EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2009/004

BETWEEN:

[1] WESTMINSTER OIL LIMITED
[2] PAUL TURNER
[3] TONY BALDRY
[4] JAMES VARANESE

Appellants

and

[1] INTERNATIONAL INVESTMENTS HOUSE CO. LLC (A COMPANY INCORPORATED UNDER THE LAWS OF THE UNITED ARAB EMIRATES)
[2] AHMED AL MARAR
[3] JIM SILLARS
[4] NICOLE GOELDNER

Respondents

Before:

The Hon. Sir Hugh A. Rawlins	Chief Justice
The Hon. Mde. Janice M. Pereira	Justice of Appeal
The Hon. Mr. Michael Gordon, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Sydney Bennett, QC, with him, Ms. Mishka Jacobs for the Appellants
Mr. Philip Shepherd, QC, with him, Mr. Adam Cloherty for the Respondents

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2009: September 29;
2012: April 30.

Civil appeal – Validity of notice of call on shares – Shareholders rights – Estoppel – Duomatic principle – Whether the IIH directors were duly appointed directors to the Board of Westminster

A Subscription and Shareholder Agreement was entered into between the first named appellant ("Westminster"), the first named respondent (International Investment House Co. LLC ("IIH")) and Petroquest Century Limited on 30th July 2007. Westminster is a wholly

owned subsidiary of Petroquest. The agreement stipulated that IIH shall subscribe to 100,000,000 ordinary shares in Westminster and pay an initial consideration of $53 million on or before 16th August 2007. By 16th August 2007, IIH did not pay any amount towards the initial consideration. Notwithstanding this, on 16th August 2007, Westminster issued a share certificate evidencing the issue of 100,000,000 shares in Westminster to IIH and about that date IIH was recorded in the Register of Members as holder of the 100,000,000. Finally, on 15th September 2007, IIH made a part payment towards the initial consideration in the sum of $10,155,000.00.

Clause 2.4 of the agreement stated that as long as IIH and Petroquest hold ordinary shares they each have the right to appoint one-half of the members of the Board of Westminster. It went on further to state that such right shall be exercisable by notice to Westminster, a copy of which shall be given to Petroquest. On 10th November 2007, a meeting was held which minutes reflected the listed agenda item, that is, discussion of appointment of six IIH directors. At that meeting, Nicole Goeldner, a representative from IIH, provided a letter from IIH to Westminster listing their nominations.

On 5th February 2008, a letter, signed by Paul Turner on behalf of Westminster, addressed to Ahmed Al Marar, the principal of IIH, was delivered to IIH. The letter purported to issue a Notice of Call on the shares held by IIH. IIH instituted a claim against Westminster alleging that the letter was not a duly issued Notice of Call as it was not authorized by the directors and cannot have legal effect as such. The learned trial judge agreed with IIH. The appellants appealed the judgment asserting inter alia that clause 2.4 of the agreement was of no effect based on the fact that the Articles of Westminster Oil had not been amended to give effect to it.

Held: dismissing the appellants' appeal with costs to the respondents; allowing the respondents' appeal on the counter-notice; and awarding costs calculated according to Civil Procedure Rules 2000 Part 65, that is using the value of $50,000.00 for a non-money claim in the court below and two-thirds of that sum in this Court, that:

1. The Subscription and Shareholder Agreement provided for the appointment of the IIH directors to the Board of Westminster. The prerequisites to the exercise of the right to appoint directors were (1) being a holder of ordinary shares in Westminster and (2) giving notice to Westminster and Petroquest. Albeit that the whole of the initial consideration was never paid by IIH, Westminster issued 100,000,000 shares which then gave IIH the right to appoint directors to it. This right became exercisable when IIH gave notice of their nomination of directors to the board of Westminster.

2. IIH directors were duly appointed directors who, not only acted as directors of the Board of Westminster but were treated as such. It would be unconscionable taking into account all the factors to hold that IIH were not appointed to the Board of Westminster. To satisfy the test of unconscionability IIH needed to show (1) that there was a clear representation made by Westminster upon which it was reasonably foreseeable that IIH would act, (2) an act by IIH which was reasonably

taken in reliance upon the representation and (3) after the act has been taken, that they will suffer detriment if Westminster is not held to the representation. After being allotted the 100,000,000 shares the IIH directors were duly nominated as a full board member at the meeting held on 10th November 2007. Thereafter, they invested monies in Westminster; expended time and energies in matters typically dealt with by directors of a company. IIH would be able to show that, owing to the representation made to them by Westminster, they acted to their detriment. As such, the learned trial judge was correct in concluding that Westminster is estopped from denying that IIH nominees are members of the Board of Westminster.

Steria Ltd and others v Hutchinson and others [2007] I.C.R. 445 applied.

3. The power to appoint directors is given to the members of the company by the Articles of Association. Although, there was no resolution appointing the IIH nominees as directors of the Board of Westminster, the ultimate fact was that IIH was a shareholder of Westminster. The entry of the name of a person in the register of members as a holder of a share in a company is prima facie evidence that legal title in the share vests in that person. Accordingly, the issuance of the share certificate to IIH provided that they were shareholders in Westminster and entitled to exercise rights as a shareholder. Moreover, where it could be shown that all the shareholders with the right to attend and vote at a general meeting had assented to some matter which a general meeting of the company could carry into effect, the assent was as binding as a resolution in general meeting. An agreement reached by the members cannot now be vetoed because there was not any compliance with formal procedures.

Section 42 of the BVI Business Companies Act, 2004 applied; In re Duomatic Ltd. [1969] 2 Ch. 365 applied.

JUDGMENT

[1] GORDON, J.A. [AG.]: By a claim form dated 19th February 2008, International Investments House Co. LLC (hereafter "IIH") sought as against (1) Westminster Oil Ltd (Westminster) (2) Paul Turner (3) Tony Baldry and (4) James Varanese declarations that:

> "(1) The letter, dated 5 February 2008 addressed to the Claimant purportedly sent on behalf of the First Defendant and signed by the Second Defendant", ("the Letter") is not a valid notice of call on the Claimant's 100,000,000 shares in the First Defendant;
>
> (2) The Letter and the content thereof was not properly authorised by the First Defendant and the Second Defendant did not have any

authority to send the said Letter on behalf of the First Defendant to the Claimant;

(3) The Letter is invalid and of no effect for the purpose of forfeiting the Claimant 100,000,000 shares in the First Defendant.

2. Injunctions restraining:

(1) The Defendants (and each of them) from taking any step whatsoever in relation to, or in reliance or purported reliance on the purported notice of call contained in the Letter, including without limitation:

i. Any step to forfeit or cancel the Claimant's shares in the First Defendant;

ii. Any step to call of convene a meeting of directors to consider a resolution to forfeit or cancel the Claimant's shares in the Fires Defendant;

iii. Any step to dispose of or deal with in any manner whatsoever the Claimant's 100,000,000 shares in the First Defendant without the express prior written consent of the Claimant or prior permission of the Court.

(2) The Second to Fourth Defendants (and each of them whether together or alone) from purporting to or holding themselves out as authorised to exercise the powers of the First Defendant in relation to serving any notice or taking any step under Regulation 9 of the First Defendant's Articles of Association, save after the passing of a valid directors' resolution made at a duly convened board meeting on good notice to all the directors of the First Defendant.

(3) Further or other relief.

(4) Costs."

[2] The background to the claim form is that Petroquest Century Limited (Petroquest), a BVI incorporated company, was the principal shareholder of Westminster (for the purposes of this judgment Petroquest shall be deemed to have been the only shareholder of Westminster). By an agreement dated 30th July 2007 between Westminster, IIH and Petroquest intituled "Subscription and Shareholder Agreement (hereafter referred to as the SSA) IIH agreed to subscribe to

100,000,000 ordinary shares in Westminster and to pay therefore an initial consideration of $53 million (though the sum of $53 million is referred to as an initial consideration and the SSA refers to an additional consideration, no further reference will be made to the additional consideration as the same is not relevant to this judgment).

[3] By clause 1.5 of the SSA it is stated that:

> "[IIH] shall transfer the Initial Consideration on or before the 16th August 2007 (or such later date as agreed by the Parties) to that bank account designated by [Westminster]. Simultaneous with receipt of the Initial Consideration in cash or cleared funds [Westminster] shall:
>
> > "(a) allot and issue the Subscriber Shares to [IIH], and
> >
> > "(b) Inscribe [IIH] in the registry of shareholders and, if shares are to be evidenced by certificates issue such certificate(s) for the Subscriber Shares"…

In the SSA, the term 'Subscriber Shares' are described as the 100,000,000 shares referred to in the preceding paragraph.

[4] By clause 2.4 of the SSA it was further agreed as follows:

> "2.4 Board Representation and Shareholder Matters
>
> (i) Appointment of Directors For so long as Petroquest and the Subscriber hold Ordinary shares, Petroquest and the Subscriber shall each have the exclusive right to appoint, remove and replace one-half of the members of the Board and the board of directors of any wholly owned subsidiary of the Issuer [Westminster] (the total number of the Issuer being limited to twelve directors). Such rights shall be exercisable by notice to the Issuer, a copy of which shall be given to the other Shareholder. The Directors appointed by Petroquest shall be known as Petroquest Directors and the Directors appointed by Subscriber shall be known as IIH Directors. IIH preserves the right to initiate the removal of a director in case this person is not acting in the best interest of the Issuer or its subsidiaries.
>
> Petroquest and the Subscriber will notify each other within 10 days of the Subscription Date of their appointed directors for the purposes of this Section
>
> (ii) Quorum – The quorum for a Board meeting shall be four Directors, including at least one Petroquest Director and one IIH Director, present in

person or by his alternate. Board meetings may be conducted by telephone. If within 30 minutes of the time appointed for a Board meeting there is no quorum, the Director(s) present shall adjourn the meeting to a place and time not less than three Business Days later. If, at such adjourned meeting, such Directors are not present within 30 minutes from the time appointed for the adjourned meeting then the meeting shall be dissolved. Petroquest and IIH agree to take any steps which for the time being are within their power and are necessary to procure that there is a quorum present for all duly convened meetings of the Board…

(vi) Veto by IIH. IIH shall be entitled to exercise a vote over any decision made by the Board, the Management Committee, and the board of directors of any wholly owned subsidiary of the Issuer, on any issue set forth in Annex 4. IIH shall exercise its veto right by designating a single IIH Director ("IIH Designated Director") to exercise such right at a vote taken at the relevant meeting and if such IIH Designated Director will be absent at any meeting he may grant a written proxy to another IIH Director to exercise the veto right."

[5] In the words of the learned trial judge:

> "From about May, 2007 discussions and negotiations were pursued between the principals of the Claimant company and the principals of Westminster, the object of which was the acquisition by the Claimant company [IIH] of an interest, as shareholder in Westminster. It appears from the exhibits before the Court that the negotiations were intense and deliberate."[1]

[6] It is common ground that the whole of the Initial Consideration Subscription was not paid by IIH to Westminster. As the trial judge found;

> …"up to the date of trial, the Claimant Company [IIH] had paid into Westminster some, but not all, of the funds contemplated to have been paid as the Initial Consideration. There is some dispute as to the precise amounts which were paid, but I do not find it necessary to make any findings as to the exact amount paid by the Claimant Company [IIH]."[2]

In fact, part payment of the Initial Consideration in the sum of $10,155,000.00 was not paid by IIH until 15th September 2007.

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[1] Paras. 12-13 of the judgment.
[2] Para. 16 of the judgment.

[7] It is further not in dispute that on 16th August 2007, the date on which the Initial Subscription was to have been paid, Westminster issued a share certificate evidencing the issue of 100,000,000 shares in Westminster to IIH and, presumably, about that date IIH was recorded in the Register of Members as the holder of the 100,000,000.

[8] By way of a series of emails the parties arranged for the holding of a meeting. This meeting was held at the Hilton Hotel near Heathrow Airport. Significantly, shortly before the holding of the meeting, Ms. Nicole Goeldner, a representative of IIH proposed as an item on the agenda for the meeting the appointment of IIH directors to the board of Westminster. This item was accepted by Mr. Turner and was listed as one of the agenda items for the meeting.

[9] The meeting was duly held on 10th November 2007 and paragraph 3 of the minutes of the meeting record the discussion relating to agenda item "Discussion of appointment of 6 IIH directors as per Section 2.4(i) of the SSA". The minutes state as follows:

> "Ahmed [Mr. Al Marar, the principal of IIH] said that they would like to nominate IIH directors to Westminster Oil. Nicole Goeldner provided a letter from IIH listing their nominations."

[10] It is trite that if the IIH directors were duly appointed, the quorum provisions and the veto powers as set forth in the SSA being operative, then the letter of 5th February 2008 addressed to Ahmed Al Marar could not have been a valid notice of call on IIH's 100 million shares in Westminster unless that letter had been duly authorised by way of a directors resolution.

[11] As learned Queen's Counsel for the respondents put it in opening his argument before us, the sole question before the judge was whether the IIH directors were or were not properly appointed directors of Westminster. Learned Queen's Counsel for the appellants, however, rested his case substantially on whether the learned trial judge was correct, having found that the IIH directors were not entitled

to be appointed as directors pursuant to the SSA (for reasons of non-performance), nevertheless Westminster was estopped from denying that the IIH directors were, for the purposes of this case, directors on the grounds of estoppel.

[12] In the scheme of this judgment I will treat the estoppel issue first.

Estoppel

[13] Both sides preyed in aid the Privy Council decision in Theresa Henry Marie Ann Mitchell v Calixtus Henry.[3] In that case Sir Jonathan Parker, who gave the advice of the Privy Council, quoted from the judgment of Lord Walker in the case of Cobbe v Yeoman's Row Management Ltd and another[4] to the following effect:

> "[Counsel for the first defendant property company] devoted a separate section of his printed case to arguing that even if the elements for an estoppel were in other respects present, it would not in any event be unconscionable for [the third defendant] to insist on her legal rights. That argument raises the question whether "unconscionability" is a separate element in making out a case of estoppel, or whether to regard it as a separate element would be what Professor Peter Birks once called "a fifth wheel on the coach": Birks & Pretto (eds), Breach of Trust (2002, p 226. But Birks was there criticising the use of "unconscionable" to describe a state of mind. Here it is being used (as in my opinion it should always be used) as an objective value judgment on behaviour (regardless of the state of mind of the individual in question). As such it does in my opinion play a very important part in the doctrine of equitable estoppel, in unifying and confirming, as it were, the other elements. If the other elements appear to be present but the result does not shock the conscience of the court, the analysis needs to be looked at again."

[14] Though that is where the quotation of Sir Jonathan stops, I find it useful to complete the paragraph of Lord Walker as giving context to this matter. He continued:

> "In this case [the third defendant's] conduct was unattractive. She chose to stand on her rights rather than respecting her non-binding assurances, while [the Claimant] continued to spend time and effort, between Christmas 2003 and March 2004, in obtaining planning permission. But

[3] [2010] UKPC 3.
[4] [2008] 1 WLR 1752 at para. 92.

> [the Plaintiff] knew that she was bound in honour only, and so in the eyes of equity her conduct, although unattractive, was not unconscionable."

[15] The saying comes to mind: "Two men looked out of prison bars, one saw mud and one saw stars". One asks the question, without seeking to answer it, is there, in reality, ever such a thing "as an objective value judgment on behavior".

[16] In Steria Ltd and others v Hutchinson and others[5] Neuberger L.J. said the following:

> "If one had to identify a single factor which a claimant in an estoppel case has to establish in order to obtain some relief from the court it would be unconscionability… Such a broad formulation is a useful guiding principle but unconscionability can, in many cases, be an issue upon which reasonable people can very easily differ…"

[17] Neuberger L.J. then suggested the following test:

> "When it comes to estoppel by representation or promissory estoppel, it seems to me very unlikely that a claimant would be able to satisfy the test of unconscionability unless he could satisfy the three classic requirements. They are (a) a clear representation or promise made by the defendant upon which it is reasonably foreseeable that the claimant will act, (b) an act on the part of the claimant which was reasonably taken in reliance upon the representation or promise, and (c) after the act has been taken, the claimant being able to show that he will suffer detriment if the defendant is not held to the representation or promise. Even this formulation is relatively broad brush, and it should be emphasised that there are many qualifications or refinements which can be made to it."[6]

[18] In her judgment, the learned trial judge concluded in this way on the issue of equitable estoppel:

> "However, it seems clear that, up to the point at which the February Letter was issued, the Claimant's nominees considered themselves to be full members of the Board of Directors of Westminster. Certainly the investment of time and energies in matters typically dealt with by directors of a company supports the contention that they believed themselves to be members of the Board of Westminster. As such, I find that the Defendants by their conduct are estopped from denying that the Claimants nominees are members of the Board of Westminster."[7]

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[5] [2007] I.C.R. 445, paras. 91- 92.
[6] Ibid, para. 93.
[7] Paras. 90-91 of the judgment.

[19] Before concluding on this issue, I find it necessary to analyse the chronology. I am of the view that the relevant date on which it is necessary to determine whether the IIH directors were or were not directors is 10th November 2007, the date of the first Board meeting at which the IIH nominated directors first attended, or shortly thereafter. This point is made in the context of determining 'unconscionability' as it pertains to the equitable doctrine of estoppel. It is not in dispute that on or before that date 100,000,000 shares in Westminster had been issued to IIH and that IIH was registered as the owner of those shares. It is further not in doubt that at that meeting a letter from IIH was presented that named the nominees of IIH for the position of directors on the Westminster Board. Further, as the trial judge records, the minutes of that 10th November meeting states:

> "Ahmed [Mr. Al Marar] said they would like to nominate IIH directors to Westminster Oil. Nicole Goeldner provided a letter from IIH listing their nominations".

[20] Further, at paragraph 73 of her judgment the learned trial judge identified a number of circumstances which indicated that the appellants treated the IIH nominees as directors of Westminster. They were:

(i) the minutes of the meeting of the 10th November, at paragraph 4 record as follows - "However TB recognises that all Directors need to participate in this decision. Therefore the suggestion is that we adjourn while IIH go out and obtain advice on corporate structure. In the interim, however, we should have de facto ManCom meetings between now and then and these should continue".

(ii) e-mail communication dated the 16th November, 2007 from Mr. Turner to Ms. Goeldner in which he referred to the Directors meeting to be held on the 3rd December.

(iii) e-mail communication dated the 28th November from Mr. Baldry to Ms. Goeldner and copied to Mr. Al Marar and Mr. Sillars in which is a number of statements were made which indicated that Mr. Baldry considered that the board of Westminster comprised of directors, appointed in equal amounts by both Petroquest and the Claimant. One such statement being - "Westminster Oil is a slight accident of history in that Petroquest started with 6 Directors and IIH balanced that number,".

(iv) the minutes of the Board meeting on the 4th December, 2007 in Abu Dhabi which records at paragraph 32 that "TB explained that there are 5 Directors on the Petroquest side and 5 on the IIH side".

(v) e-mail dated the 8th January, 2008 from Mr. Baldry to other of the Petroquest personnel in which he speaks of a meeting to be held in Abu Dhabi at which "there will be four Petroquest directors and a maximum of four IIH directors" present.

[21] I therefore venture that in November and December 2007 the IIH nominees were treated as directors and acted as such. In the terms of the test proposed by Neuberger L.J. there can be no doubt that (a) and (b)[8] were satisfied. I am of the view that (c) is also satisfied in that if the letter of call of 5th February 2008 is to be relied on then IIH will be able to show that it will suffer detriment if Westminster is not held to the representation or promise namely the loss of monies already invested in Westminster. Lest there be any misunderstanding, I am not saying that IIH are being forgiven their obligations under the SSA.

[22] I would therefore dismiss these grounds of appeal (grounds 2-6) and confirm the finding of the learned trial judge on the issue of estoppel.

[23] The appellants also appealed on the ground that the trial judge's finding that any conflict between clause 4.2 of the SSA and the Articles of Association should be resolved in favour of the SSA. This ground will be dealt with at the end of this judgment.

[24] IIH filed a counter-notice of appeal in support of the learned judge's findings on different grounds. IIH argued that the IIH nominees had been validly appointed to the Westminster board at the meeting of 10th November 2007.

[25] The facts recited at paragraphs 6 – 9 above are not seriously in dispute.

[26] It seems to me that once the shares in Westminster had been issued, the

[8] See para. 17 above.

appointment of the IIH directors pursuant to clause 2.4 of the SSA became operative. At that point, the relationship between the parties changed. It seems to me that at that point, IIH was a shareholder but also a debtor of Westminster. As the trial judge said in her judgment:

> "I also find that the issuance by Westminster of a share certificate to the Claimant [IIH] and recording the Claimant as a shareholder as late as the 8th November, 2007, [meeting] speak eloquently to Westminster's acceptance of the Claimant as a shareholder of the Company and entitled to exercise the rights as a shareholder."[9]

[27] Section 42 of the BVI Business Companies Act, 2004 (as amended)[10] ("the Companies Act 2004") reads as follows:

> "42. (1) The entry of the name of a person in the register of members as a holder of a share in a company is prima facie evidence that legal title in the share vests in that person.
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> (2) A company may treat the holder of a registered share as the only person entitled to
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> (a) exercise any voting rights attaching to the share;
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> (b) receive notices;
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> (c) receive a distribution in respect of the share; and
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> (d) exercise other rights and powers attaching to the share."

[28] It therefore seems to me to be unarguable that once the shares in Westminster were issued to IIH and IIH was registered as a shareholder, then IIH was a shareholder.

[29] In the context of IIH being a shareholder of Westminster, the IIH appointees were also made directors pursuant to clause 2.4 of the SSA. The learned trial judge stated the following in her judgment:

> "If it was that the Defendants [appellants] were taking the position that the issuance of the share certificate and the recording of the Claimant [IIH] as shareholder were mere acts of good faith on which the Claimant should not rely as determining its rights – for example, to appoint Directors – then

[9] Para. 74 of the judgment.
[10] No. 16 of 2004, Laws of the Virgin Islands.

surely that would have been the time to say so" [8th November 2007].[11]

[30] However, the trial judge went on to say the following:

> "However, as discussed above, the Claimant, by not paying the Initial Consideration, did not meet the required threshold as agreed and set out in the SSA for it to exercise the right of appointment of Directors to Westminster."[12]

With the greatest of respect I disagree with the learned trial judge. By failing to pay the whole of the Initial Consideration IIH may well not have reached the required threshold to demand the allotment of the 100,000,000 shares to it. However, once those shares were allotted, IIH did meet the required threshold to appoint directors under the terms of the SSA. I would therefore allow IIH's appeal on the counter-notice against this finding by the learned trial judge.

[31] As stated above, the appellants also appealed on the ground that the trial judge was in error in holding that any conflict between the Articles of Association and the SSA regarding the method of appointing directors should be resolved in favour of the SSA.

[32] This ground brings into sharp focus what is referred to as the Duomatic principle. As I understand the argument of the appellants it is that the power to appoint directors of a company is given either by section 113 of the Companies Act 2004 or by the memorandum and articles of the company.

[33] Learned Queen's Counsel for the appellants points out that, according to section 113(2)(a) and (b), directors subsequent to the first directors (mandatorily appointed by the Registered Agent of the company) may be appointed by either the members of the company or by the directors where so permitted by the memorandum and articles of the company. The power to appoint directors is given to the members of the company by the Articles. So, proceeds the argument of the appellants, there having been no resolution of the members to appoint the IIH director, the IIH nominees were, ipso facto, not directors.

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[11] Para. 78 of the judgment.
[12] Para. 64 of the judgment.

[34] In the case of In re Duomatic Ltd.[13] the headnote reads, in part:

> "Held:(1) that where it could be shown that all the shareholders with the right to attend and vote at a general meeting had assented to some matter which a general meeting of the company could carry into effect, the assent was as binding as a resolution in general meeting…"

[35] Duomatic was considered by the Court of Appeal in England in the case of Euro Brokers Holdings Ltd v Monecor (London) Ltd[14]. In that case Mummery L.J. said:

> "[62] I see nothing in the circumstances of the present case to exclude the Duomatic principle. It is a sound and sensible principle of company law allowing the members of the company to reach an agreement without the need for strict compliance with formal procedures, where they exist only for the benefit of those who have agreed not comply with them. What matters is the unanimous assent of those who ultimately exercise power over the affairs of the company through their right to attend and vote at a general meeting. It does not matter whether the formal procedures in question are stipulated for in the articles of association in the Companies Acts or in a separate contract between the members of the company concerned. What matters is that all the members have reached an agreement. If they have, they cannot be heard to say that they are not bound by it because the formal procedure was not followed. The position is treated in the same way as if the agreed formal procedure had been followed."

[36] The learned trial judge found that the Duomatic principle did not apply as, she concluded, that "…there must be a clear agreement by the parties reached after consideration by the parties of all the relevant and known facts"[15] and she found that this was not the case here. Indeed, at paragraph 106 of the judgment she states:

> "Indeed, it seems to be accepted that when Ms. Goeldner handed over the letter at the November meeting, there was no discussion at all. It even appears that the letter was not read by the Petroquest directors until sometime after the meeting."

[37] It is beyond doubt that at the meeting on 7th November 2007 Petroquest was

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[13] [1969] 2Ch. 365.
[14] [2003] 1 B.C.L.C. 506.
[15] Para. 102 of the judgment.

represented and IIH was represented. I am of the view that to say that because the nominations of IIH was not discussed, then it cannot be inferred that there was agreement by the members there present to the appointment of the IIH directors. On this issue, I would uphold IIH's appeal on the counter-notice against the finding of the learned trial judge. I would find it extraordinary the persons present at the meeting, representing the two shareholders did not know and consider that IIH was in fact exercising the right given to it by virtue of its being a shareholder. If Petroquest objected to that exercise, then it was at liberty to say so. That it did not, entitles this Court to infer agreement.

[38] In conclusion, I would dismiss the appellants' appeal with costs to the respondents and confirm the finding of the court below, but for the reasons as set forth herein.

[39] The parties submitted a joint statement on the subject of costs to the effect that they agreed that costs would be calculated according to Civil Procedure Rules 2000 Part 65, that is using the value of $50,000.00 for a non-money claim in the court below and two-thirds of that sum in this Court.

[40] Finally, I would like to apologise most sincerely to the parties and their counsel for making them wait for such an inordinate time for the result of this case. Reasons/excuses for the delay will in no way ameliorate the effect. I would also like to apologise to my Brother and Sister who, with me, comprised the Coram in this case. They bear no responsibility for this delay.

Michael Gordon
Justice of Appeal [Ag.]

Sir Hugh A. Rawlins
Chief Justice

Janice M. Periera
Justice of Appeal