote. The agreement was expressed in terms that the chairman of the company shall not exercise any casting vote as chairman and in the event of an equality of votes an independent chairman should be appointed.

65. One of the plaintiff's arguments in *Cane v Jones* was that the agreement did not in terms purport to alter the articles. Whilst it was not strictly necessary for the court to address the argument, it did make some observations. It expressed the view that it was significant in the context of the argument that it was the four shareholders who signed the agreement, "*thus underlining the nature and purpose of the agreement*". It seems to us that it was implicit on the facts of that case that the shareholders were intending to amend the articles of association,

without expressly stating that was what they were doing. The provision for a casting vote referred to in the written agreement clearly derived from the articles.

66. The case does not therefore add anything on this issue to the principles we derive from *EIC Services Ltd*. In our view, the nature and effect of any agreement will be very much fact-specific. We agree with Mr Yates that the fact the members did not reference the articles of association in their agreement is irrelevant on the present facts. Indeed, it is notable that even now the parties do not agree on the effect of article 104, so it is hardly surprising that no consideration was given to an amendment of article 104 at the time of the interim dividend. The fact that members of Regis had not given any thought to the articles does not undermine the FTT's conclusions. It is clear from *EIC Services Ltd* that the *Duomatic* principle is a principle designed to apply to ordinary shareholders, not trained lawyers. That is also clear from *Sharma v Sharma* [2013] EWCA Civ 1287 which the FTT referenced at [100] of the Decision.

67. *Sharma* was concerned with financial remedy proceedings in the Family Division. In particular, whether the shareholders in a company had acquiesced in what would otherwise have been a breach of fiduciary duty by a director and whether acquiescence could be inferred from silence. The Court of Appeal described the *Duomatic* principle as follows:

> 44. In *Re Duomatic Ltd [1969] 2 Ch. 365* the liquidators of a company sought to recover certain payments made to directors on the basis that the payments had not been authorised by a resolution of the shareholders, as required by s.191 of the Companies Act 1948 . There had been no general meeting of the shareholders to approve the payments. On the other hand, at the relevant time the two directors who approved the accounts held all the ordinary shares in the company. Buckley J. held that their approval of those accounts had been sufficient authorisation even though there had not been any formal general meeting.
>
> 45. The principle which emerges from *Duomatic* (above) is that if payments are made by a company with the full knowledge and consent of all the shareholders, then those payments are duly authorised as if there had been a formal resolution to that effect at a general meeting.

68. As with *Duomatic*, the Court of Appeal in *Sharma* was not directly concerned with the articles of association of the company. It was concerned with the question of whether the shareholders had acquiesced in what would otherwise have been a breach of duty by the directors. The Court went on to note at [47] that to establish acquiescence or consent to a breach of duty the court will be scrupulous to ensure that the director has made full disclosure of all relevant facts to the shareholders. However, it was not necessary for the shareholders to understand the legal characterisation of those facts, namely that they constituted a breach of fiduciary duty:

> 47. These principles are also applicable when the question is whether the shareholders of a company have authorised a director to do that which would otherwise be a breach of fiduciary duty. In such a situation, however, the court is scrupulous to ensure that the director has made full disclosure of all relevant facts to the shareholders: see *Gwembe Valley Development Co Ltd (in receivership) v Koshy (No 3)* [2003] EWCA Civ 1048 at [64]-[66]; [2004] 1 BCLC 131. Although the shareholders must be made aware of the relevant facts, it is not necessary that they understand the legal characterisation of those facts, namely that they would constitute a breach of fiduciary duty: see *Knight v Frost* [1999] BCC 819 at 828.
>
> 48. In *EIC Services Ltd v Phipps* [2003] EWHC 1507 (Ch); [2003] BCC 931 one of the issues was whether the issue and allotment of bonus shares had been effectively authorised by the members of the company, as required by regulation 110 of Table A in the schedule to the

> Companies Act 1985. The thirteen shareholders had been told of the projected bonus issue and its general effect, but there was no question of their consent being sought or given. Neuberger J held that the shareholders had not thereby consented to the bonus issue. He formulated the principle as follows at paragraph 133: [*quoted above*]
>
> 49. In that passage the words "at least without more" may be significant. It is relevant to consider whether the circumstances were such that the shareholders would be expected to voice any objections, even if they were not aware of their legal rights. When a court is considering what, if anything, can be inferred from a party's silence, the factual context is a matter of critical importance. If the surrounding circumstances are such that it would be unconscionable for a party to remain silent at the time and only raise his objections later, then I would have thought that assent can be inferred from silence.

69. The present appeal is not concerned with the question of whether acquiescence to what would otherwise be a breach of duty by the directors can be inferred from silence. Nor is it suggested that the directors of Regis required any form of formal authorisation in order to pay dividends to NG and PG. We are concerned with the legal consequence of payment not being made to PG. The FTT found on the facts at [100] and [101] that the members had agreed that the articles would be amended so that the directors were permitted to pay dividends at different times without creating a debt.

70. Mr Bradley also submitted that any amendment having the effect contended for must have been altering the rights attaching to PG’s shares, thereby creating a new class of shares. He suggested that such an alteration of rights would be inconsistent with the FTT’s other findings of fact. In particular, the FTT found at [32] that the directors resolved that the interim dividends were being paid “*on the A and B shares in issue*”.

71. It is not clear to us that a new class of shares was created, as opposed to a more limited variation of article 104 or of the articles generally. In any event, we do not consider that there is any inconsistency in the FTT’s findings of fact. The directors resolved to pay interim dividends on the A and B shares in issue. Even if an informal amendment to the articles had the effect of creating a new class of shares with a deferred right to dividends, there is no suggestion that the directors realised at the time of the resolution that the agreed course of action would have the effect of creating a new class of shares. In those circumstances, nothing can be read into the director’s resolution that the dividend should be paid on the A and B shares, rather than on any new class of shares being created by an amendment to the articles.

72. Overall, we consider that the FTT did not err in failing to specify what amendment was being made to the articles. The FTT specified the amendment at [100] and [101] of the Decision. Further, the FTT was entitled to find that the members intended to informally amend the articles even though they did not have the articles in mind when agreeing the terms on which the interim dividend would be paid.

73. The second broad criticism made by Mr Bradley was that the FTT’s conclusion that the shareholders had unanimously agreed to amend the articles was untenable by reference to the FTT’s findings of fact. He submitted that at [15] – [25] the FTT’s findings simply evidence discussions with various advisers, albeit including advice that PG would have no right to enforce payment of an interim dividend in 2015-16. He submitted that it is hard to see how one could infer from these discussions an agreement to amend the articles when, on the basis of the advice received, no amendment was necessary to achieve the desired tax outcome. He also submitted that the FTT’s findings of fact were consistent with a misunderstanding of the company law position, that PG could not enforce payment of the dividend as a debt. There was

nothing in those paragraphs from which it could be inferred objectively that PG and NG intended to amend the articles. They simply accepted the tax advice. Indeed, the FTT found in terms at [25] that none of the members of the Company had given any consideration to whether the proposed structure of the dividends was permitted by Regis' articles.

74. Mr Yates submitted that the findings at [23] and [24] are not merely recording the discussions about the brothers' tax planning but the real world, commercial implications of PG not receiving an interim dividend at the same time as NG. PG was agreeing to those implications, including the possibility that he would not be paid the dividend if anything unforeseen happened.

75. We do not agree with Mr Bradley that there is nothing in those paragraphs which establishes an agreement that PG would not be able to enforce the debt once NG was paid his share of the interim dividend. The paragraphs record an agreement that NG and PG should be paid their share of the interim dividend in different tax years, albeit the precise timing for payment to PG in 2016-17 was not agreed. The FTT recorded at [24], PG's acceptance that he would not be able to enforce payment of his share of the dividend in the 2015-16 tax year. We consider that this is an important finding. It is not simply recording that PG was accepting advice that he would not be entitled to enforce payment. If that was the case, there would have been no need for the explanation in the following sentence where the FTT says "*However, the appellant was content to take the risk…*". On our reading, the FTT's reference to PG's acceptance was intended as a finding that there was an agreement that PG would not enforce payment.

76. That is consistent with a fair reading of the Decision as a whole. The findings at [99] – [102] are not simply a description of the parties' understanding of the advice given. The FTT identifies at [100] that "*[t]he question is whether there was an agreement to vary … the articles so that the directors were permitted to pay dividends at different time without creating a debt*". The FTT answers that question in the affirmative at [101] where it says *"[i]n our view that is what occurred in this instance. The shareholders agreed the appellant's dividend would be delayed into the new tax year and the appellant was at risk of it not being paid.*". Then as noted at [131], the FTT finds that the appellant had "*clearly agreed*" to the deferral of his dividend.

77. We do not consider that it is fair to say that the FTT's only findings of fact in relation to discussions about payment of the dividend are contained in [15] – [25] of the Decision. We consider that the FTT also made key findings as to the existence and terms of the agreement for payment of PG's share of the interim dividend in the discussion sections of the Decision.

78. Mr Bradley submitted that the factual basis for the FTT's conclusion that the members of the Company had assented to an amendment of the articles was set out, apparently in its entirety, at [101]. He submitted that these facts are equally, indeed more, consistent with the members proceeding on a shared misunderstanding of the law than with the members having agreed to vary the Company's constitution.

79. Mr Yates characterised this as an *Edwards v Bairstow* challenge. In our view he was right to do so. HMRC are seeking to challenge the FTT's findings as to the existence and terms of the agreement. Those findings in relation to what was essentially an oral contract amending the articles are findings of fact and an appellate tribunal should be slow to interfere with them. We can only interfere if there was no evidence to support the finding, where the only evidence contradicted the finding or where the only reasonable conclusion on the evidence contracdicted the finding. We were also referred to *BVM Management Ltd v Roger Yeomans* [2011] EWCA Civ 1254 at [23]:

> 23. When the terms of a contract have to be ascertained from oral exchanges and conduct that is a question of fact… Many cases have emphasised that an appellate court should not readily hold, particularly in a case where the finding is dependent upon oral evidence, unless the judge's finding is obviously wrong, is an unreasonable finding on the evidence or the finding produces a result unsustainable in law. All this means that we must be very slow to reverse the judge's evaluation of the facts.

80. We also have regard to what was said in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114] and most recently by the Upper Tribunal in *HMRC v Marlborough DP Limited* [2024] UT 98 (TCC) at [75]-[80]. In particular at [80], that the Decision has to be read fairly as a whole, not picking upon individual passages in isolation.

81. Mr Yates submitted that HMRC's case came nowhere near satisfying an *Edwards v Bairstow* threshold. Even taken at its highest, the fact that the FTT *could* have found that the shareholders' agreement, discussions and actions did not establish an agreement falling within the *Duomatic* principle is not enough. HMRC must show that no reasonable tribunal, properly instructed as to the law, could have made such a finding. There is no basis to reach that conclusion about the Decision.

82. We agree with Mr Yates. The FTT had the benefit of hearing the oral evidence and considering the documentary evidence. It found that there was an agreement that PG would not be able to enforce payment of the dividend in 2015-16. We can see no basis on which to interfere with that finding.

83. For the reasons given above, we are not satisfied that Ground 2 establishes any error of law in the Decision.

GROUND 3

84. The FTT also found that if there would otherwise have been an enforceable debt then PG had waived his right to enforce payment of the dividend. HMRC say that the FTT erred in law in finding that the waiver was contractually binding.

85. The articles of association constitute a contract and an informal agreement to amend the articles would take effect as part of that contract. The parties acknowledged that it is not necessary to identify any consideration for such an informal agreement to be effective. We have found under Ground 2 that the FTT was entitled to find that there was an informal agreement falling within the *Duomatic* principle. However, if that is wrong, Ground 3 addresses the question of whether there was a contractually binding waiver by PG of his right to enforce payment of the interim dividend prior to 6 April 2016.

86. The parties' arguments on waiver before the FTT focussed on whether there was consideration for such a waiver. Mr Yates submitted that the waiver agreement occurred before NG was paid his dividend and therefore before any debt could have arisen. The waiver was supported by consideration in that the directors of Regis agreed to pay an interim dividend and PG agreed to waive his right to enforce payment.

87. Mr Yates had also submitted to the FTT that even if PG was waiving a right to enforce payment of a debt which had already accrued, then consideration was still provided by Regis because PG received a substantial "practical benefit" in that he would not be liable to tax on the dividend until 2016-17. That way of putting PG's case raised difficult issues as to whether that could be good consideration as a matter of law. Arguably, an agreement to pay a debt at a

point later than it was due would fall within the principle in *Foakes v Beer* 9 App Cas 605, that a promise to accept part payment of a debt is not binding because it is not supported by consideration.

88. In the event, the FTT considered that PG's waiver occurred before the interim dividend was paid to NG and was therefore supported by consideration. It stated at [113] and [114]:

> 113. That said, the position does not seem to us to fall into the problematic territory of *Foakes v Beer* as the issue must be considered prior to the (assumed) creation of the debt on 5 April 2016. At this point there is no subsisting obligation.
>
> 114. As we have found, the shareholders including the appellant agreed Nicholas Gould would be paid in 2015-16 but the appellant's dividend would be delayed into the new tax year and the appellant accepted he was at risk of it not being paid. In doing so there has been a waiver by the appellant of his (assumed) right to enforce payment of the dividend at the same time as his brother. The agreement by Regis, principally through Sydney Taylor and Nicholas Gould, who presumably have authority to do so, to pay an interim dividend to the appellant at a later date amounted to consideration for the appellant's waiver.

89. HMRC say that the FTT erred in law in finding that there was consideration. Mr Bradley submitted that the contract identified by the FTT was that: (1) PG promised, in the event of an interim dividend being paid to NG at time t, to waive his right to be paid his share at time t in consideration of (2) the company's promise to pay PG his share at time $t+x$. He relied on *In re Selectmove Ltd* [1995] 1 WLR 474 and submitted that the circumstances fell within the principle in *Foakes v Beer*.

90. *In re Selectmove Ltd* it was alleged that there was an agreement between a company and the Inland Revenue that the company would pay tax arrears by instalments over a period of time, and future liabilities as they fell due. The company failed to pay future liabilities when they fell due and the Inland Revenue served a winding up petition. A winding up order was made and the company's appeal to the Court of Appeal against that order was dismissed. The Court of Appeal held that there had been no agreement, and in any event the company's promise to pay existing liabilities by instalments and future liabilities when they fell due could not constitute good consideration. The circumstances fell within the principle in *Foakes v Beer*.

91. The Court of Appeal also held that the company could not rely on its previous decision in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 to the effect that a promise to perform an existing obligation can amount to good consideration provided that there are "practical benefits" to the promisee. That case concerned a building subcontract where there was a risk that the work would not be completed by the plaintiff. The defendant agreed to make additional payments to the plaintiff in return for his promise to carry out his existing obligations. The defendant argued that its promise to make additional payments was unenforceable. The Court of Appeal held that in the case of contracts to do work or to supply goods or services, where as a result of the further agreement the defendant in that case obtained in practice a benefit from the further agreement then that benefit was capable of being consideration for the promise to make further payments.

92. Peter Gibson LJ in *Selectmove* refused to extend that principle to cases involving a debt. He stated at p481B:

> When a creditor and a debtor who are at arm's length reach agreement on the payment of the debt by instalments to accommodate the debtor, the creditor will no doubt always see a practical benefit to himself in so doing. In the absence of authority there would be much to be said for

> the enforceability of such a contract. But that was a matter expressly considered in *Foakes v. Beer* yet held not to constitute good consideration in law. *Foakes v. Beer* was not even referred to in *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.* [1991] 1 Q.B. 1, and it is in my judgment impossible, consistently with the doctrine of precedent, for this court to extend the principle of *Williams's* case to any circumstances governed by the principle of *Foakes v. Beer,* 9 App.Cas. 605. If that extension is to be made, it must be by the House of Lords or, perhaps even more appropriately, by Parliament after consideration by the Law Commission.

93. The position in relation to these authorities was described by Lord Sumption in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2019] AC 119 at [18]:

> 18. That makes it unnecessary to deal with consideration. It is also, I think, undesirable to do so. The issue is a difficult one. The only consideration which MWB can be said to have been given for accepting a less advantageous schedule of payments was (i) the prospect that the payments were more likely to be made if they were loaded onto the back end of the contract term, and (ii) the fact that MWB would be less likely to have the premises left vacant on its hands while it sought a new licensee. These were both expectations of practical value, but neither was a contractual entitlement. In *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, the Court of Appeal held that an expectation of commercial advantage was good consideration. The problem about this was that practical expectation of benefit was the very thing which the House of Lords held not to be adequate consideration in *Foakes v Beer* (1884) 9 App Cas 605: see in particular p 622 per Lord Blackburn. There are arguable points of distinction, although the arguments are somewhat forced. A differently constituted Court of Appeal made these points in *In re Selectmove Ltd* [1995] 1 WLR 474, and declined to follow *Williams v Roffey*. The reality is that any decision on this point is likely to involve a re-examination of the decision in *Foakes v Beer*. It is probably ripe for re-examination. But if it is to be overruled or its effect substantially modified, it should be before an enlarged panel of the court and in a case where the decision would be more than obiter dictum.

94. We are satisfied that the FTT was right to find that the agreement it had identified did not fall within the principle of *Foakes v Beer*. That is because PG's waiver of the right to enforce the debt was agreed before the directors resolved to pay the interim dividend. In those circumstances, we do not accept Mr Bradley's submission that there was no consideration. PG agreed to waive his right to enforce payment of a dividend until after 5 April 2016 if Regis agreed to pay the interim dividend. At the time of that agreement there was no enforceable debt. It is not the case of an existing creditor agreeing to give up an entitlement to be paid without receiving anything in return.

95. Mr Bradley also submitted that the FTT was not entitled to find on the facts that there was any such agreement. He relied on the same arguments as in relation to whether there was an agreement to amend the articles for the purposes of Ground 2. Namely, that there could be no agreement to waive enforcement of a debt where the directors were simply following advice premised on an understanding that the interim dividend could be paid to NG without a debt becoming due and payable to PG. The facts were more consistent with a shared misunderstanding as to the existence of a debt than with an agreement to waive a debt.

96. For the same reasons as set out under Ground 2, we consider that the FTT was entitled to find and did find at [114] that there was an agreement by PG to waive his right to enforce the debt. We can see no basis on which to interfere with that finding.

97. In the circumstances, we are not satisfied that Ground 3 establishes any error of law in the Decision.

CONCLUSION

98. We are satisfied that overall, the FTT made no material error of law and that HMRC's appeal must be dismissed. The FTT was wrong to find that no enforceable debt arises where a company with Table A articles of association pays an interim dividend to one shareholder but not to another. However, that was not a material error of law because the FTT was entitled to find that the articles had been amended prior to payment of the interim dividend or alternatively because the appellant entered into a contractually binding agreement to waive his right to enforce the dividend.

JONATHAN CANNAN
VIMAL TILAKAPALA

UPPER TRIBUNAL JUDGES

Release date: 17th September 2024