HIGH COURT OF JUSTICE OF THE ISLE OF MAN
CIVIL - CHANCERY PROCEDURE
KOLEMOS v SIMPSON AND OTHERS
09 November 2010
His Honour Deemster Doyle

1. The Claimant, Roger Harper, was appointed Receiver of Kolemos Limited on the 26th July 2005. Kolemos Limited is a company incorporated under the laws of the Isle of Man. Timeshare Trustees (International) Limited ("TTI") and Timeshare Trustees (International) 1985 Limited ("TTI 1985") are the members of Kolemos Limited. They are the registered legal shareholders. The First Defendant has never been a member of Kolemos Limited.

2. I refer to a Declaration of Trust stated to be made on Tuesday, January 11th 2005 between TTI and the First Defendant. Indeed TTI 1985 also entered into a similar deed on the same day. TTI and TTI 1985 are described as the Trustees and John Stewart Simpson, the First Defendant, is described as the Beneficial Owner.

3. Paragraph 1 of the deeds contains declarations by the Trustees that they hold the Membership, namely the registered membership in Kolemos Limited, a company registered in the Isle of Man number 40767, in trust for the Beneficial Owner absolutely and agree that they will, at the request of the Beneficial Owner, resign their membership.

4. Paragraph 2 of the deeds is an important paragraph and it contains the following covenant:-

"THE TRUSTEE HEREBY COVENANTS with the Beneficial Owner that it will at all times and from time to time at the Beneficial Owner's request execute the powers vested in it as the holder of the Membership in such manner as the Beneficial Owner may direct (including the appointment of proxies) and will account to the Beneficial Owner for all sums by way of dividend, bonus or otherwise as shall be received by it or to which it shall become entitled by reason of the Membership."

5. The First Defendant says that in January 2005 he had concluded negotiations for the sale of 18 apartments in the Nerja Lodge complex in Spain. He says he anticipated that it would be difficult and protracted to request TTI and TTI 1985 to request the directors of Kolemos Limited to convene an extraordinary general meeting of the members of Kolemos Limited to appoint new directors and this may have taken many weeks.

6. It may well be that the members and directors would have been unwilling to act on such request as there were concerns over the position of the creditors. The registered legal owners of the shares and the directors may have declined to act on the request of the Beneficial Owner for any number of legitimate reasons. It was not a foregone conclusion that they would have taken the action which the Beneficial Owner may have required of them. It may be that the First Defendant did not ask them because he feared he would not like the answers.

7. The First Defendant says (and I quote from his witness statement):-

"Instead I convened an EGM myself on short notice which was held at the offices of Osmond & Osmond, 62-67 Temple Chambers, Temple Avenue, London, EZ4Y OHP. I

attended that meeting and voted in favour of the resolution to appoint Christopher Martin Dixon and Franklyn Bevan as directors of Kolemos. Copies of the Notice of the EGM and Minutes of that meeting are now produced and shown to me marked "JSS1". Following that meeting Forms 492(1)(b) were lodged at Companies House to confirm the appointment of Messrs. Dixon and Bevan as directors. Thereafter those directors executed an Escritura de Poder which authorised me to act as the Company's agent for the sale of the 18 apartments. A copy of that Escritura is exhibited to Mr. Kenny's affidavit."

8. The translation of the Escritura di Poder (the Power of Attorney), which appears at page 298 of the bundle, refers to a "Deed of Power of Attorney executed by Kolemos Limited". There is reference in that document to Christopher Martin Dixon and Franklyn Bevan "appearing in their capacity as directors of the company KOLEMOS LIMITED". There is reference to a resolution of the Board of Directors of the 15th March 2004 where it was stated:-

"It was unanimously agreed to authorise MR. CHRISTOPHER MARTIN DIXON and MR. FRANKLYN BEVAN to appear before a Notary Public and to grant a special power of attorney in favour of Mr. JOHN STEWART SIMPSON."

The powers refer to some 18 apartments at Nerja and a Property Register in Malaga.

9. I note the contents of the Deed of Power of Attorney dated the 31st May 2005. I have also noted the contents of the notice of the extraordinary general meeting which refers to a meeting to be held on the 2nd February 2005. The minutes upon which the First Defendant relies refer to the First Defendant as Chairman and Beneficial Owner of all the shares in Kolemos Limited. No members of Kolemos Limited are recorded as being present at the meeting which is described as an extraordinary general meeting of the members of Kolemos Limited.

10. The First Defendant says that on the 8th July 2005, pursuant to his instructions, Osmond & Osmond sent a letter to Miss Elaine Higgins at FNTC. He says that in that letter was enclosed a notice of an extraordinary general meeting and proxy forms to be signed by TTI and TTI 1985 appointing the First Defendant as their proxy to vote in favour of the resolutions proposed. The First Defendant says that the purpose of the extraordinary general meeting was to remove Messrs. Beardsley, Broomhead and Cox as directors and to ratify the appointment of Messrs. Dixon and Bevan. Plainly in the First Defendant's mind there was some doubt as to whether the appointment of Messrs. Dixon and Bevan had been valid. The First Defendant says that Miss Higgins refused to comply with the request for the reasons set out in the letter from Cains dated 13th July 2005. There is no evidence that any such meeting ever took place.

11. The First Defendant filed a witness statement dated the 27th August 2010 and by acknowledgement of service dated the 8th August 2010 the First Defendant indicated an intention to contest the claim. The Second and Third Defendants play no role in these proceedings and the claim against them was dismissed on the 31st August 2010. Upon the irregularities being brought to their attention they signed documentation referring to their resignation as directors of Kolemos Limited.

12. As indicated, the First Defendant filed an acknowledgement of service dated 8th August 2010 and he indicated an intention to contest the claim. He failed to attend the hearing

yesterday. I refused his somewhat belated written application for an adjournment for the reasons stated in the judgment I delivered yesterday morning.

13. In his witness statement dated the 27th August 2010 at paragraph 4 the First Defendant says that the Second and Third Defendants were:

"properly appointed pursuant to an EGM held on the 2nd February 2005 which was convened on my instructions. Even if they were not properly appointed their acts are still valid pursuant to section 142 of the Companies Act 1931".

14. I should stress that as soon as the irregularities of Mr. Simpson came to the attention of the Second and Third Defendants, they signed documents recording their resignations in an effort to put the record straight. Moreover, the members of Kolemos Limited also took prompt action and a receiver was appointed and proceedings were commenced against Mr. Simpson.

15. I have carefully considered the contents of the skeleton argument filed on behalf of the First Defendant. It is dated the 4th November 2010 and is unsigned.

16. The First Defendant stresses the following points and I quote from his skeleton argument:-

"4. Although section 113 of the Companies Act 1931 provides that the registered members should requisition the directors of the Company to convene an EGM this would not have been possible in the short time available. The shareholders and directors would have refused to convene the EGM - See paragraph 9 of Simpson witness statement.

5. In any event the appointment of the First Defendant as the Company's attorney by the Escritura di Poder signed by Second and Third Defendants was valid under the terms of section 142 of the Companies Act 1931. This states "the act of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification." At the time these directors executed the Escritura di Poder they had been appointed by the Second Defendant [that is an error in the skeleton, I think he means himself, the First Defendant] at the EGM held on 2nd February 2005 and they appeared on the Company's register in England as directors.

6. In this case the words of Lord Simonds (in the case of *Morris v. Kanssen [1946] 1 All ER (HL))* that there was *"no appointment at all "* are not appropriate. Here there was an appointment made by the beneficial owner of the whole of the Company but, if it was defective (which is not admitted), it was only because section 113 of the Companies Act had not been complied with. There is nothing to prevent the First Defendant convening a new EGM complying fully with section 113 and ratifying the appointment of the directors for the purpose of signing the Escritura de Poder. This is precisely the situation that section 142 is designed to safeguard, namely, that acts of the directors should not be invalid because of some defect in their appointment.

7. Accordingly it is submitted that the claim be dismissed."

17. Mr. Caine, on behalf of the Claimant, refers to sections 102 and 103 of the Companies Act 1931. Section 102 of the Companies Act 1931 provides that no notice of any trust, expressed, implied or constructive shall be entered on the register or be receivable by the

Financial Supervision Commission. Section 103 of the Companies Act 1931 provides that the register of members shall be prima facie evidence of any matters by this Act directed or authorised to be inserted therein.

18. There is also reference to Article 4.2 of the Articles of Association of Kolemos Limited which provides that the fact that the name of a person has been entered in the Register of Members shall be conclusive evidence of that person's membership.

19. Mr. Caine also refers to Deemster Teare's judgment in *In re Law Investments Limited* 2003-05 MLR 494 where it was held that the beneficial owner of shares in a company incorporated in the Isle of Man did not have locus standi to oppose an application to wind up the company concerned.

20. I have also considered the provisions of section 113 of the Companies Act 1931 which provides as follows:

" (1) The directors of a company, notwithstanding anything in its articles, shall, on the requisition of members of the company holding at the date of the deposit of the requisition not less than one-tenth of such of the paid-up capital of the company as at the date of the deposit carries the right of voting at general meetings of the company, or, in the case of a company not having a share capital, members of the company representing not less than one-tenth of the total voting rights of all the members having at the said date a right to vote at general meetings of the company, forthwith proceed duly to convene an extraordinary general meeting of the company.

(2) The requisition must state the objects of the meeting, and must be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form, each signed by one or more requisitionists.

(3) If the directors do not within twenty-one days from the date of the deposit of the requisition proceed duly to convene a meeting, the requisitionists, or any of them representing more than one half of the total voting rights of all of them, may themselves convene a meeting, but any meeting so convened shall not be held after the expiration of three months from the said date.

(4) A meeting convened under this section by the requisitionists shall be convened in the same manner, as nearly as possible, as that in which meetings are to be convened by directors.

(5) Any reasonable expenses incurred by the requisitionists by reason of the failure of the directors duly to convene a meeting shall be repaid to the requisitionists by the company, and any sum so repaid shall be retained by the company out of any sums due or to become due from the company by way of fees or other remuneration in respect of their services to such of the directors as were in default.

(6) For the purposes of this section the directors shall, in the case of a meeting at which a resolution is to be proposed as a special resolution, be deemed not to have duly convened the meeting if they do not give such notice thereof as is required by section one hundred and sixteen of this Act."

21. Section 113 of the Companies Act 1931 concerns the convening of an extraordinary general meeting on requisition. I have also considered the Articles of Association of Kolemos Limited. Article 41 provides that the business of the Company shall be managed by the directors. Article 44 provides that the directors from time to time and at any time may provide through local boards, attorneys or agencies for the management of the affairs of the Company abroad and may appoint any persons to be members of such local boards or as attorneys or agent and may remove any person so appointed and appoint others in their place. I note the powers of delegation in Article 45. Article 52 provides that the Company may by extraordinary resolution remove any director and may by an ordinary resolution appoint another person in his stead. I note that Article 60 provides that all acts done by any meeting of the directors or of a committee of directors or by any person acting as a director shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such director or person acting as aforesaid or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

22. I have considered the provisions of section 142 of the Companies Act 1931 which provides that the acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.

23. Mr. Caine has referred the court to the leading English case of *Morris v Kanssen and others* [1946] 1 All ER 586 (HL). The headnote in the report indicates that it was held that certain statutory provisions and provisions of the Articles did not validate certain transactions because on the facts of the case neither C nor S were directors at the time. C's appointment had terminated at the end of 1941 and S had never been appointed. Section 143 and Table A Article 88 applied only to acts done by persons acting as directors whose appointment or qualification was afterwards found to be defective. They did not cover a case where there had been a total absence of appointment or of a fraudulent usurpation of authority.

24. Lord Simonds at page 590 of the report stated as follows:-

"There is, as it appears to me, a vital distinction between (a) an appointment in which there is a defect or, on (sic) other words, a defective appointment, and (b) no appointment at all. In the first case, it is implied that some act is done which purports to be an appointment but is by reason of some defect inadequate for the purpose: in the second case, there is not a defect; there is no act at all. The section does not say that the acts of a person acting as director shall be valid notwithstanding that it is afterwards discovered that he was not appointed a director. Even if it did, it might well be contended that at least a purported appointment was postulated. But it does not do so, and it would, I think, be doing violence to plain language to construe the section as covering a case in which there had been no genuine attempt to appoint at all. These observations apply equally where the term of office of a director has expired, but he nevertheless continues to act as a director, and where the office has been from the outset usurped without the colour of authority. Cromie's acts after the end of 1941 were not validated by the section: Strelitz's acts were at no time validated.

I have so far dealt with defect in "appointment," and what I have said in regard to the section covers the article also where the same words are repeated. Some argument was founded by counsel for the appellant upon the words "or qualification," in the section, and "disqualified" in the article. This argument is not easy to follow. So far as both Cromie and

Strelitz were concerned, there was no defect in their qualification after the end of 1941. They were not disqualified. They were, so far as I know, qualified to act, but they had not been appointed. I do not suggest that qualification refers only to the holding of qualification shares. But whatever extended meaning may be given to "qualification" or "disqualified," I find it impossible to say that it covers the case of Cromie or of Strelitz. The point may be summed up by saying that the section and the article, being designed as machinery to avoid questions being raised as to the validity of transactions where there has been a slip in the appointment of a director, cannot be utilized for the purpose of ignoring or overriding the substantive provisions relating to such appointment."

The wise words of Lord Simonds in 1946.

25. I should record that I have also considered Deemster Corrin's judgment in *Voyager* 1993-95 MLR 1.

26. Yesterday, after the luncheon adjournment, Mr. Caine produced an extract from Practical Law October 2001 commenting on the case of *Deakin and another v Faulding and another* Times Law Report 29th August 2001. The summary extract stated that assent by a beneficial shareholder on behalf of a nominee shareholder is effective in the context of the application of the *Duomatic* principle. It was perfectly proper for Mr. Caine to draw this extract, which on the face of it appeared to run against paragraph 30 of his skeleton argument, to the court's attention. Indeed, he was duty bound to do so.

27. I have considered the very helpful additional authorities brought to the attention of the Court yesterday by Mr. Caine and indeed his very helpful skeleton argument upon the issue of whether the principle of unanimous informal assent can apply to beneficial shareholders. It is a fascinating point. Mr. Caine submits that although there is conflicting case law upon the issue of whether the *Duomatic* principle applies to the consent of beneficial, but not registered shareholders, the preferred view is that the *Duomatic* principle does not so apply, but at the very least, if it does apply, it can only apply to a beneficial owner where the registered (legal) shareholder has appointed the beneficial owner as his agent. Accordingly, the issue can only be determined on a case by case basis.

28. Mr. Caine further submitted that in all the circumstances of this case there were no grounds upon which it could be said that the *Duomatic* principle applied to the actions of the First Defendant in appointing the Second and Third Defendants as directors of Kolemos Limited.

29. On the facts of the case presently before this court I am not satisfied that it would be appropriate to apply the *Duomatic* principle to the circumstances of this case and to the actions taken by the First Defendant. In this case the court should, for the sake of certainty and justice, simply look at the register of members and the position of the registered legal members.

30. I note in particular the decision of the Supreme Court of Queensland handed down on the 13th December 1996 in *Jalmoon Pty Limited v Bow* [1997] 15 ACLC 233 and indeed Deemster Teare's decision in the *Law Investments* 2003-05 MLR 494 case.

31. In my judgment in *Bitel*, (Chancery Division, judgment delivered 30th November 2007) I dealt with the affect of judgments from other jurisdictions in this jurisdiction. The *Jalmoon*

case is of course not binding upon this court in any way but I regard it as of assistance and interest and of persuasive value. It is a decision of the Court of Appeal of the Supreme Court of Queensland.

32. I have considered also the transcript of the judgment of Mann J in *Shahar v Tsitsekkos & Others* [2004] EWHC 2659 in particular paragraphs 59 to 71. I have considered the transcript of the judgment of Hart J in *Deakin v Faulding* 31st July 2001, in particular paragraphs 115 to 122 and a transcript of the judgment of Lindsay J in *Demoney v Godinho*[2004] EWHC 328.

33. Mr. Caine has also handed up to the Court this morning the transcript of the judgments in *Euro Brokers Holdings Limited v Monecor (London) Limited* [2003] EWCA Civ. 105 which I have considered in particular paragraph 62.

34. I return now to the *Jalmoon* case where the headnote to the report in that case indicates that it was held:-

"(Per curiam) The doctrine of unanimous assent did not apply as it did not cover instances in which some or all of the persons who assented were not registered shareholders: in re Sander's Ltd (1932) ... FCT v Patcorp Investments Pty Ltd (1976) ... Kingston v Keprose (1988), followed. Secondly, it did not apply because the solicitor had no reason to think that the payment of the money to Mr Ivory could have been for the benefit of the company. The solicitor knew the company was insolvent, and the effect of the payment to Mr Ivory was to take the money out of the reach of the company's other creditors."

35. At page 237 of the report the following is stated. This is the judgment of Pincus JA and Helman J:

"... it is our opinion that the doctrine conveniently called one of "unanimous assent", on which the defendant relies does not apply.

First, it was not established that at any relevant time Ivory was registered as holder of all the shares. It therefore appears to be necessary, in order to apply the doctrine in the present case, to hold that the principle of unanimous assent covers instances in which some or all of the persons who assent are not registered shareholders. To accept that proposition would, as it seems to us, introduce an additional element of uncertainty into the operation of a principle the present basis of which is itself unclear. In *Re Compaction Systems Pty Ltd* (1977-1978) CLC ... Bowen C.J. ... referred to the absence of authority for the proposition that the principle of *Re Express Engineering Works Ltd* [1920] 1 Ch. 466, being the leading case on unanimous assent, applies where all persons beneficially entitled to shares agree. At the time when his Honour made that remark there was direct authority on the point: in *Re Sander's Limited* [1932] ... it was held there that the relevant principle applies only to persons registered as shareholders. It is true that in some of the older cases one can find suggestions that persons not on the register may for various purposes be treated as shareholders, but that is not now an orthodox approach: see *FC of T v. Patcorp Investments Pty Ltd* (1976) ... and the cases referred to ... see also *Kingston v Keprose Pty Ltd* (1988) ...

Secondly, it is our opinion that the doctrine of unanimous assent does not apply to Ivory's authority given to the defendant, purporting to be on behalf of the plaintiff company,

because the defendant had absolutely no reason to think that the payment of the money to Ivory could have been for the benefit of the company."

36. I have also considered the interesting article *Informal Unanimous Assent of Beneficial Shareholders* by Peter Watts of the University of Auckland, Law Quarterly Review 2006 at 15. The following are extracts from that article:-

"What is unsettled is whether the concept, "the *Duomatic* principle", can be extended to the giving of assent by persons who are only the beneficial owners of shares."

And then the learned author goes through various cases including the Privy Council decision in the *Attorney-General for Canada v Standard Trust Co of New York* [1911] A.C. 498 and I continue with the extract:-

"There are difficulties, it is suggested, in a straightforward assertion that the assent of beneficial owners suffices. ... Generally speaking, company structures have made no provision for participation by merely beneficial owners of shares, and indeed the rules positively suppress recognition of trusts of shares, in order to simplify a company's relations with its shareholders. ... Without express provision in the articles, therefore, beneficiaries of a trust cannot vote as such. However much their assent may give rise to personal liability, they have no standing to act for the company."

37. In the circumstances of the case presently before this court, I am not satisfied that the *Duomatic* principle is applicable. Indeed, I am satisfied that the *Duomatic* principle is not applicable in the circumstances of this case. Moreover, I am not satisfied that the Beneficial Owner was acting as agent for the registered legal owners.

38. On the facts of this case, it cannot validly be suggested that the First Defendant was the authorised agent of the registered legal owners or that they have held him out in some way as the agent of the company.

39. Moreover, I am not satisfied that the Beneficial Owner was acting in good faith or with proper regard to the best interests of the company or the interests of the creditors of the company. His actions seem solely motivated by his desire to protect his own personal interests and that would involve prejudicing the interests of others, including creditors of the company.

40. I am informed that he has yet to account to the duly appointed Receiver. The Claimant's position appears to be that the First Defendant has acted to the detriment of the lawful creditors of the Company. This court should not and cannot condone such conduct.

41. I turn now to the conclusions I have reached in connection with the claim and the legal issues that have arisen for determination and I conclude as follows.

42. The First Defendant, John Stewart Simpson, had no power to convene an extraordinary general meeting of the members of Kolemos Limited or to attend and vote at an extraordinary general meeting. The First Defendant did not have any power under the Companies Acts or the Articles of Association of Kolemos Limited to remove or appoint directors of the company.

43. The purported appointments of the Second and Third Defendants, that is Christopher Martin Dixon and Franklyn Bevan, were invalid. There was no appointment at all. Section 142 of the Companies Act 1931 does not save the acts of the Second and Third Defendants in purporting to grant the power of attorney dated the 31st May 2005. Such power of attorney was not validly granted. The *Duomatic* principle does not assist the First Defendant in the circumstances of this case.

44. I grant the following relief by way of declaration. It is declared that the purported appointment of Christopher Martin Dixon and Franklyn Bevan as directors of Kolemos Limited on the 2nd February 2005 was not valid under the laws of the Isle of Man and Mr. Dixon and Mr. Bevan were not so appointed as directors of Kolemos Limited. Consequently, the power of attorney dated the 31st May 2005, purportedly granted by Mr. Dixon and Mr. Bevan as directors of Kolemos Limited, to John Stewart Simpson to act on behalf of Kolemos Limited was not valid under the laws of the Isle of Man.