Neutral Citation Number: [2022] EWCA Civ 22

Case No: A3/2021/1273

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
HIS HONOUR JUDGE JARMAN QC
SITTING AS A JUDGE OF THE HIGH COURT
[2021] EWHC 1783 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/01/2022

Before :

SIR JULIAN FLAUX, THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE NEWEY
and
LORD JUSTICE EDIS

- -

Between :

CEREDIGION RECYCLING & FURNITURE TEAM	**Claimant/ First Respondent**
-and-	
(1) CLIFFORD POPE	**First Defendant/ Applicant**
(2) ALLISON CANN	**Second Respondent**

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Guy Adams (instructed by **Redkite Law LLP**) for the **First Defendant/Applicant**
Lydia Seymour (instructed by **Hugh James Solicitors**) for the **Claimant/Respondent**
Joshua Griffin (appearing pro bono) for the **Second Defendant/Second Respondent**

Hearing date: 30 November 2021

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Approved Judgment

Sir Julian Flaux C:

Introduction

1. The first defendant to these proceedings, Clifford Pope, applies by an application notice dated 9 August 2021 under CPR 52.30 and this Court's inherent jurisdiction for an order that permission be granted to reopen the appeal, following refusal by Popplewell LJ on paper of permission to appeal against the Order dated 20 July 2021 of HHJ Jarman QC ("the judge"), sitting as a Judge of the High Court in the Business List (Chancery) of the Business and Property Courts in Wales at Cardiff. The judge held, inter alia, that the claimant was entitled to relief (to be dealt with at a later hearing) for breaches by both defendants of their duties as directors of the claimant.

2. The application to reopen the appeal came before Andrews LJ on paper on 11 August 2021. In the Order she made she considered that Popplewell LJ had not directly engaged with one of the issues raised by the first defendant's proposed appeal and ordered that the application to reopen should be dealt with at the same time as the application for permission to appeal, if reopening the appeal was allowed, at a hearing before the full Court, which the claimant was directed to attend. That hearing took place before this Court on 30 November 2021.

The factual background and the judgment below

3. The factual background which is of significance for the present application can be derived from the findings in the judgment of the judge dated 30 June 2021, none of which findings is challenged in the proposed appeal. The claimant is a company limited by guarantee incorporated in 1998 to take over a project started some years earlier by volunteers in Aberystwyth to recycle furniture and other domestic items. One of the volunteers was the first defendant who became a director, with four others. Clause 5 of the Memorandum of Association provided:

> "The income and property of the Company whencesoever derived shall be applied solely towards the promotion of the objects of the Company as set out herein and no portion shall be paid or transferred directly or indirectly to the members of the Company except by way of payment in good faith of reasonable and proper wages, bonuses and repayments (including loans) of expenses to any member or employee of the Company in return for any services actually rendered to the Company."

The Memorandum also provided that clause 5 "may only be changed by a unanimous vote of all Members at an Extraordinary General Meeting…"

4. In 2003 the claimant purchased a property which then comprised a derelict platform at Aberystwyth Railway Station and adjacent waste land for £50,000, £40,000 of which was raised by mortgage. The claimant employed professionals to design and build an ecologically sustainable building on the land. Just under £2.7 million was received to fund the design and build from public bodies including the Welsh European Funds Office and the local authority. The claimant moved into the new premises ("the property") in 2006, by which time the directors had reduced to three, the first and

second defendants and another, who resigned in 2009, after which the defendants were the only directors and members.

5. The first and second defendants took financial and accountancy advice in relation to the provision for themselves of pensions from the claimant. In a board meeting in March 2012, they agreed to make employer's contributions of £288,000 for the two of them into self -invested pension plans ("SIPPs") with Suffolk Life. These took the form of payments of appropriate portions of the freehold of the property funded by a £200,000 bank bridging loan. The claimant paid £288,000 to Suffolk Life. Further payments were made to the SIPPs later in 2012 and in 2013. By January 2014 95% of the beneficial interest in the property had been transferred into the SIPPs.

6. In July 2012 the defendants also arranged for the claimant to enter into a leaseback arrangement under which the claimant would pay rent to the SIPPs in increasing amounts as the freehold in the property was transferred to the SIPPs. In August 2014, the freehold of the property was transferred to Suffolk Life. Thereupon the rent became £60,000 per annum. By that stage £358,000 had been contributed by the claimant to the pensions of each of the defendant directors over a four year period. This represented almost the full value of the property.

7. The first defendant had identified four employees who might become additional or replacement directors. Towards the end of 2014 the transfer of the property, the leaseback and pension payments came to the attention of the local press and adverse articles appeared in the papers. The four indicated they did not wish to become directors although two were co-opted onto the board in June 2015. The following month, a budget statement was presented to the board which made no provision for directors' salary for 2016/2017. The claimant was suffering from poor performance. The second defendant was unhappy with this and resigned as a director in December 2015. The first defendant continued as a director, though he ceased to work for the claimant in March 2016 and resigned as a director in December 2017.

8. In March 2019, the claimant issued the claim form in the present proceedings. Against the first and second defendants the claimant claims that the transfer of the property to the SIPPs amounted to a breach of their duties as directors and seeks the return of the property or alternative and consequential relief. The defendants deny any wrongdoing, contending that, as the claimant was a company limited by guarantee with no shareholders, they were entitled as the only members and directors to make the transfer and their actions could be attributed to the claimant, so that they had acted lawfully. On behalf of the first defendant Mr Guy Adams relied on section 39(1) of the Companies Act 2006 ("the 2006 Act") which provides that the validity of any act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's constitution and on section 40(1) which provides that in favour of a person dealing with the company in good faith, the power of the director to bind the company, or to authorise others to do so, is deemed to be free of any limitation under the company's constitution.

9. As recorded by the judge in the section of his judgment headed "Issues of law" Mr Adams relied on the line of authorities from *Salomon v Salomon & Co Ltd* [1897] AC 22 to *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] 1 Ch 259, in support of his submission that a company is bound in

a matter which is intra vires the company by the unanimous agreement of its members or shareholders and, if the company was solvent, no complaint could be made.

10. At [80] of his judgment the judge noted that Mr Adams submitted that the decision in respect of the pension arrangements could be attributed to the company. The judge referred to the Supreme Court decision in *Bilta (UK) Ltd v Nazir (No 2)* [2015] UKSC 23 citing passages from the judgments including that of Lord Neuberger PSC who stated the principle in relation to attribution at [7]:

> "Where a company has been the victim of wrong-doing by its directors, or of which its directors had notice, then the wrong-doing, or knowledge, of the directors cannot be attributed to the company as a defence to a claim brought against the directors by the company's liquidator, in the name of the company and/or on behalf of its creditors, for the loss suffered by the company as a result of the wrong-doing, even where the directors were the only directors and shareholders of the company, and even though the wrong-doing or knowledge of the directors may be attributed to the company in many other types of proceedings."

11. The judge also referred to the so-called *Duomatic* principle on which Mr Adams relied, saying at [85] and [86] of his judgment:

> "85 Lord Toulson at paragraph 187 referred to the non-statutory "consent principle," that shareholders who have a right to vote may by unanimous agreement bind the company in a matter in which they had power to do so by passing a resolution at a general meeting (*In re Duomatic Ltd* [1969] 2 Ch 365).
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> 86 However, this principle does not apply if a decision is invalid because it is a fraud or ultra vires. See Palmer's Company Law at 7.446:
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> > "The Duomatic principle does not permit shareholders to do informally what they could not have done formally by a resolution. It follows that it cannot be used to ratify any act which is ultra vires the company, such as an unlawful payment of dividends, or the exercise of powers for an improper purpose."'

12. The judge considered that regard had to be had to the issue of vires notwithstanding section 39 of the 2006 Act which he considered was concerned with capacity rather than vires. He also referred at [87] of his judgment to section 62 of the 2006 Act which provides that a company is entitled to omit "Limited" from its title, as did the claimant, provided the requirements of that section are met: that its objects are charitable; its articles require its income to be applied in promoting its objects and its articles prohibit the payment of dividends. The judge also referred to section 63 by which such a company must not amend its articles so that it ceases to comply with the conditions for exemption and commits a criminal offence if it does so. He accepted the submission by Ms Lydia Seymour for the claimant that the entitlement not to use "Limited" is a sign to the public that the company is not for profit, in other words that it cannot distribute

its assets, which suggests that the directors cannot ignore any prohibition against distribution in its memorandum and articles of association.

13. At [88], in relation to attribution, the judge said that it was clear from the judgments in the Supreme Court decision in *Bilta* that in deciding whether the principle of attribution applies to a claim by a company against its directors, regard is to be had to any wrongdoing on the part of the directors. Accordingly, he turned to consider the questions of vires and wrongdoing.

14. He began [90] of his judgment by concluding that the establishment of the SIPPs using the whole of the beneficial equity in the property did not constitute the establishment, maintenance or joining of a pension scheme within clause 4.2 of the Memorandum and that it is clear that the scheme went well beyond the payment of proper wages within clause 5. He concluded that the sums which the defendants awarded themselves were not proper, reasonable or in good faith.

15. He noted at [91] that Mr Adams submitted that the defendants could have used the power of amendment to remove the restriction of distribution to members in clauses 5 and 9, but said that the short answer to that point was that they did not do so. The judge cited what Cotton LJ said in *Imperial Hydropathic Hotel Company Blackpool v Hampson* (1882) 23 ChD 1:

> "Now in my opinion it is an entire fallacy to say that because there is power to alter the regulations, you can by a resolution which might alter the regulations, do that which is contrary to the regulations as they stand in a particular and individual case."

16. The judge then turned to consider whether the two defendants were in breach of their duties under sections 171 to 177 of the 2006 Act and of their fiduciary duty to the company. He concluded at [92]-[93] that, in putting into effect the schemes, the directors did not act within the powers of the company, in breach of the duty under section 171 and in using the main asset of the company for the scheme and exposing the company to rent without being able to hire out rooms they failed to promote the success of the company, in breach of the duty under section 172. By taking these steps without computing the amounts of previous underpayments, they failed to act with reasonable skill and diligence, in breach of the duty under section 174 and put themselves in a position of conflict with the company, in breach of the duty under section 175. The judge held that when all those factors were taken into account, the first and second defendants were in breach of their fiduciary duties to the company. None of these findings of breach of duty is challenged on this proposed appeal.

17. The judge went on to consider, applying the test for dishonesty set out by the Supreme Court in *Ivey v Genting Casinos Limited* [2017] UKSC 67, whether the first and second defendants had acted dishonestly in setting up the SIPPs. The judge held that the factors relied upon by Ms Seymour were a strong indication of dishonesty. However, he concluded that they were both beguiled by various pieces of advice they received, so that they each took their eyes off the interests of the company and focused instead on their own interests. Hence, they fell into the breaches of duty, but applying the *Ivey* test they fell short of the mark of dishonesty.

18. Because Suffolk Life were entitled to make submissions on the relief sought by the claimant and because the claimant had not calculated the precise losses it had suffered as a consequence of the breaches of duty, the judge adjourned the issue of relief to a further hearing.

The grounds of appeal

19. The first defendant's grounds of appeal are that the judge was wrong as a matter of law to draw a distinction between the capacity and powers of the company and to find that the first and second defendants had acted outside the powers and in breach of duty. He contends that the capacity of the claimant company under the 2006 Act was not limited by anything in the memorandum or by section 62 and that the judge ought to have found that the company, acting by or with the unanimous agreement of its members had capacity and power to deal with its property in any lawful manner, which included the sale and leaseback of its property to and from Suffolk Life and the remuneration of the first and second defendants in the manner found by the judge. In the circumstances the claimant had no grounds for complaint against the first and second defendants as directors.

The refusal of permission to appeal and the subsequent order of Andrews LJ

20. On 2 August 2021, Popplewell LJ refused permission to appeal. His reasons were as follows:

> "The judge was right to treat the payments as beyond the capacity and powers of the company by reason of clause 5 of the Memorandum unless the *Duomatic* principle was capable of applying so as to treat the agreement to the arrangements by Mr Pope and Ms Cann as members as having the same effect as a unanimous vote of members at an EGM to amend the Memorandum to remove the restriction. The judge held that their agreement was not capable of having that effect because (i) it was not an agreement to alter the Memorandum but merely to make the specific arrangements for the particular distributions: [71] relying on *Imperial Hydropathic Hotel v Hampson*; and (ii) such an amendment would be prohibited by s.62 CA 2006 for a company limited by guarantee without "limited" in its name: [87]. An appeal cannot succeed unless the judge was wrong on both these points. He was unarguably right on both."

21. The first defendant then issued the present application to reopen that refusal of permission to appeal. Andrews LJ made her order on 11 August 2021. Having set out the test under CPR 52.30, she said that on the face of it the judge's decision and Popplewell LJ's reasons both appeared unimpeachable. The first defendant's position was not an attractive one, yet Popplewell LJ's reasoning is dependent on the judge being right that the capacity and/or powers of the company were limited by clause 5 of the memorandum despite the members acting unanimously and that issue was the nub of the first defendant's challenge to the judgment.

22. She considered that Popplewell LJ did not directly engage with that issue nor did he give any explanation of why the first defendant's argument that the abolition of the ultra

vires doctrine by the 2006 Act has restored the position at common law is one which stands no real prospect of success. She considered it sufficiently arguable that Popplewell LJ did not grapple with the key issues raised on this appeal as to warrant the matter being called in for reconsideration at an oral hearing. She then ordered the application to reopen and, if that application were granted, the application for permission to appeal to be dealt with by the full Court at this hearing. She also granted a stay of the proceedings at first instance pending the determination of the application to reopen.

The parties' submissions

23. In spirited and bold submissions, Mr Adams on behalf of the first defendant focused not so much on CPR 52.30 (which is the specific provision in the CPR setting out the conditions for the reopening of appeals) as on what he submitted was the inherent jurisdiction of this Court to review the decision of Popplewell LJ, as recognised by CPR 3.1(7), which he submitted gave the Court power to vary or revoke his Order. He submitted that the first defendant had a right of appeal to the Court of Appeal by virtue of section 16 of the Senior Courts Act 1981 and any exercise of a power to refuse permission to appeal unless the proposed appeal is hopeless is an interference with that right of access to the Court of Appeal. A court was not competent by the exercise of powers over its own practice and procedure to alter its substantive jurisdiction: *A-G v Sillem* (1864) 10 HL 704.

24. Mr Adams contended that, by the Judicature Act 1873, the Court of Appeal was established as a Court of Record and all appellate jurisdiction formerly exercised by other higher courts was transferred to the newly established court. That jurisdiction included the jurisdiction of the Court of Chancery to re-hear its own decisions: *Re St Nazaire Company* (1879) 12 Ch D 88 at 97-98 per Sir George Jessel MR. He submitted that since the appellate jurisdiction like all substantive jurisdiction derives from the Crown (*ibid* at 97) it was doubtful whether the Crown in Parliament could limit as opposed to redistribute the substantive judicial power to administer justice according to the law just as the Crown in Parliament cannot limit or fetter its own jurisdiction to legislate.

25. Mr Adams submitted that there is a distinction as a matter of principle between on the one hand permission required as a pre-condition of a substantive right of appeal (as in the case of many statutory appeals and appeals to the Supreme Court) and rights of appeal which are subject to a subsequent procedural requirement of permission. He submitted that appeals to the Court of Appeal fell into the latter category. The effect of section 54(1) of the Access to Justice Act 1999 was to make the pre-existing substantive right to appeal subject to a subsequent procedural limitation that the right of appeal *"may only be exercised with permission"*. The nature of the determination by a single Lord or Lady Justice of Appeal as to whether to grant or refuse permission is not a substantive determination of the appeal, but a procedural filter against frivolous or unmeritorious proceedings. Mr Adams relied in that regard on what was said by Lord Hoffmann giving the judgment of the Privy Council in *Kemper Reinsurance v Minister of Finance* [2000] 1 AC 1 at 14G.

26. Mr Adams submitted that, where the proposed appeal raised a properly arguable point of law, it was the duty of the Court of Appeal to deal with it. It was not for a single member of the Court sitting in his or her room to decide at the stroke of a pen which

litigants got a right of appeal. He submitted that if permission to appeal was wrongly refused by a single Lord or Lady Justice of Appeal on a properly arguable point of law, then that decision was void and a nullity and his client was entitled to have that decision reviewed by another member of the Court or by the full Court. This was only consistent with the rule of law and this Court's supervisory jurisdiction to review the decision of the original Lord or Lady Justice was borne out by CPR 3.1(7).

27. To the extent that previous decisions of this Court had sought to limit the power to reopen to CPR 52.30, those decisions were not binding since they concerned only matters of practice. Mr Adams relied upon what was said by Lord Reed PSC in *R (Gourlay) v Parole Board* [2020] UKSC 50; [2020] 1 WLR 5344 at [37]:

> "The counterpart of this restraint on the part of the Supreme Court is that the Court of Appeal must fulfil its primary responsibility for monitoring and controlling developments in practice, including developments in relation to costs. It cannot do so, however, unless it is able to keep its decisions laying down principles of practice as to how lower courts should exercise their discretion in relation to costs, such as *Davies*, under review. That entails that its decisions on such matters cannot be treated as binding precedents, in the sense in which that expression is generally understood: that is to say, precedents which the Court of Appeal is required to follow in accordance with the principles laid down in authorities such as *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 and *Davis v Johnson* [1979] AC 264. Were the position otherwise, the Court of Appeal would be severely restricted in its ability to introduce changes in practice, since any departure from its previous decisions could only be brought about by appeals to this court."

28. Mr Adams submitted that not only were those previous decisions of this Court on rule 52.30 not binding, but they were wrongly decided since they failed to recognise the important supervisory jurisdiction of this Court to consider whether, where a single Lord or Lady Justice has gone wrong, the point raised is a proper point to go on appeal.

29. Mr Adams submitted that this case raised an arguable point of law which was whether, as he contended, in the light of the abolition of the ultra vires doctrine by section 39 of the 2006 Act, the capacity of the company is no longer limited by anything in its memorandum and articles but only by the general law applicable to such companies. He submitted that the common law position had been restored. In other words, the directors as the members of the company could lawfully resolve to transfer the property to the SIPPs even if the memorandum and articles did not permit this. He relied upon the statements of the position at common law in *Riche v Ashbury Railway Carriage Co* (1874) 9 Ex 224 by Channell B in the Court of Exchequer at 227 and by Blackburn J on appeal to the Exchequer Chamber at 262-264. The common law position was also recognised in the House of Lords in that case ((1875) LR 7 HL 653), for example by Lord Cairns LC at 671.

30. He submitted that the first and second defendants as the only members of the company had determined to take this course which was within their capacity and so bound the company, so that no question of the members being in breach of duty or dishonest could

arise between themselves and the company. That was also the answer to what was said by Lord Neuberger PSC in *Bilta*.

31. Mr Adams submitted in reply that, if the test to be applied was that under CPR 52.30, the criteria for an appeal to be reopened set out in that rule were satisfied. An important and arguable point of law was raised by the proposed appeal and, in refusing permission to appeal, Popplewell LJ had failed to grapple with it. It was accordingly necessary to reopen the appeal to avoid a real injustice. The circumstances of the case were exceptional. He submitted that "exceptional" meant no more than outside the ordinary run of cases, relying on a statement to that effect in the judgment of the Privy Council delivered by Lord Brown in *Dymocks Franchise Systems v Todd* [2004] UKPC 39; [2004] 1 WLR 2807 at [25]. Finally he submitted that there was no alternative remedy as it would be wholly wrong to leave the first defendant to uncertain claims against professional advisers.

32. On behalf of the claimant, Ms Seymour submitted that merely by asserting that the decision of Popplewell LJ refusing permission was wrong and void, the first defendant could not get a second bite of the cherry. The circumstances in which the Court of Appeal will reopen an appeal (including a refusal of permission to appeal) are circumscribed by CPR 52.30. The jurisdiction under that rule is an exceptional one and the Court has no power to reopen an appeal unless each of the criteria in 52.30(1) is satisfied. If they are satisfied, then the Court has a discretion as to whether to allow a refusal of permission to appeal to be reopened.

33. Ms Seymour relied upon [2] and [3] of the judgment of Hickinbottom LJ in *R (Akram) v Secretary of State for the Home Department* [2020] EWCA Civ 1072; [2021] Imm AR 1:

> "2. The refusal of permission to appeal was a final determination of the appeal for the purposes of CPR rule 52.30(1), which provides that:
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> "The Court of Appeal… will not reopen a final determination of any appeal unless –
>
> (a) it is necessary to do so in order to avoid real injustice;
>
> (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
>
> (c) there is no alternative effective remedy."
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> Therefore, unless each of these criteria is satisfied, the court has no power to reopen an appeal. If they are each satisfied, then the court has a discretion to do so; although it may be difficult to envisage, in practice, circumstances in which the three criteria are satisfied and the court's discretion exercised not to reopen the appeal.
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> 3. The reopening of an appeal is approached in the same way as the reopening of a final judgment after full argument, in

> accordance with the principles set out in *Taylor v Lawrence* [2002] EWCA Civ 90; [2003] QB 528 and, more recently, in *Lawal v Circle 33 Housing Trust* [2014] EWCA Civ 1514; [2015] HLR 9 at [65], *R (Goring-on-Thames Parish Council) v South Oxfordshire District Council* [2018] EWCA Civ 1860; [2018] 1 WLR 5161 at [10]-[11] and [15] and *Singh v Secretary of State for the Home Department* [2019] EWCA Civ 1504 at [3]. It is an exceptional jurisdiction, to be exercised rarely. It will not be exercised simply because an earlier determination was (let alone, may have been) wrong, but only where there is a "powerful probability" that the decision in question would have been different if the integrity of the earlier proceedings has not been critically undermined. The injustice that would be perpetrated if the appeal is not reopened must be so grave as to overbear the pressing claim of finality in litigation."

34. Ms Seymour noted that the key importance of the need for the Court to be satisfied that "the integrity of the [permission to appeal] process has been undermined" was repeated by this Court in *Municipio de Mariana v BHP Group plc ("Mariana")* [2021] EWCA Civ 1156 (a case in which exceptionally the application to reopen succeeded) and more recently still in *R (Khan) v Secretary of State for the Home Department* [2021] EWCA Civ 1655 at [19].

35. She submitted that the first defendant could not satisfy any of the three criteria. Far from the refusal of permission to appeal causing injustice, to reopen the refusal and allow the first defendant to run his case on appeal would cause injustice. The overall findings of the judge at [90] and [93] of his judgment, none of which are challenged, amounted to conversion of the property by the defendants and yet, on the first defendant's case, their conduct cannot be scrutinised by the Court.

36. Ms Seymour submitted that the first defendant's argument about the effect of section 39 of the 2006 Act was a bad one. That is a provision to protect a third party dealing with a company from the internal restrictions on a company's capacity which may be contained within its constitution. Hence the section refers to: "the validity of an act done by a company". The section is not relevant and cannot be prayed in aid by a director who is facing a claim by the company itself. Such claims are expressly preserved by section 40(5) which provides that the section does not affect any liability incurred by the directors by reason of the directors exceeding their powers.

37. She submitted that the judge found that the directors were in breach of duties under sections 171, 172, 174 and 175 of the 2006 Act and in breach of fiduciary duty and their liability for those breaches of duty was preserved by section 40(5). The case of breach of duty the first and second defendants had to meet was not answered by saying that the company had the capacity to do what they wanted. They were still in breach of duties owed to the company, as the judge found.

38. She also submitted that Mr Adams' submission as to the effect of section 39 of the 2006 Act on the liability of the first and second defendants in this case was contrary to the Supreme Court authority of *Bilta* which was binding on this Court. If Mr Adams' construction of section 39 were correct, Lord Neuberger's analysis would be both wrong and otiose. There would be no need to consider attribution in cases where the

directors were the only shareholders or members of the company. No claim could be brought against them in the name of the company for loss suffered as a result of their wrongdoing since the simple answer would be that the shareholders or members had decided something which could not be challenged.

39. Ms Seymour submitted that Mr Adams' construction of section 39 is also inconsistent with sections 62 and 63. If, as he contended, no claim could be brought against the company or its directors and members for acting contrary to its memorandum and articles, there would be no purpose in these provisions preventing amendment of the memorandum and articles of a company limited by guarantee or in making such amendment a criminal offence.

40. On behalf of the second defendant (who has not appealed the judge's order) the only submissions advanced by Mr Griffin were that if the appeal were successful, the order should be set aside against both defendants and that any stay in the meantime should cover both defendants.

Discussion

41. Ingenious though Mr Adams' submissions were, they proceeded on the fundamental misapprehension that this Court has some inherent jurisdiction to review a decision by a single Lord or Lady Justice to refuse permission to appeal if the issue raised on appeal was an arguable one, so that the decision to refuse permission was "wrong". Such supposed jurisdiction would be completely contrary to CPR 52.30(1) and (2) which make it clear that it is only if the criteria set out in that rule are satisfied that the Court of Appeal will reopen a refusal of permission to appeal. It would also contradict a number of decisions of this Court on 52.30 which make it clear that it is never enough under that rule to demonstrate that the refusal of permission was arguably wrong. This is stated most clearly in the judgment of the Court (Sir Terence Etherton MR, McCombe and Lindblom LJJ) in *R (Goring on Thames Parish Council) v South Oxfordshire District Council* [2018] EWCA Civ 860; [2018] 1 WLR 5161 at [29]:

> "The court's jurisdiction under CPR 52.30 is, as we have said, a tightly constrained jurisdiction. It is rightly described in the authorities as "exceptional". It is "exceptional" in the sense that it will be engaged only where some obvious and egregious error has occurred in the underlying proceedings and that error has vitiated – or corrupted – the very process itself. It follows that the CPR 52.30 jurisdiction will never be engaged simply because it might plausibly or even cogently be suggested that the decision of the court in the underlying proceedings, whether it be a decision on a substantive appeal or a decision on an application for permission to appeal, was wrong. The question of whether the decision in the underlying proceedings was wrong is only secondary to the prior question of whether the process itself has been vitiated. But even if that prior question is answered "Yes", the decision will only be re-opened if the court is satisfied that there is a powerful probability that it was wrong."

42. Furthermore, contrary to Mr Adams' submission, the jurisdiction for which he contends cannot be derived nor does it receive any support from the power given in CPR 3.1(7).

In *Tibbles v SIG plc* [2012] EWCA Civ 518; [2012] 1 WLR 2591, this Court made clear that, whilst an exhaustive definition of the circumstances in which the discretion could be exercised was not possible, as a matter of principle it may normally only be exercised: (a) where there has been a material change of circumstances since the order was made or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated: see per Rix LJ at [39]. Mr Adams had not addressed this principle in his opening submissions and really had no answer in reply to the point made by the Court that he could not bring this case within it.

43. In other words, rule 3.1(7) will not avail the first defendant and any application to reopen the appeal can only be made under CPR 52.30. The "implicit" or "residual" jurisdiction of the Court of Appeal to correct injustice recognised by this Court in *Taylor v Lawrence* [2003] QB 528 was subsumed into what was rule 52.17 (now 52.30) which, as the note in the White Book at 52.30.1 states, was the procedure formulated by the Civil Procedure Rules Committee to regulate the exercise of the jurisdiction identified in *Taylor v Lawrence*. There is simply no other inherent jurisdiction to which the first defendant can have resort.

44. Furthermore, this application to reopen must fail unless the first defendant can satisfy the criteria set out in CPR 52.30(1). Not only is this clear from the wording of the rule itself, but the limits on the jurisdiction have been clearly stated in a number of decisions of this Court. Contrary to Mr Adams' submission, these decisions are not simply statements of practice not binding on this Court in the manner described in *Gourlay*, but authoritative statements of law (albeit on matters of procedure under the CPR) intended to be binding on this Court.

45. The principles applicable to applications to reopen under CPR 52.30 were recently summarised at [57] to [64] in the judgment of the Court (Sir Geoffrey Vos MR, Underhill VP and Carr LJ) in one of those cases, *Mariana*. Having set out the provisions of 52.30 and noted that 52.30 (previously 52.17) gives effect to the decision in *Taylor v Lawrence* [2003] QB 528, the Court stated at [59] that the most useful review since *Taylor v Lawrence* was in *Goring on Thames* [10]-[15] which the Court then quoted in full which I will also do:

> "10. The note in the White Book Service 2018 describing the scope of the rule states, at paragraph 52.30.2:
>
> > "… Rule 52.30 is drafted in highly restrictive terms. The circumstances described in r.52.30(1) are truly exceptional. Both practitioners and litigants should note the high hurdle to be surmounted and should refrain from applying to reopen the general run of appellate decisions, about which (inevitably) one or other party is likely to be aggrieved. The jurisdiction can only be properly invoked where it is demonstrated that the integrity of the earlier proceedings … has been critically undermined. … ."
>
> 11. We would endorse those observations, which are justified by ample authority in this court. The relevant jurisprudence is familiar, but the salient principles bear repeating here.

12. Giving the judgment of the court in *In re Uddin (A Child)* [2005] 1 WLR 2398, Dame Elizabeth Butler-Sloss, the President of the Family Division, observed that the hurdle to be surmounted in an application to re-open under CPR 52.17 (now CPR 52.30) was much greater than the normal test for admitting fresh evidence on appeal. She observed (in paragraph 18 of her judgment) that the *Taylor v Lawrence* jurisdiction "can in our judgment only be properly invoked where it is demonstrated that the integrity of the earlier litigation process, whether at trial or at the first appeal, has been critically undermined". And she added this (in paragraph 22):

> "22. … In our judgment it must at least be shown, not merely that the fresh evidence demonstrates a real possibility that an erroneous result was arrived at in the earlier proceedings (first instance or appellate), but that there exists a powerful probability that such a result *has in fact* been perpetrated. That, in our view, is a necessary but by no means a sufficient condition for a successful application under CPR r.52.17(1). It is to be remembered that apart from the requirement of no alternative remedy, "The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations": *Taylor v Lawrence* [2003] QB 528, para 55. Earlier we stated that the *Taylor v Lawrence* jurisdiction can only be properly invoked where it is demonstrated that the integrity of the earlier litigation process, whether at trial or at the first appeal, has been critically undermined. That test will generally be met where the process has been corrupted. It may be met where it is shown that a wrong result was earlier arrived at. It will not be met where it is shown only that a wrong result may have been arrived at."

13. In *Barclays Bank plc v Guy (No.2)* [2011] 1 WLR 681 Lord Neuberger M.R. said (in paragraph 36 of his judgment):

> "36. … If a party fails to advance a point, or argues a point ineptly, that would not, at least without more, justify reopening a court decision. If it could be shown that the judge had completely failed to understand a clearly articulated point, it is possible that his decision might be susceptible to being reopened (particularly if the facts were as extreme in their nature as a judge failing to read the right papers for the case and never realising it). … ."

14. In *Lawal v Circle 33 Housing Trust* [2014] EWCA Civ 1514, Sir Terence Etherton, then the Chancellor of the High Court, summarized the principles relevant to an application under CPR 52.30 (in paragraph 65 of his judgment):

> "65. … The following principles relevant to [the] application [of CPR 52.17, as the relevant rule then was] to this appeal appear from *Re Uddin (A Child)* … and *Guy v Barclays Bank plc* … . First, the same approach applies whether the application is to re-open a refusal of permission to appeal or to re-open a final judgment reached after full argument. Second, CPR 52.17(1) sets out the essential pre-requisites for invoking the jurisdiction to re-open an appeal or a refusal of permission to appeal. More generally, it is to be interpreted and applied in accordance with the principles laid down in *Taylor v Lawrence* … . Accordingly, third, the jurisdiction under CPR 52.17 can only be invoked where it is demonstrated that the integrity of the earlier litigation process has been critically undermined. The paradigm case is where the litigation process has been corrupted, such as by fraud or bias or where the judge read the wrong papers. Those are not, however, the only instances for the application of CPR 52.17. The broad principle is that, for an appeal to be re-opened, the injustice that would be perpetrated if the appeal is not reopened must be so grave as to overbear the pressing claim of finality in litigation. Fourth, it also follows that the fact that a wrong result was reached earlier, or that there is fresh evidence, or that the amounts in issue are very large, or that the point in issue is very important to one or more of the parties or is of general importance is not of itself sufficient to displace the fundamental public importance of the need for finality."

Sir Terence Etherton C went on to say (in paragraph 69):

> "69. … [The] appellants' reasons for re-opening the application for permission to appeal Judge May's possession order amount, on one view, to no more than a criticism that Arden LJ's decision to refuse permission to appeal was wrong. That is not enough to invoke the *Taylor v Lawrence* jurisdiction."

15. For completeness, there should be added to that summary of the principles in *Lawal* the requirement that there must be a powerful probability that the decision in question would have been different if the integrity of the earlier proceedings had not been critically undermined."

46. The Court in *Mariana* continued at [60] to [64] as follows:

> "60. The Court of Appeal (Sir Keith Lindblom SPT, Coulson and Andrews LJJ) revisited CPR 52.30 in *R (Wingfield) v. Canterbury City Council* [2020] EWCA Civ, [2021] 1 WLR 2863 ("*Wingfield*"), on the basis that "the clear message of

[*Goring*] has still not been understood". At [61], five principles were extracted from the authorities as follows:

> "(1) A final determination of an appeal, including a refusal of permission to appeal, will not be reopened unless the circumstances are exceptional (*Taylor v Lawrence*).
>
> (2) There must be a powerful probability that a significant injustice has already occurred, and that reconsideration is the only effective remedy (*Taylor v Lawrence*, ... *Re Uddin*).
>
> (3) The paradigm case is fraud or bias or where the judge read the wrong papers (*Barclays Bank v Guy*, *Lawal*).
>
> (4) Matters such as the fact that a wrong result was reached earlier, or that there is fresh evidence, or that the amounts in issue are very large or the point in issue is important, are not of themselves sufficient to displace the fundamental public importance of the need for finality (*Lawal*).
>
> (5) There must be a powerful probability that the decision in question would have been different if the integrity of the earlier proceedings had not been critically undermined (*Goring*...)."

61. Although that is a helpful summary, we would sound a note of caution about [62] in *Wingfield*, where the court recorded a submission that the combination of factors enumerated above "meant that in practical terms, the requirements of CPR 52.30 are 'almost impossible' to meet" and observed:

> "That may be so; but it seems to us that the difficulty of succeeding in a such an application is merely the inevitable consequence of the principles to which we have referred."

62. Experience shows that practitioners, and even sometimes judges, can fasten on phrases like "almost impossible to meet" and use them as a short-cut to avoid analysis of the circumstances of the particular case. It is better not to put glosses on the language of the rule itself, though of course illustrative guidance based on the case-law such as that given in *Goring* and *Wingfield* is sometimes helpful.

63. At [66] in *Wingfield*, the court said this:

> "In our view, an application for reconsideration of a refusal of permission to appeal involves a two-stage process. First, the

> court should ask whether the Lord or Lady Justice of Appeal who refused permission to appeal grappled with the issues raised by the application for permission, or whether they wholly failed so to do. Secondly, if the Lord or Lady Justice of Appeal did grapple with the issues when refusing permission to appeal, the court should ask whether, in so doing, a mistake was made that was so exceptional, such as wholly failing to understand a point that was clearly articulated, which corrupted the whole process and where, but for that error, there would probably have been a different result."
>
> 64. The claimants submitted that a judge considering an application for PTA must "grapple with" (or "engage with") the issues raised. This means, in our view, that the appellate judge should address the essential points raised by the grounds and identify why in their view the point in question does not satisfy the test for the grant of PTA: cf. *Wasif* at [20]. The concept of "grappling with" the issue does not connote any particular degree of detail: what is required depends on the case."

47. Turning to the application of those principles to the present case, in my judgment, Popplewell LJ did not expressly deal with Mr Adams' "essential point" that, section 39 of the 2006 Act having abolished the ultra vires doctrine, given that the decision to transfer the property to the SIPPs was a unanimous one of the only members of the company, the company could have no complaint. However, the point is a bad one for the reasons Ms Seymour gave. The fact that section 39 abolishes the ultra vires doctrine as between the company and third parties does not relieve the directors from liability to the company for their breach of duty or wrongdoing merely because, qua members, they agreed with the course which was taken. Not only is that liability of the directors expressly preserved by section 40(5) but *Bilta* in the Supreme Court makes it clear that knowledge of the breach of duty and wrongdoing by a director is not to be attributed to the company, even if the director is the sole shareholder or member.

48. In addition to the passage from the judgment of Lord Neuberger PSC cited at [10] above, there is a passage from the judgment of Lord Mance JSC at [42] which is also a complete answer to Mr Adams' "essential point":

> "Where the relevant rule consists in the duties owed by an officer to the company which he or she serves, then, whether such duties are statutory or common law, the acts, knowledge and states of mind of the company must necessarily be separated from those of its officer. The purpose of the rule itself means that the company cannot be identified with its officers. It is self-evidently impossible that the officer should be able to argue that the company either committed or knew about the breach of duty, simply because the officer committed or knew about it. This is so even though the officer is the directing mind and will of the company. The same clearly also applies even if the officer is also the sole shareholder of a company in or facing insolvency. Any other conclusion would ignore the separate legal identity of the

> company, empty the concept of duty of content and enable the company's affairs to be conducted in fraud of creditors."

49. Accordingly, as I have said, once it is recognised that this "essential point" is a bad one, that left the first defendant only with the other argument, that the arrangements made by the first and second defendants as members to transfer the property to the SIPPs could be treated as having the same effect as a unanimous vote of members at an EGM to amend the Memorandum to remove the restriction. Popplewell LJ did deal expressly with this argument in refusing permission to appeal, holding (i) that the judge was right to hold, relying on *Imperial Hydropathic Hotel Company Blackpool v Hampson* (1882) 23 Ch. D 1, that arrangements could not be treated as an agreement to alter the Memorandum; and (ii) that, in any event, such an amendment would be prohibited by section 62 of the 2006 Act for a company limited by guarantee without "limited" in its name, such as the claimant. As Andrews LJ recognised, the judge's reasons for rejecting that argument and Popplewell LJ's reasons for refusing permission to appeal in respect of it, are unimpeachable.

50. It follows that, although Popplewell LJ did not deal expressly with all Mr Adams' arguments, he was quite right to refuse permission to appeal. From this, it must also follow that the first defendant cannot begin to satisfy the first two criteria for reopening an appeal under CPR 52.30. There is no question of it being necessary to reopen the appeal to avoid real injustice and the first defendant cannot show that he has suffered any injustice from his application for permission to appeal being refused. Furthermore, there is no question of the circumstances of the case being exceptional. It is clear from the authorities on 52.30 (see for example [29] in *Goring on Thames* cited above) that "exceptional" here means more than merely out of the ordinary run of cases, but that an obvious and egregious error has occurred in the permission to appeal process which error has vitiated or corrupted the very process itself or as it is put in other cases, the integrity of that process has been critically undermined. In circumstances where Popplewell LJ may not have expressly dealt with a particular point, but was right to refuse permission to appeal, the first defendant comes nowhere near satisfying that test.

51. Given that the first defendant cannot satisfy the first two criteria, it is not necessary to decide whether he would satisfy the third, although I would incline to the view that the fact that he may have a claim over against his professional advisers, however complex or difficult that may be, means that he does potentially have an alternative remedy.

52. In all the circumstances, this application to reopen the refusal of permission to appeal must fail and is dismissed. It follows also that the stay of the proceedings at first instance granted by Andrews LJ must be lifted.

Lord Justice Newey

53. I agree.

Lord Justice Edis

54. I also agree.