In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 447

BETWEEN:

ST JOHN'S TRUST COMPANY (PVT) LIMITED

PLAINTIFF

-and-

(1) JAMES WATLINGTON
(2) GLENN FERGUSON
(3) CABARITA (PTC) LIMITED
(Sued in its personal capacity and in its capacity as trustee of The Waterford Charitable Trust)
(4) THE ATTORNEY GENERAL

DEFENDANTS

Before: **Hon. Chief Justice Narinder Hargun**

Appearances: **Dakis Hagen QC, Jeffrey Elkinson and Benjamin Adamson, Conyers Dill & Pearman Limited, in the name of the Plaintiff**

Mark Diel, Katie Tornari and Christina Herrero, Marshall Diel & Myers Limited, for the 1st and 2nd Defendants

David Brownbill QC, and Paul Harshaw, Canterbury Law Limited, for the 3rd Defendant

Dates of Hearing: **19-20 and 27 February 2020**
Date of Judgment: **26 March 2020**

JUDGMENT

Application for strike-out of proceedings for lack of authority; application of the Duomatic principle to the appointment of directors; scope of exceptions to the Duomatic principle; locus standi to enforce a charitable trust; scope of section 47A(5)(d) of the Trustee Act 1975; whether leave should be given under section 47A(5)(d)

The Applications

1. Over a period of three days I heard two applications on behalf of the Defendants. The first application was made on behalf Cabarita (PTC) Limited ("**Cabarita**") seeking an order that the Amended Generally Endorsed Writ of Summons issued in the name of St John's Trust Company (PVT) Limited ("**SJTC**") be struck out on the grounds that the proceedings were commenced without the named Plaintiff's authority and/or pursuant to RSC O. 18, r.19. The second application, made on behalf of the First to Third Defendants, sought to set aside or vary the ex parte Order made by the Court on 6 November 2019 restraining Mr James Watlington, the First Defendant, and Glenn Ferguson, the Second Defendant, from acting as directors of SJTC.

The Background

2. On 6 November 2019 I heard an ex parte application in the name of SJTC seeking an interim injunction against Mr Watlington and Mr Ferguson to prevent them from acting as directors of SJTC or holding themselves out as such. Mr Adamson and Mr Elkinson purported to appear on behalf of SJTC at the ex parte hearing.

3. Counsel explained that SJTC is a private trust company and is a corporate trustee administering a very valuable trust, the A. Eugene Brockman Charitable Trust ("**the Brockman Trust**"). SJTC's sole shareholder is another private trust company, domiciled in Nevis, called Cabarita. Cabarita is also a corporate trustee of a charity called the Waterford Charitable Trust, a Bermudian charitable trust. The shareholding in SJTC is a trust asset of the Waterford Charitable Trust.

4. Mr Adamson advised that SJTC has commenced litigation against a Mr Evatt Tamine, a former director of SJTC, for, in part, stealing trust assets of the value of more than $20 million and SJTC is currently seeking, in separate proceedings pending in this Court, a full accounting to determine whether Mr Tamine has stolen additional trust assets. Mr Tamine, counsel explained, is also a shareholder and director of Cabarita and recently, more than a year after resigning his

position with SJTC and the week before his defence to the litigation against him in the Bermuda proceedings was due, has used his position with Cabarita to appoint Mr Watlington and Mr Ferguson as directors of SJTC. The expanded board of directors of SJTC would now consist of Mr James Gilbert, Mr Watlington and Mr Ferguson. Mr Adamson explained that SJTC's fear is that the appointment of additional directors is an attempt by Mr Tamine to derail the investigations into his activities and/or to obtain information about SJTC's litigation strategy against him.

5. Mr Watlington and Mr Ferguson were appointed directors of SJTC by a unanimous written resolution of the sole member of SJTC. Mr Adamson submitted that while the bye-laws do contemplate and provide for written resolutions of the members (bye-law 27), the wording of the bye-law is narrowly drawn. Bye-law 27, submitted Mr Adamson, only permits members to use written resolutions where the members were entitled to attend *"the Meeting and vote on the resolution"*, so that *"the Meeting"* must be convened before the written resolution process can be utilised. And only the company (acting through directors and secretary) can convene a meeting/circulate the resolution.

6. Further, Mr Adamson submitted that sections 79 and 80 of the Companies Act 1981 (the "**Act**") provided detailed statutory mechanism for members to require companies to circulate members' resolutions in advance of general meetings. The statutory mechanism, Mr Adamson submitted, is inconsistent with members having a freewheeling power to circulate resolutions to themselves, by-passing the scheme. The Bye-laws provide that the directors are entitled to receive notice of and attend any general meeting (Bye-law 31). This seemingly renders, submitted Mr Adamson, impossible the by-passing of members of the need to (a) hold any general meeting at all; (b) at the very least provide notice to the director.

7. Mr Adamson also advised the Court that SJTC anticipated an action against Cabarita for seeking to derail the current litigation through, what appears to be, a clear fraud on power/improper exercise of a fiduciary duty for an improper purpose. He submitted that if Cabarita acted in excess of its powers as a trustee in appointing Mr Watlington and Mr Ferguson as directors, as a matter of trust law, their appointment was void in equity.

8. In conclusion, Mr Adamson submitted that there was no prejudice in Mr Watlington and Mr Ferguson standing down. On the other hand, the potential prejudice of allowing Mr Watlington and Mr Ferguson who are, it is to be assumed, funded by Mr Tamine to have control of the litigation against Mr Tamine enormous. The appointment of Mr Watlington and Mr Ferguson is, submitted Mr Adamson, *"to be blunt, an attempt to hijack".*

9. In his First Affidavit sworn in support of the ex parte application, Mr Gilbert stated at paragraph 24, that: "*I ask for an injunction to hold the ring. There is no prejudice to the Defendants if they are prevented from holding board meetings while their authority (and their interactions with Mr Tamine) is scrutinised. There is certainly prejudice to the Trust (which of course is my main concern). The danger of allowing the Defendants to purport to call director meetings, to potentially derail the litigation, and to have the access to the trust funds is extreme".*

10. On the basis that the *inter partes* hearing in relation to the application for an injunction would take place within the next two weeks and on an expedited basis, I made an Order at the conclusion of the ex parte hearing on 6 November 2019, that Mr Watlington and Mr Ferguson be restrained from acting as directors of SJTC or in any way holding themselves out as such. In order to regulate the affairs of SJTC for the next week or so I also made an order that SJTC may continue to conduct its business in accordance with its bye-laws, as if Mr Gilbert is the sole director.

11. For various reasons the *inter partes* hearing in relation to the injunction did not take place until 19 February 2020. During this period substantial evidence has been filed in the name of SJTC and the Defendants. In particular, Cabarita has filed an affidavit of Michael D. Padula, an attorney acting for Mr Tamine in the US. Mr Padula states that in the course of 2018, Mr Tamine became aware that the US Department of Justice ("**DOJ**") and the US Internal Revenue Service (**"IRS**") were pursuing a tax and money laundering investigation which concerned SJTC and the Brockman Trust ("**the Investigations**"). Mr Tamine is now aware, from his involvement as a co-operating witness in the Investigations, that the Investigations related to the tax affairs of Mr Brockman and the suspected evasion by Mr Brockman of tax in relation to more than USD 2 billion of unreported gains made by entities within the Brockman Trust structure. One of the

issues with which the Investigations are concerned is the extent to which Mr Brockman has control over the Brockman Trust. Mr Padula believes that if the Investigations proceed to trial then it will be one of the largest tax evasion cases by individuals in US history.

12. The Bermuda authorities became involved in the Investigations in or about August 2018 and on 29 August 2018 the Bermuda Police obtained a search warrant permitting them to search for the requested materials at Mr Tamine's home address in Bermuda. The search warrant gave authority for any police officer entering the premises to be accompanied by an officer or agent belonging to the IRS.

13. After Mr Tamine had been informed about the search warrant, his representatives made contact with the DOJ and Mr Tamine was granted immunity in the US and gave evidence before a Grand Jury. At around the same time that Mr Tamine was discussing these matters with the DOJ he signed a letter dated 28 September 2018 stating that *"I hereby resign from my position as director, secretary, trustee, manager and/or any other office of any and all companies, trusts, or other entities".* Mr Tamine was a director of SJTC from 2010 until he resigned on 28 September 2018. Mr Tamine was sole director of SJTC from 2013 until 23 June 2017, when Mr Gilbert was appointed as a second director. After Mr Tamine's resignation on 28 September 2018, Mr Gilbert became the sole director of SJTC.

14. Mr Tamine has expressed the view that he has serious concerns that SJTC is conducting itself in a manner which is designed to improperly obstruct the Investigations, including by means of actions brought against him in England and in this jurisdiction. In paragraph 3 of Mr Tamine's Defence in the Bermuda proceedings he asserts:

> "*This Defence is served without prejudice to the Defendants' case that these proceedings constitute an abuse of process of the Court and ought to be struck out. The Defendants believe that these proceedings are brought for the purpose of putting pressure on the First Defendant to discourage him from co-operating with the United States Department of Justice (the "DOJ") in relation to its investigations into the Trust and the tax affairs of the principal beneficiary of the Trust, Bob*

Brockman, and to either prevent the First Defendant from disclosing information to the DOJ, or to allow the Plaintiffs and Bob Brockman to understand what information the DOJ has obtained from the First Defendant".

15. Mr Gilbert, in his third affidavit dated 3 January 2020, revealed for the first time that on 19 December 2019 in separate proceedings before Subair Williams J ("**the Beddoe Proceedings**"), it had been determined that SJTC had never been properly appointed as trustee of the Brockman Trust and Medlands (PTC) Limited ("**Medlands**") was appointed as the sole trustee of the Brockman Trust.

16. Medlands apparently had been incorporated on 15 July 2019 with the intention that it would be used in the corporate structure through which the Brockman Trust is administered. The Beddoe Proceedings had been commenced, at Mr Gilbert's instigation, in the name of SJTC with the particular application which led to the appointment of Medlands being made in the name of SJTC on 22 July 2019.

17. No attempt was made by Mr Gilbert either prior or after the ex parte hearing to update the Court as to these potentially momentous developments before they occurred.

18. Cabarita, Mr Watlington and Mr Ferguson complain bitterly that SJTC persuaded the Court to grant an ex parte injunction based upon the representation that its sole purpose was "*to hold the ring*" and having obtained the *ex parte* injunction, proceeded to make an application in confidential proceedings which rendered SJTC an empty vessel.

The Strike-Out Application

19. Cabarita contends that the Amended Writ should be struck out on three distinct grounds:

    1. The proceedings have been brought in the name of SJTC without proper authority because Mr Gilbert is not a director of SJTC and, even if he is a director, Mr Gilbert had no authority to commence these proceedings in the name of SJTC without the approval of the other directors, Mr Watlington and Mr Ferguson.

2. In any event, SJTC has no *locus standi* to commence proceedings in relation to the administration of the Waterford Charitable Trust.

3. As a matter of law, the appointment of Mr Watlington and Mr Ferguson was effective in accordance with the ***Duomatic*** principle so that the Amended Writ discloses no reasonable cause of action.

20. Before considering these grounds I should deal with a preliminary issue. Mr Hagen QC urges the Court that the consideration of a strike out application is inappropriate given the legal and factual issues raised in this application. He refers to the guidance given in the cases that the Court should decline to entertain an application for a strike out if it involves a prolonged and serious argument and that it is not an appropriate procedure for determining controversial points of law in a developing area. Reliance is placed upon *Ivanishvili & Ors v Credit Suisse Life (Bermuda) Limited* [2018] SC (Bda) 67 Civ at [16], [19]: *Kingate Global Fund Ltd (In Liquidation) v Kingate Management* Ltd [2016] Bda 4; and *Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804.

21. However, the primary basis of the strike out application is that the named plaintiff, SJTC, has not authorised the commencement of this action. The issue whether the action is properly constituted due to lack of authority, must be determined at this stage and not deferred until the trial of the action. As Kerr LJ explained in *Airways Ltd v Bowen* BCLC 355 at 359b-c:

> *"So far as concerns the practice of applying to strike out the plaintiffs' name, we were referred to a number of authorities, in particular to the leading decision of the House of Lords* in *Russian Commercial and Industrial Bank* v *Le Comptoir d'Escompte* de *Mulhouse [1925] AC 112. The relevant passage is in the speech of Viscount Cave (at 130). He said, in relation to the issue as to the authority of the company's secretary, Mr Jones, to bring those proceedings in the name of the plaintiffs:*
>
> *'My Lords, I do not think that it is open to the defendants to raise this question by*

way of defence to the action. If the defendants desired to dispute the authority of Mr Jones to commence these proceedings in the name of the plaintiff's company, their proper course was to move at an early stage of the action to have the name of the company struck out as plaintiff and so to bring the proceedings to an end.'

That is precisely the substance of the application made by the defendants in the present case.

…

The important point made in that citation which the judge must have overlooked is that a contention that an action is not properly constituted, due to lack of authority from the named plaintiffs to bring it, is one which cannot be raised by way of defence. It must be raised at the outset, and it must therefore be dealt with at the outset. The only qualification is that even if it is not raised at the outset, but if it then comes to the notice of the court or of the defendants in the course of the proceedings, then it can still be raised as an issue at that stage, but not by way of defence to the action. In the present case it was properly raised at the outset. The judge should therefore have borne in mind that this issue had to be decided at the outset, subject only to the possibility of adjourning the application. Once the issue has been raised, it is, with respect, plainly wrong to decline to decide the issue on the ground that the rights and wrongs as to the control of the company and the propriety of the proceedings may be in doubt, and then to allow the action to go on by dismissing the application without having decided it on the merits."

Lack of authority: Mr Gilbert was never validly appointed as a director SJTC

22. Counsel for Cabarita points out that Mr Gilbert's primary case at the *ex parte* hearing was that a director of SJTC cannot be appointed by Cabarita without a general meeting of SJTC being called. At the *ex parte* hearing on 6 November 2019, Mr Adamson told the Court (having referred to Bye-law 27) that *"if a written resolution is signed in accordance with this Bye-law*

it is as valid as if it had been passed at a General Meeting duly constituted. Yes. But the process clearly envisages that there must be a meeting and a resolution as a predicate."

23. Counsel for Cabarita submits that the argument advanced by Mr Adamson at the ex parte hearing on 7 November 2019, is wrong because under the *Duomatic* principle the appointment of Mr Watlington and Mr Ferguson, by the decision of the sole member, was valid and effective. However, Counsel contends, if there was any merit in Mr Adamson's argument then by parity of reasoning Mr Gilbert's appointment as a director of SJTC in June 2017 could not have been effective because no general meeting of SJTC was called for that purpose.

24. At the *inter partes* hearing, Mr Hagen QC contended that Mr Gilbert was validly appointed by the simple application of the *Duomatic* principle. On 23 June 2017, Mr Tamine acting as the sole director of SJTC signed a resolution appointing Mr Gilbert as his co-director. Reliance is placed on the judgment of a Neuberger J in *EIC Services v Phipps* [2003] BCC 931 at [122]:

> "*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 at different times, does not matter."*

25. Counsel contends that even if there was a procedural defect in Mr Gilbert's appointment in June 2017, his appointment has been informally ratified by Cabarita (as the sole member of SJTC). In this regard he relies upon (i) the resolution to appoint Mr Gilbert was effected by Mr Tamine, who has been owner and sole director of Cabarita at all material times whose knowledge and intentions stand to be imputed to Cabarita; (ii) following the appointment, Mr Tamine dealt with Mr Gilbert as a duly appointed co-director; and (iii) in his Defence in the Bermuda proceedings dated 31 October 2019, Mr Tamine admits Mr Gilbert's directorship of SJTC.

26. Having regard to these circumstances, I accept the submission made by Mr Hagen QC that it would be wholly inequitable for Cabarita to now deny that Mr Gilbert's appointment as a director of SJTC has been informally ratified by Cabarita, as the sole member of SJTC. Accordingly, I hold that Mr Gilbert was validly appointed on 23 June 2017.

Lack of authority: Mr Gilbert ceased to be a director of SJTC at the end of 2017

27. Counsel for Cabarita contends that whether or not Mr Gilbert's initial appointment was valid and effective, it is clear that Mr Gilbert ceased to be a director by the end of 2017, and because no Annual General Meeting ("AGM") of SJTC was held in 2017 or in any subsequent year.

28. This contention is based upon Bye-law 4(1) as amended on 8 April 2013 and which provides:

> *"The business of the Company shall be managed and conducted by one (1) Director or such number in excess thereof as the Members may, from time to time, determine* ***who shall be elected or appointed at the Annual General Meeting and who shall hold office until the next Annual General Meeting or until his or their successors are elected or appointed****, and any General Meeting may authorise the Board of Directors to fill any vacancy in the number left unfilled at a General Meeting."*

29. Bye-law 21 provides that other than in the year of incorporation the AGM of SJTC "*shall be held in each year".* This mirrors the statutory requirement of section 71 (1) of the Act which obliges SJTC to hold an AGM at least once in every calendar year. Based upon the statutory and bye-law provisions, Counsel submits that the effect of bye-law 4(1) in conjunction with bye-law 21 (and section 71 (1)) is that if no AGM is held in a calendar year then the directors automatically vacate their office at the end of that calendar year.

30. I am unable to accept this submission. First, section 73 of the Act provides:

> *"**Position when election of directors does not take place***

73 If the annual general meeting or the election of any directors, if such election is required by the bye-laws of the company, does not take place at the proper time, it shall be lawful for the company to continue its business and for the existing directors to continue in office."

31. The wording of section 73 makes it clear that if an AGM or the election of any directors does not take place, as required either by the Act or the bye-laws, it is still lawful for the company to continue its business in the ordinary way. Second, despite the fact that there has been no election of any directors it is lawful "*for the **existing directors** to **continue in office.***" It follows, in my judgment, the mere fact that an AGM does not take place or that the election of directors at such an AGM does not take place, does not lead to the conclusion that the "existing directors" cease to be directors at the end of that year.

32. Second, the wording of section 73 is consistent with the wording bye-law 4(1) which provides that a duly elected director "*shall hold office until the next Annual General Meeting or **until his or their successors are elected or appointed."*** It follows from the terms of bye-law 4(1) that a duly appointed director may continue in office until his successor is elected or appointed. It follows, therefore, that Mr Gilbert continued in the office of director until his successor was elected or appointed and did not cease to be a director at the end of 2017.

33. Third, the application of the *Duomatic* principle again leads to the conclusion that Mr Gilbert did not cease to be a director of SJTC the end of 2017 (See paragraphs 22 to 26 above).

Lack of authority: Mr Gilbert had no authority to commence proceedings without the approval of Mr Watlington and Mr Ferguson

34. As noted at paragraph 28 above, bye-law 4(1) of SJTC's bye-laws provides that "*The business of the Company shall be managed and conducted by one (1) Director **or such number in excess thereof as the Members may from time to time determine"***. Assuming Mr Watlington and Mr Ferguson were validly appointed as directors on 25 October 2019, there were three directors of SJTC who were charged to manage and conduct its business. On that basis, counsel submits for

Cabarita, Mr Gilbert did not have authority on his own to commence the present proceedings in the name of SJTC.

35. Counsel submits that to commence proceedings in that name, SJTC required a valid board resolution. However, no board resolution could have been passed without either a unanimous written resolution of all directors (see bye-law 8), or a resolution being passed by a majority at a quorate board meeting, properly convened. There was no such resolution and it follows, counsel submits, that Mr Gilbert had no authority to instruct Conyers to commence the proceedings in SJTC's name.

36. I accept the general proposition that the power to conduct affairs of a company lies with the directors as a body (if more than one) and requires a board resolution. Where there is a board of directors, a single director has no power to take any particular action on behalf of the company unless such a power has been delegated to him by the board of directors. On the assumption that on 1 November 2019, when the Generally Endorsed Writ of Summons was filed in these proceedings, the board of SJTC comprised of three directors, it must follow that Mr Gilbert had no authority to institute these proceedings on behalf of SJTC.

37. In the circumstances, the critical issue, in relation to this ground, is whether Mr Watlington and Mr Ferguson had been validly appointed as directors of SJTC when these proceedings were commenced on 1 November 2019.

38. In support of the contention that Mr Watlington and Mr Ferguson were validly appointed on 5 October 2019, counsel for Cabarita does not rely upon any particular bye-law of SJTC but relies squarely on the principle expressed by Lord Davey in *Salomon v Salomon* [1897] AC 22 at 57 that a *"company is bound in a matter intra vires by the unanimous agreement of its members".*

39. The application of this principle is illustrated by *Re Duomatic* [1969] 2 Ch 365, where directors had no contracts of service and no resolution was passed authorising the directors to receive remuneration but received payments from the company on account of remuneration. The liquidator of the company sought to recover the payments on the basis that the payments were

unauthorized. *Buckley LJ* rejected the liquidator's claim in so far as the evidence showed that all the shareholders with voting rights had assented to the payments, explaining at 373C that:

> "*Mr. Wright, for the liquidator, has contended that where there has been no formal meeting of the company and reliance is placed upon the informal consent of the shareholders, the cases indicate that it is necessary to establish that all shareholders have consented….*
>
> *I proceed upon the basis that 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 a general meeting would be.*
>
> *The preference shareholder, having shares which conferred upon him no right to receive notice of or to attend and vote at a general meeting of the company, could be in no worse position if the matter were dealt with informally by agreement between all the shareholders having voting rights than he would be if the shareholders met together in a duly constituted general meeting."*

40. *Re Duomatic* has been applied in this jurisdiction by Bell J in *Phoenix Global Limited v Citigroup Fund Services (Bermuda) Limited* [2009] Bda LR 68.

41. Illustrations of the *Duomatic* principle show that it gives effect to the unanimous assent of the shareholders in circumstances where the formal processes in the company's constitutional documents have not been followed. Indeed, the principle applies even where a statutory procedure for approving contracts has not been followed. In *Atlas Wright v Wright* [1999] BCC 163, a director's service contract was held to be valid because all of the shareholders had in fact assented to the contract, even though the formal statutory procedure for approving such contracts had not been followed. In that case Potter LJ stated the principle at 168H in following terms:

> *"The doctrine that the unanimous consent of all shareholders who have a right to*

attend and vote at a general meeting of the company can override formal (including statutory) requirements in relation to the passing of resolutions at such meetings (for convenience called the Re Duomatic principle) has been developed and applied in a number of reported decisions other than those from which I have quoted above: see for instance, the authorities cited at para 7.417 of the current edition of Palmer's Company Law as well, no doubt, as in many unreported cases. They are largely decisions at first instance. However, the Court of Appeal recognised that statutory requirements as to notice might be waived in the Express Engineering Works case (see also Re Horsley & Weight Ltd [1982] 3 All ER 1045 at 1055, [1982] 1 Ch 442 at 454, per Buckley LJ) and it has not been argued before us that the Re Duomatic principle is, in any respect, in error. The argument has centred upon the question of whether the particular statutory language of s. 319 is such as to exclude or render inappropriate the application of the Re Duomatic principle".

42. In order for the *Duomatic* principle to operate there must be material from which an observer could discern or infer, on an objective basis, assent on the part of the shareholders *(See Re Tulsesence Ltd* [2010] 2 BCLC 525). Cabarita relies upon the written decision dated 25 October 2019 recording that Cabarita has decided, as the sole member of SJTC, that *"each of Glenn Ferguson and James Watlington be appointed as directors of [SJTC] with immediate effect".* I accept that the written decision, on an objective basis, does constitute an effective outward manifestation of Cabarita's assent to those appointments.

43. In the circumstances, I accept the submission made on behalf of Cabarita that whether or not bye-law 27 can be utilised in circumstances where no general meeting has yet been called (an issue relied upon by Mr Adamson at the ex parte hearing (see paragraph 5 above)) is irrelevant to the application of the *Duomatic* principle in the present case in relation to the appointment of Mr Watlington and Mr Ferguson.

44. Mr Hagen QC argues that Cabarita's reliance on the *Duomatic* principle overlooks the exception to that principle, namely that it will not assist where the underlying transaction is dishonest or not bona fide and reliance is placed on *Bowthorpe Holdings Ltd v R J Hills* [2002] EWHC 2331

(Ch) at [50]. This exception, counsel contends, extends beyond considering merely whether the relevant failure to observe formality was honest and in good faith; rather the underlying corporate act must itself be honest and in good faith. Here, it is said, that SJTC has pleaded that the appointments of Mr Watlington and Mr Ferguson was not made honestly and in good faith, thus squarely engaging that exception.

45. In *Bowthorpe,* Y Ltd, a company wholly owned by Mr Peter Hills, granted an option to Bowthorpe Holdings to acquire his shares in Y Ltd. The only asset of Y Ltd was its shareholding in a company called Argyll. The underlying allegation was that in order to frustrate the option agreement, Mr Peter Hills caused Y Ltd to sell the Argyll shares at an undervalue to his brother, Mr Richard Hills. In this action commenced by Y Ltd and Bowthorpe Holdings, Y Ltd sought to rescind the sale by Y Ltd of its shares in Argyll to Richard Hills and/or to obtain damages from Peter Hills for breach of his fiduciary duties to Y Ltd as its director. For the purposes of the strike out application the court assumed that the sale of shares in Argyll was an improper exercise of the powers of the directors both because it was effected otherwise than in the interests of Y Ltd and at a substantial undervalue. The defendants, Mr Peter Hills and Mr Richard Hills, argued that even on that assumption, the claim must fail because the sale was authorised by the shareholders of Y Ltd, being Mr Peter Hills. It was this submission which was addressed by Morritt V-C at [50]:

> *"But subsequent decisions show that there are exceptions to such a principle. First, the transaction must be bona fide or honest. This, in my view, is demonstrated by the qualification of Viscount Haldane in A-G for Canada v Standard Trust [1911] AC 498, 505 that "the case was not...a cloak under which a conspiracy to defraud was concealed", by Younger LJ in Re: Express Engineering Works [1920] 1 Ch 466, 471 that "no fraud is alleged in respect of this transaction", and by Lawton LJ in Multinational Gas v Multinational Services [1983] Ch 258, 268 that the members must act in good faith. Thus, in Re Duomatic [1969] 2 Ch 365, 372 Buckley J cited with approval the view of Astbury J in Parker and Cooper Ltd v Reading [1926] Ch 975, 984 that the transaction must be both intra vires and honest."*

46. The relevant "transaction" in *Bowthorpe* was the sale of Argyll shares at an undervalue and this transaction damaged the interests of Y Ltd and Bowthorpe Holdings. *In A-G for Canada v Standard Trust* [1911] AC 498, referred to by Morritt V-C in the above passage, the "transaction" which had been approved by all the shareholders of company, and which was being challenged, was the resolution of the directors fixing the price of the railway at $648,000. The "transaction" in *Re Express Engineering Works* [1920] 1 Ch 466, referred to in the above passage, was the decision by the company to issue certain debentures. The "transaction" in *Parker and Cooper Ltd v Reading* [1926] Ch. 975 was again the issuance of a debenture by the company.

47. In the context of commercial transactions, as illustrated by the facts in *Bowthorpe* and cases cited in the above passage in the judgment of Morritt V-C, it is readily understandable why the requirements of good faith and honesty, on the part of shareholders, are imported. These "transactions" clearly affect the commercial interests of other shareholders and/or third parties. However, it is not readily apparent that the election of directors by the sole shareholder of a company can properly be characterised as a "transaction", as that term is used by Morritt V-C in the above passage.

48. I accept the submission, made by counsel for Cabarita, that in this case the appointment of Mr Watlington and Mr Ferguson would undoubtedly have been valid and effective at a general meeting and in the circumstances there is no justification in principle as to why the same act would not be valid and effective by operation of the *Duomatic* principle.

49. It is not challenged that a member is entitled to vote its shares in its own interests. In *Pender v Lushington* (1877) 6 Ch D 70 (CA) Jessel MR said at 75-76: *"There is, if I may say so, no obligation on a shareholder of the company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right, if he thinks fit, to give his vote from motives or promptings of what he considers his own individual interest*".

50. To the same effect, the judgment of Sir Richard Baggallay in *North West Transportation v Beatty* (1887) 12 App Cas 589 (PC) at 593: *"…the resolution of the majority of the shareholders,*

duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, and consequently on the company, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject matter opposed to, or different from, the general or particular interests of the company."

51. To the extent that a shareholder is under a duty to exercise its powers as a shareholder *"bona fide for the benefit of the company"* any such duty does not require a shareholder to act solely for the benefit of the company as a separate entity distinct from members. It requires the shareholder to consider the interests of the shareholders as a general body. In *Greenhalgh v Arderne Cinemas* [1951] Ch 286 Evershed MR said at 291:

> *"Certain principles, I think, can be safely stated as emerging from those authorities. In the first place, I think it is now plain that "bona fide for the benefit of the company as a whole" means not two things but one thing. It means that the shareholder must proceed upon what, in his honest opinion, is for the benefit of the company as a whole. The second thing is that the phrase, "the company as a whole", does not (at any rate in such a case as the present) mean the company as a commercial entity, distinct from the corporators: it means the corporators as a general body.*
> *That is to say, the case may be taken of an individual hypothetical member and it may be asked whether what is proposed is, in the honest opinion of those who voted in its favour, for that person's benefit."*

52. These cases make it clear that a shareholder is not required to wholly divorce his personal interests in exercising his voting rights. In the context of exercise of shareholder power in electing directors of the company, the only persons who can properly complain of the decisions are other shareholders in the company. However, in this case Cabarita is the sole shareholder in SJTC. It seems unreal and contrived that the company(SJTC), as a separate entity distinct from its members, should be taking these proceedings to challenge the decision of its sole shareholder appointing directors to its board.

53. The evidence in relation to Mr Watlington is that he has been in practice at the Bermuda Bar for over 40 years, specialising in trust advisory work. He notes, at paragraph 25 of his First Affidavit that he currently sits on the board of a large charity with 22 trustees and directors.

54. Mr Ferguson has been in practice in Australia since 1991. He is a former President of the Queensland Law Society with extensive experience in provision of corporate services.

55. At the ex parte hearing, Mr Adamson told the court in respect of the appointment of Mr Watlington and Mr Ferguson that; "I appreciate [Mr Tamine] has appointed two lawyers who I say nothing against. They are of good character".

56. Both Mr Watlington and Mr Ferguson were examined at the *inter partes* hearing primarily to determine whether there was any "collusion" between them and Mr Tamine. However, the suggestion of "collusion" was never put to either Mr Watlington or Mr Ferguson in cross examination and indeed has been disavowed in correspondence.

57. Mr Watlington advised that he was a friend of Mr Tamine's wife's family and had known her for a long time. Mr Ferguson advised that he had in fact instructed Mr Tamine as a barrister when Mr Tamine was in private practice in Australia many years ago. He advised that he had maintained contact with Mr Tamine over this time. Both Mr Watlington and Mr Ferguson were adamant that Mr Tamine had not asked them to do anything improper nor will they do so in their capacity as directors of SJTC.

58. Mr Hagen QC's final submission in relation to the reason why this Court should seek to set aside the appointments of Mr Watlington and Mr Ferguson as directors of SJTC was as follows:

> *"What I have to demonstrate to Your Lordship is that Mr Tamine thought that by rolling the dice and putting those two gentlemen in office, he would stand a better chance, given that one was an old family friend of his wife and the other was an old friend of his from the-- from the 1980s or 1990s, depending on how you listen to Mr Ferguson's evidence, of the claim not being pursued with quite the same vigour and*

quite the same alacrity and quite the same determination as they are being pursued by Mr Gilbert.

And that is, My Lord, a fraud. It's dishonest. That is a dishonest intent."

59. In the end the case for setting aside the appointment of Mr Watlington and Mr Ferguson does not depend upon any agreement or understanding on their part in relation to the pending litigation but upon the subjective intention of Mr Tamine, who is the shareholder of Cabarita, which in turn is the shareholder of SJTC.

60. It seems to me that the subjective intention of a shareholder cannot be the criteria which determines the validity of a particular transaction which the company has entered into. Morritt V-C in *Bowthorpe* referred to the requirement in terms that *"the **transaction** must be bona fide or honest."* The requirement relates to the "transaction" and not to the "subjective intent" of the shareholder. It is questionable whether the appointment of directors by the sole shareholder of the company can appropriately be referred to as a "transaction" (see paragraph 49 above).

61. However, even if it is a transaction, it is a perfectly lawful and *intra-vires* transaction. The only issues which can arise in relation to a "transaction" are, whether it defeats the interests of minority shareholders or has an effect on creditors of the company. Here, the appointment of two directors by the sole shareholder of SJTC is incapable of having either of those two consequences.

62. Furthermore, in *IRC v Bibby* [1945] 1 All ER 667 the House of Lords established that, regardless of any allegation of breach of trust against Cabarita in connection with the appointment of Mr Watlington and Mr Ferguson as directors of SJTC, Cabarita's decision is valid and binding as against SJTC and it is not open to SJTC to assert that those appointments are void on that basis.

63. As an additional ground against the application of the *Duomatic* principle, Mr Hagen QC contends, the appointments of Mr Watlington and Mr Ferguson as directors were made by Cabarita with a view to furthering the interests of Mr Tamine, its sole director and shareholder,

they were not made properly in the interests of SJTC but rather for an ulterior advantage. The *Duomatic* principle can only empower shareholders to do informally what they can do formally. It is argued that shareholders cannot properly exercise the power to appoint directors for purposes dehors the company even at an AGM called in accordance with the bye-laws. Reliance is placed on *In re HR Harmer* [1959] 1 WLR 62 at 82 and *Theseus Exploration v Mining and Associated Industries Limited* [1973] Qd.R. 81, a decision of Hoare J of the Supreme Court, Brisbane, Queensland.

64. The passage relied upon by counsel for SJTC in *Re Harmer* is in the judgment of Jenkins LJ at 82:

> *"It cannot be denied that the holder of the majority in voting power of the shares in a company may, broadly speaking, appoint any person he thinks fit as director, and the appointment cannot be challenged merely on the ground that he might have found some more suitable person than the person he selected, or that the person he selected was his friend; but I take it that the majority shareholder's power of appointing directors must within broad limits be exercised for the benefit of the company as a whole and not to secure some ulterior advantage."*

65. This passage in the judgment of *Jenkins LJ* has to be understood in the context of a minority oppression action under section 210 of the Companies Act, 1948. In that action, the minority shareholder was alleging that the action of the majority shareholder was burdensome, harsh and wrongful, and, accordingly was oppressive within the meaning of section 210. One of the matters complained of by the minority shareholders was the remarkable number of appointments of directors and retirements brought about in one way or another by the majority shareholder. It is in this context Jenkins LJ speaks of the duty upon the majority shareholder to exercise the power of appointment for the benefit of the company as a whole. The reference to "*for the benefit of the company as a whole*" is a reference to all the shareholders of the company as a general body.

66. However, this passage in the judgment of *Jenkins LJ* has no application where there is only one shareholder and there are no minority shareholders. The decision of the sole shareholder must

necessarily be "*for the benefit of the company as a whole*" meaning for "*the shareholders as a general body*" (see: *Greenhalgh v Arderne Cinemas* [1951] Ch 286 at 291 (paragraph 53 above). A sole shareholder, in the position of Cabarita, by definition is the "*the shareholders as a general body".*

67. The decision of Hoare J in *Theseus* has to be examined in its proper context. It was again a minority oppression action where the minority shareholders were alleging that the directors appointed by the majority shareholders would not act bona fide in the interests of the company and the shareholders generally. It was in this context that Hoare J referred to the passage in Professor Gower's *Modern Company Law*, third edition, at page 574:

> *"Though shareholders are not expected to divorce themselves wholly from their personal interests, they are bound to ask themselves whether the proposal is beneficial not only to themselves but to a hypothetical member who, presumably, has no personal interests apart from those as a member. Clearly there must be cases in which the controllers do not ask themselves this question".*

68. The entire discussion in that case was in the context of protection of minority shareholders in the face of an allegation that the directors appointed by the majority shareholders would not act bona fide in the interests of the company. Thus, Hoare J summarised the position at page 87F:

> *"It is quite right that it is for the shareholders and not for the court to say who the directors will be, but in special circumstances, as I have already said, the court can interfere. The application, as I see it, is not to confer rights on a minority. The application is to prevent the election of directors who, it is alleged, would probably not act bone fide in the interests of the company,* ***which is the shareholders generally"*** (emphasis added).

69. The justification for the court's intervention in the internal affairs of a company is to ensure that the majority shareholders do not act inequitably towards the minority shareholders. However, this analysis assumes and is only applicable in the factual situation where there are majority and

minority shareholders in a company. The reasoning of Hoare J only applies where there is more than one shareholder in a company. In the present case SJTC only has one shareholder, Cabarita. In the circumstances it is not possible for Cabarita to take actions as a shareholder which could be the subject of complaint by minority shareholders. Cabarita is the entire body of shareholders of SJTC. In the case of a single member, it is wholly unrealistic to suggest that it is bound to ask itself whether the proposal is not only beneficial to itself but to a hypothetical member. In my judgment there is no such requirement.

70. Finally, it is to be noted that Hoare J did not hold that the appointment of the directors by the majority was a nullity and did not set aside their appointment. Hoare J accepted the validity of the appointment but restrained the directors from taking certain actions.

71. Mr Hagen QC further contends that the *Duomatic* principle does not operate to cure defects in compliance with procedural formalities (such as those in the bye-laws) where those formalities are intended and/or designed to protect the interests of the third party and the third party has not waived that protection. Reliance is placed on the judgement of Potter LJ in *Atlas Wright v Wright* [1999] BCC 163. Counsel argues that bye-law 31 which provides that *"Any Director who is not a Member shall be entitled to receive notice of and to attend and to be heard at any General Meeting,"* confers on existing directors the right to be heard on the question of appointment of new or additional directors. Since Mr Gilbert was deprived of his right to be heard on the issue, the *Duomatic* principle cannot and does not operate to validate the appointments of Mr Watlington and Mr Ferguson.

72. This argument was further developed by reference to bye- law 27. Bye-law 27 provides:

> *"A resolution in writing signed by all of the Members who at the date of the resolution would be entitled to attend the Meeting and vote on the resolution, which resolution may be in counterparts, shall be as valid and as effectual as if it had been passed by a General Meeting duly called and constituted. The date of such resolution shall be the date when the last Member signed the same."*

73. It was argued that while bye-law 27 contemplates and provides for written resolutions of members, the wording of the bye-law is narrowly drawn. Counsel argues that bye-law 27 only permits members to use written resolutions where the members were entitled to attend "*the Meeting and vote on the resolution".* It is argued that "*the Meeting*" must be convened before the written resolution process can be utilized. And only the Company (acting through its directors and secretary) can convene the meeting and circulate the resolution. As bye-law 31 provides that the directors are entitled to receive notice of and attend any general meeting, it follows that it is impossible to by-pass the members of the need to (a) hold any general meeting at all; (b) at the very least provide notice to the director.

74. I am unable to accept these submissions largely for the reasons advanced by counsel for Cabarita. First, whilst it is clear that certain procedural requirements cannot be overridden by the operation of the *Duomatic* principle, it is also clear that it is only ousted where it is shown that the purpose of the procedural requirement extends beyond the benefit and protection of the shareholders. In *Atlas Wright v Wright* BCC 163 Potter LJ explained at 175C:

> *"In this case it is plain that real consent was given by the sole shareholder of the company for an act which was intra vires the company's powers. Further, it does not seem to me to be plain that there is any statutory purpose underlying the provisions of s. 319(3) and (5) beyond the benefit and protection of the shareholders of the company (nor has Mr Stafford so argued). The underlying intention appears to me no more nor less than to require unequivocal approval of the shareholders (sub-section (3)) to a long- term contract in respect of which there has been proper opportunity for the shareholders to consider the terms of the agreement approved (sub-section (5)). The requirement of sub-section (3), taken alone, is unarguably amenable to the principle in Re: Duomatic. While sub-section (5) sets out the formality required as a pre-condition to the passing of the resolution contemplated in sub-section (3) it seems to me no more than a "back up" formality in the nature of a notice provision designed to ensure the opportunity for fully informed consent by the shareholders. It is thus amenable to waiver by the class for whose protection it is designed, in circumstances where it is clear that that there was in fact fully*

informed consent in respect of an agreement known to the sole shareholder for longer than the fifteen-day period provided for in sub-section (5).”

75. Bye-law 31 is not intended to provide any personal rights to the directors (such as indemnity provisions in respect of actions by the company or third parties) but is plainly intended for the benefit and protection of the shareholders which the shareholders are entitled to waive. As directors are not party to the bye-laws they would not be entitled to enforce bye-law 31 (see: *Browne v La Trinidad* (1887) 37 Ch D 1 at 14 per Cotton LJ).

76. Second, the construction of bye-law 27, contended for by counsel for SJTC produces surprising results. It is generally understood that the primary purpose of the unanimous written resolution procedure is to avoid the need to call and hold a general meeting of members. However, counsel contends that before the members can validly sign a resolution a general meeting must be called. No cogent explanation was provided to the Court why this procedure made any practical sense. Further, counsel contends that a director must be given notice of such a meeting even though it is anticipated by all members that such a meeting will in fact not take place. Counsel could not provide any compelling rationale as to why a director should be given notice of a non-existent meeting where he has no role to play.

77. In my judgment the proper construction of bye-law 27 does not require that before a valid resolution of the members can be signed a general meeting of the members must be called. The reference to “*Members at the date of the resolution would be entitled to attend the Meeting and vote on the resolution*” is merely a reference to identifying those members who must sign the written resolution. The words “*as if*” in the sentence *“shall be valid and as effectual as if it had been passed by a General Meeting duly called and constituted*” make it clear that no such meeting need be called or held.

78. Third, as counsel for Cabarita pointed out, bye-law 31 is a standard provision which has been included (in similar form) in Model Articles of Association under UK company law since 1985. If the argument of Mr Hagen QC that bye-law 31 has the effect of ousting the *Duomatic* principle is correct then it would necessarily follow that the *Duomatic* principle has been ousted in the

case of all companies adopting Table A or Model Articles of Association in the UK since 1985, which is plainly not the case. I accept the submission that it is implausible that such a radical change in company law could have occurred without attracting any academic commentary or resulting in any case law on that point in almost 35 years, notwithstanding the fact that the *Duomatic* principle frequently arises in company law disputes in England.

79. Finally, I must deal with a submission of SJTC that Mr Gilbert, as the director on whom the Court has, by its injunction, conferred sole authority to manage the business of SJTC on an interim basis is to be taken to have approved the continuation of the proceedings on behalf SJTC.

80. As I stated during argument, this would be a surprising result. At the request of Mr Adamson the Court made an order that; "*The Plaintiff may continue to conduct its business in accordance with its bye-laws, as if Mr James Gilbert is the sole director, without regard to the Members Decision dated 25 October 2019."* There was no suggestion by Mr Adamson that by agreeing to this relief the court would be providing requisite authority to Mr Gilbert to commence these proceedings. Mr Adamson justified seeking this relief on the basis: "*we are left in the position where the Company could technically be seen as inquorate permanently and therefore we need an order to allow to carry on going; and I do point out this is a Charitable Trust; the only thing we are currently doing is proceeding with litigation to protect the assets* of the *Trust".* This relief was justified on the basis that it was required *"to carry on going".* Accordingly, I conclude that this provision in my order dated 6 November 2019 was not intended to and does not provide the relevant authority to Mr Gilbert to commence these proceedings on behalf of SJTC.

81. In the circumstances, I conclude that Mr Watlington and Mr Ferguson were validly appointed on 5 October 2019 as a result of the operation of the *Duomatic* principle. I do not accept the submission that in this case the *Duomatic* principle does not apply because the underlying transaction is dishonest or not bona fide; or that the appointments were made by Cabarita with a view to furthering the interests of Mr Tamine, its sole director and shareholder, and they were not made properly in the interests of SJTC but rather for an ulterior advantage; or that there were defects in compliance with procedural formalities designed to protect the interest of a third party (Bye-law 31).

82. It follows that from 25 October 2019 onward the Board of Directors of SJTC comprised Mr Gilbert, Mr Watlington and Mr Ferguson. The commencement of the proceedings on 1 November 2019 required a resolution of the Board of Directors. Mr Gilbert, acting alone, had no authority to institute these proceedings on behalf of SJTC. As no relevant board resolution authorizing these proceedings was passed, it follows that these proceedings were commenced without any proper authority from SJTC.

Trust Law Claims

The Claims

83. In paragraph 27 of the Amended Statement of Claim, it is averred that the appointment of Mr Watlington and Mr Ferguson as directors should be set aside because:

    a. the interest of Waterford Charitable Trust, and the fact that the deed contemplated no interference save in the most exceptional circumstances in the business of an underlying company, amounted to relevant matters which Mr Tamine (and thus Cabarita) failed to take into account in exercising Cabarita's discretion to appoint Mr Watlington and Mr Ferguson as directors of SJTC; and

    b. the negative impact of the appointments on litigation was an irrelevant consideration which Mr Tamine (and thus Cabarita) wrongly did take into account.

84. But for that inadequate deliberation, a trustee of the Waterford Charitable Trust would not have acted as it did.

85. In paragraph 28 of the Amended Statement of Claim, it is averred that if the appointments of Mr Watlington and Mr Ferguson are neither void nor fall to be set aside, it is in the best interests of Waterford Charitable Trust that:

    a. Cabarita be directed under the inherent jurisdiction of the Supreme Court to

forthwith remove and/or procure the resignation of Mr Watlington and Mr Ferguson as directors of SJTC; and

b. Cabarita is removed and/or replaced as a trustee of the Waterford Charitable Trust under the inherent jurisdiction of the Supreme Court.

Authority to pursue Trust Law Claims in the name of SJTC

86. For the reasons set out above, Mr Gilbert, in my judgement, had no authority to institute these proceedings on behalf of SJTC and it follows that these proceedings were commenced without any proper authority from SJTC. That finding applies equally to the Trust Law Claims set out in paragraphs 83 to 85 above. The lack of authority to commence these proceedings remains even if this court was minded to give leave to SJTC under section 47A (5)(d) of the Trustee Act 1975.

Locus standi to pursue the Trust Law Claims

87. The Charities Act 2014 repealed and re-enacted, with substantial amendment, the Charities Act 1978. However, the 2014 Act did not deal with the issue of *locus standi* to institute proceedings in relation to charities and charitable trusts. The position continues to be governed by common law.

88. Mr Hagen QC argues that SJTC has a substantial interest in the subject matter of the Waterford Charitable Trust and thus has the *locus standi* to pursue the trust claims against Cabarita in its capacity as trustee of the Waterford Charitable Trust. First, it is said that the only asset of the Waterford Charitable Trust is SJTC's own share capital. It is argued that SJTC has a direct interest in the conduct of the affairs of the Waterford Charitable Trust and, in particular, in the administration of its assets. Second, the breach of the Waterford Charitable Trust on which the claim is partly founded is precisely an instance of a public wrong (breach of a charitable trust) causing private harm to a claimant, justifying proceedings other than by Attorney General's information. Third, SJTC is presently administering a number of other trusts which include

charitable objects, which would include the objects of the Waterford Charitable Trust.

89. The conventional understanding is that at common law, the only person with *locus standi* to challenge the acts of the trustee of a charitable trust, or to apply for the replacement of such a trustee, is the Attorney General. The role of the Attorney General in relation to charities is recognised in section 47A (5)(c) which provides that *"An application to the court under this section may be made… where the power is conferred in respect of a charitable trust or otherwise for charitable purpose, by the Attorney General".*

90. The common law position is summarized by Professor Graham Virgo in *The Principles of Equity & and Trusts*, second edition, at page 177*:*

> *"The Attorney General is responsible for enforcing the charitable trust in the name of the Crown. He or she acts as the protector of the charity and has been described as the "representative of the beneficial interest" (Weth v Attorney General [1999] 1 WLR 686,691 (Nourse J)). There is a need for the Attorney General to protect the property of the charitable trust because no private person has a beneficial interest in the trust's property".*

91. In *Lang v Purves* (1862) 15 ER 541, a decision binding on this Court, the Privy Council dismissed a claim brought by private individuals without the approval of the Attorney General because they did not have *locus standi*. The facts of the case are instructive. The dispute occurred in connection with the administration of a charitable trust which owned a church. The plaintiffs were members of an ecclesiastical body called the "*Synod of Australia*" who sought an order removing the trustees because of their support for a church minister whom the Synod wished to dismiss from his office. Despite the obvious "*interest*" in the popular sense, the Privy Council held that the plaintiffs did not have the *locus standi* to pursue the action. Lord Kingsdown stated:

> *"But mere strangers to the trust cannot file such a Bill, though a certain number of a class may sue on behalf of the whole body; those who sue must be members of the body. The suit must be maintained either by somebody having an interest in the*

subject matter, or by some Public officer entrusted by law with authority to institute it.

But what private interest or public authority have the Plaintiffs upon this record? They are a number of gentlemen who describe themselves as composing the Synod of Australia, and who profess to sue "on behalf of the said Synod, and also for and on behalf of the members of the congregation of the Church." But they are none of them members of the congregation; they were none of them, as far as appears, contributors to the funds out of which the Church was built, and so far from really representing the feelings of wishes of the congregation, there is no evidence that anyone member of that body desires the success of this suit, and it is clear from the evidence, that the great master of the congregation dissents from it; yet no one member of the congregation is in that character made a party either as Plaintiff or Defendant.

If, then, the Plaintiffs have no right to sue in respect of any interest of their own or of any other person whom they are authorized to represent, are they entitled as a public body to maintain the suit?

…

The proceedings in this case are governed by English law, and there can be no doubt that as far as the right or duty of correcting any breach of trust exists in any public officer, that right and duty are vested in the Attorney General of the Colony, and in fact he is made a Defendant in this very suit in that character. He has apparently not considered it to be a case calling for his interference.

The individuals named as Plaintiffs upon this record appear to their Lordships to have no locus standi, either in respect of interest or of public authority".

92. The Privy Council dismissed the action because the members of the Synod were not beneficiaries of the trust, they were not trustees of the trust and the Attorney General of the Colony chose not to interfere. Accordingly, they had no *locus standi* to commence proceedings against the trustees. Contrary to the submission of Mr Hagen QC the reference in the judgment

of Lord Kingsdown to "*somebody having an interest in the subject matter*" is not a reference to a person who is closely connected with the charitable trust in the popular sense but is a reference to those who are within the charitable object or beneficiaries.

93. Again, in *Hauxwell v Barton Upon Humber DC* [1974] Ch 432, there was a dispute as to whether a certain piece of land was held on the terms of a charitable trust. The plaintiffs were two local inhabitants who (having failed to obtain authority from the Charity Commissioners to institute proceedings) sought declarations that the land was subject to a charitable trust and obtained an *ex parte* injunction to prohibit the defendant council from using the land as a public highway. The defendant council applied to strike out the proceedings on the basis that the plaintiff had no *locus standi* to bring the proceedings. Brightman J (as he then was) upheld that submission and said at 450F-H that:

> *"I am able to discern nothing in the cases which have been cited to me to indicate that anyone save the Attorney General is entitled to maintain an action against supposed trustees to establish the existence of a charitable trust, or that anyone except the Attorney General or the trustees of the charity can bring proceedings to recover charity property from third person, or that persons are capable of maintaining such a suit on the ground that the charity is a local one and that they are persons of that locality who are thus potential recipients of the benefits under the trust."*

94. Mr Hagen QC points to *Attorney General v President and Scholars of Magdalen College, Oxford* (1857) VI HL Cas (Clark's) 189 as showing that it is incorrect to state that at common law only the Attorney General could sue in relation to a charitable trust. This was a claim brought by the Attorney General against the College as recipient of certain trust property. It was a recovery claim by the Attorney General and the issue before the court was whether the claim by the Attorney General was statute barred. In that context the court was concerned to determine who would have a sufficient interest to assert a claim. In relation to this issue Lord Wensleydale said at 214: *"By the interpretation clause (section 1), the word "person" extends to a class of persons, as well as individuals, and under that the denomination all the poor of the parish for*

the time being, who certainly have an interest in the application of the rents and profits of the land to the purposes of the charity, seem to me to be included".

95. *Magdalen College* indicates that persons within the purview of the charitable intent potentially have standing and the House of Lords appears to be looking at who would benefit in the broad sense from the charitable intention in this particular case. It does not indicate that anyone with an "interest" in the popular sense has the legal standing to commence proceedings in relation to a charitable trust.

96. *Magdalen College* was not cited as an authority for any relevant proposition when, five years later, the Privy Council came to consider the issue of *locus standi* to enforce a charitable trust in *Lang v Purves* [1862] 15 ER 541. *Lang v Purves*, being a decision of the Privy Council, is of course binding on this Court.

97. None of the authorities cited to the court support the proposition that at common law a person in the position of SJTC, not being a beneficiary, would have legal standing to enforce a charitable trust. This position is consistent with company law principles. SJTC's only connection with the Waterford Charitable Trust is that its shares are assets of the trust. As a matter of company law, whilst a company may have reason to inquire into the beneficial ownership of its shares, it has no interest in the due administration of any trust on which its shares may be held and is bound by the decisions of its registered members regardless of any trust.

98. In *IRC v Bibby* [1945] 1 All ER 667, the House of Lords considered the relationship between a company and any trust on which its shares may be held and the extent to which the company is bound by the decision of a member even if that decision may be in breach of trust. The following statements of principle demonstrate that a company is bound by the decision of its registered shareholders even if that decision constitutes a potential breach of trust on the part of the registered shareholders.

99. Lord Russell stated at 669B that: *"the fact that a vote-carrying share is vested in a director as trustee seems immaterial. The power is there, and though it be exercised in breach of trust or even in breach of an injunction, the vote would be validly cast vis-à-vis the company, and the resolution until rescinded would be binding on it."* The reference to "*until rescinded"* in this passage, in my view, is a reference to a subsequent resolution and not to intervention by the court on account of the breach of trust.

100. Lord Macmillan stated at 671A that: *"So far as the company is concerned the relation between such of its shareholders as happened to be trustees and their beneficiaries is res inter alios. It may be that a trustee shareholder may, as between himself and his cestuis que trust, be under a duty to exercises his vote in a particular manner, or a shareholder may be bound under contract to vote in a particular way (cf Puddephatt v Leith). But with such restrictions the company has nothing to do. It must accept and act upon the shareholder's vote notwithstanding it may be given contrary to some duty which he owes to outsiders. The remedy for such breach lies elsewhere."*

101. Lord Simonds stated at 673A that: *"Those who by their votes can control the company do not the less control it because they may themselves be amenable to some external control. Theirs is the control, though in the exercise of it they may be guilty of some breach of obligation whether of conscience or of law. It is impossible (an impossibility long recognised in company law) to enter into an investigation whether the registered holder of a share is to any and to what extent the beneficial owner. A clean cut there must be."*

102. The principle that a company has no interest in any trust on which its shares may be held is given statutory recognition by section 65(7) of the Act which provides that:

> *"A company shall not be bound to see to the execution of any trust, whether express, implied or constructive, to which any of its shares are subject and whether or not the company had notice of such trust; and the receipt of the person, firm or corporation in whose name any share stands shall be sufficient discharge to the company for any money paid by the company in respect of such share notwithstanding any trust to which it may be subject."*

103. The House of Lords decision in *IRC v Bibby* and section 65(7) of the Companies Act 1981 provide strong support for the proposition that SJTC has no *locus standi* in respect of any breach of fiduciary duty in relation to the Waterford Charitable Trust.

104. Mr Hagen QC invites the Court to "develop" the common law relating to *locus standi* to enforce charitable trusts and cites the case of *In the Matter of H* [2011] JRC 070 where the Jersey Royal Court developed Jersey law by analogy with English legislation. I must decline the invitation to develop Bermuda law relating to *locus standi* to enforce charitable trusts by analogy with English legislation. It seems to me that this is an area which is preeminently suited for legislation. The issue of *locus standi* to enforce charities is not merely a technical area of the law but is underpinned by substantive public policy considerations. The charities legislation in Bermuda was recently reviewed by the Legislature when it enacted the Charities Act 2014 and the Legislature did not see fit to amend the existing law relating to *locus standi* to commence proceedings in relation to charities. In the circumstances, it is not appropriate for this Court to undertake that task.

Locus standi under section 47A of the Trustee Act 1975

105. In the Statement of Claim, section 47A of the Trustee Act 1975 is relied on as a jurisdictional basis for challenging the appointment of Mr Watlington and Mr Ferguson and leave is sought (in the alternative to the assertion that SJTC has *locus standi* to challenge Cabarita's decision at common law) to bring such a claim under section 47A(5)(d).

106. Section 47A (5) provides:

> *"(5) An application to the court under this section may be made by—*
>
> *(a) the person who holds the power;*
>
> *(b) where the power is conferred in respect of a trust or trust property, by any trustee of that trust, or by any person beneficially interested under that trust, or (in the case of a purpose trust) by any person appointed by or under the trust for the purposes of section 12B(1) of the Trusts*

(Special Provisions) Act 1989;

(c) where the power is conferred in respect of a charitable trust or otherwise for a charitable purpose, the Attorney-General; or

(d) with the leave of the court, any other person."

107. Mr Hagen QC argues that this is precisely the type of case in which leave ought to be granted so as to ensure that justice may be done. He argues that the language in section 47A(5)(d) would seem to be broader even than a "sufficient interest" or "sufficient connection" test because it would have been perfectly open to the legislature to limit applicants under the provision to those who met those tests but chose not to do so.

108. Section 47A was enacted in the Trustee Amendment Act 2014 and its purpose was to restore the law relating to the flawed exercise of fiduciary powers to the position as it was thought to be under the common law before the decision of the UK Supreme Court in *Pitt v Holt* [2013] 2 AC 108, which redefined the Hastings-Bass principle, restricting it to cases where it could be shown that the fiduciary had acted in breach of duty. That this was the purpose for enacting section 47A is confirmed by the Explanatory Memorandum to the Trustee Amendment Act 2014 Bill and the decision of Kawaley CJ in *In the Matter of the F Trust* [2015] SC (Bda) 77 Civ.

109. I accept the submission, made by counsel for Cabarita, that the purpose of section 47A is that it was intended to put the law as it was understood to be prior to 2011 on a statutory footing and it was not intended to change that law, including in relation to *locus standi*. In connection with *locus standi* in relation to charitable trusts section 47A (5)(c) provides that *"where the power is conferred in respect of a charitable trust or otherwise for a charitable purpose, the Attorney General*" reflecting and confirming the common law position in relation to charities.

110. I accept the submission made by counsel for Cabarita that the Court's ability to grant leave to "*any other person*" must be construed as a means of ensuring that anyone who would have had *locus standi* under the law as it was understood to be before 2011 would still have *locus standi* under section 47A if, for any reason, they were omitted from the categories of applicant that are specifically defined in section 47A(5)(a)-(c).

111. Accordingly, I would hold that section 47A(5)(d) does not confer any power on the Court to grant leave to any person who would not have had *locus standi* under the pre-2011 law and, on that basis, the Court has no power to grant leave to SJTC in this case.

112. However, even if section 47A(5)(d) could be construed as not limited to those persons who would have had *locus standi* under the pre-2011 law, I would decline to give leave in the circumstances of this case. The proceedings which SJTC wishes to pursue under section 47A would be contrary to the well-established principle that a company has no standing to involve itself in relations between the registered member and any person who may have a beneficial interest in the company's shares. The proposed proceedings would be contrary to the emphatic statements in the House of Lords in *IRC v Bibby* and the terms of section 65(7) of the Companies Act 1981.

Conclusion on the strike-out application

113. For the reasons set out above, I conclude that these proceedings, commenced by Writ of Summons dated to 1 November 2019, in the name of SJTC were brought without proper authority; SJTC has no *locus* to pursue the claims made in these proceedings, and the Amended Writ of Summons discloses no reasonable cause of action. In the circumstances, I order that the Amended Generally Endorsed Writ of Summons be struck out.

Discharge of the Injunction

114. As a result of the Court's ruling that the underlying proceedings must be struck out, it necessarily follows that the *ex parte* Order made on 6 November 2019, restraining Mr Watlington and Mr Ferguson from acting as directors of SJTC, must be discharged and I so order.

115. I wish to add that even if I had come to the view that the underlying proceedings should not be struck-out I would still have discharged the injunction. Having heard full argument, I am persuaded that it is in principle, wrong for the Court to reconstitute, even on a temporary basis,

the board of a company. In *MacDougall v Gardiner* (1874-75) LR 10 Ch App 606, Mellish LJ stated the position at 609 as follows:

> *"I cannot see how the Court has power to take the management of the company out of the hands of the directors, at any rate whilst the question is still in litigation, whether they are properly directors are not. If a case happened in which there were no directors, or in which there was a majority, and they had neglected to appoint directors, or directors had died, so that* there *was not a quorum, then I do not say whether the Court might not have yielded to the proposal to summon a meeting in order to prevent the company from altogether coming to an end. In this case it is not necessary to consider that question, as there is a Board of Directors who are de facto acting, and it has not been determined that they were not properly appointed. Under these circumstances, I cannot see how the Court can deprive them of the discretion which is given them by the articles. By the articles it is in their discretion whether to summon a meeting or not, and the Court cannot take the management of the company in that respect out of their hands."*

116. Even stronger language was used by Lord Davey in the Privy Council in *Burland v Earle* [1902] AC 83 at 93:

> *"It is an elementary principle of law relating to joint-stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so".*

117. It seems to me that, in principle, the Court should not grant interim relief in relation to internal management of the company, grounded upon irregularities which can readily be remedied. In this case any irregularity in relation to the election of Mr Watlington and Mr Ferguson could have been remedied by Cabarita, the sole shareholder of SJTC. In *Bentley-Stevens v Jones* [1974] 1 WLR 638, the Court refused to grant an interlocutory injunction to restrain the majority shareholders from removing a minority shareholder as a director of the company in circumstances where it was alleged that a meeting had taken place without proper notice and

that the company was a quasi-partnership so that the plaintiff had a right not to be expelled from the management of the company by the other shareholders. Plowman J held at 640H-641A that:

> *"even assuming the plaintiff's complaint of irregularities is correct, this is not a case in which an interlocutory injunction ought to be granted. I say that for the reason that the irregularities can all be cured by going through the proper processes and the ultimate result would inevitably be the same".*

118. I would also have discharged the injunction on the ground that the result of the Order made by Subair Williams J dated 19 December 2019, appointing Medlands as the trustee of the Brockman Trust, was to render SJTC an empty vessel and in the circumstances interim relief was unnecessary and could no longer be justified.

119. It is unnecessary to review the many other grounds which were relied upon in support of the application to discharge the *ex parte* injunction.

120. In the result, I strike out the Amended Writ of Summons and discharge the ex parte Order dated 6 November 2019.

121. I will hear the parties in relation to the issue of costs, if required.

Dated this 26 March 2020

NARINDER K HARGUN

CHIEF JUSTICE