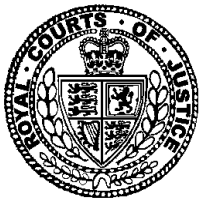

Neutral Citation Number: [2019] EWCA Civ 2146

Case No: A3/2017/0654

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
His Honour Judge David Cooke (sitting as a Judge of the High Court)
[2017] EWHC 28 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/12/2019

Before:

LORD JUSTICE NEWEY
LORD JUSTICE BAKER
and
LORD JUSTICE DINGEMANS

- -

Between:

(1) HENRY GEORGE DICKINSON **(2) JUDITH YAP DICKINSON**	**Appellants**
- and -	
(1) NAL REALISATIONS (STAFFORDSHIRE) LIMITED **(2) KEVIN JOHN HELLARD & GERALD KRASNER** **(Joint Liquidators of the First Respondent)**	**Respondents**

- -
- -

Mr Stephen Davies QC (instructed by **Francis Wilks & Jones**) for the **Appellants**
Mr James Barker (instructed by **Gateley plc**) for the **Respondents**

Hearing dates: 22-23 October 2019

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Approved Judgment

Lord Justice Newey:

1. This appeal concerns the validity of (a) the transfer of a property from the first respondent, NAL Realisations (Staffordshire) Limited ("NAL"), to the first appellant, Mr Henry Dickinson, in 2005 and (b) a share buy-back which NAL undertook in 2010. His Honour Judge David Cooke, sitting as a Judge of the High Court, held both to be invalid. That conclusion is challenged by Mr Dickinson and his wife Mrs Judith Dickinson, the second appellant.

Basic facts

2. NAL, which was formerly called "Norton Aluminium Limited", operated an aluminium smelting foundry in Norton Canes in Staffordshire. Mr Dickinson bought the company in 2000, and by the time of the events relevant to this appeal NAL's shares were held as to 50.6% by Mr Dickinson personally, as to 39.2% by the trustees of the H Dickinson Discretionary Settlement 2003 ("the Settlement"), and as to the remaining 10.2% by the trustees of the STB Engineering Ltd Directors SSAS ("the Pension Scheme"). In the course of the trial before Judge Cooke, it was assumed that the trustees of the Settlement were Mr and Mrs Dickinson, but counsel then appearing for the Dickinsons submitted in closing that it had not been established that Mrs Dickinson was a trustee and Mr James Barker, who was appearing for the respondents (as he did before us, too), said that he would accept that Mr Dickinson was able to act on behalf of the Settlement as if he had the authority of any other trustee (see paragraph 6 of the judgment). As regards the Pension Scheme, this was established in 2000 as a "small self-administered scheme" and, as such, was until April 2006 required to have amongst its trustees a "pensioneer trustee" with no connection to any scheme member (see regulation 9 of the Retirement Benefits Schemes (Restriction on Discretion to Approve) (Small Self-administered Schemes) Regulations 1991). Barnett Waddingham Trustees Limited ("BWTL") had that role until 6 April 2006, continuing thereafter as "professional trustee". Mr and Mrs Dickinson were the other trustees of the Pension Scheme.

3. During the relevant period, NAL's board comprised Mr and Mrs Dickinson and also, from 2008, Mr Robert Williamson. In practice, however, there were no formal board meetings. In the course of his oral evidence, Mr Dickinson explained that "Minuted board meetings were usually paper meetings at the instigation of either a financial institution or one of our professional advisers".

4. In September 2005, the freehold factory premises from which NAL traded were transferred by it to Mr Dickinson. A minute was produced recording a board meeting attended by Mr and Mrs Dickinson as directors and Mr Lynn Tranter as company secretary at which the directors resolved that NAL should sell the property to Mr Dickinson for £224,000 and take a lease back for a period of four years at a rent of £40,000 per annum, contracted out of the security of tenure provisions of the Landlord and Tenant Act 1954. The minute states that Mr Tranter expressed concern that the purchase price might be below market value, but Mr Dickinson disagreed. At trial, Mr and Mrs Dickinson both accepted that no meeting had in fact taken place. As the Judge explained in paragraph 68 of his judgment, "Mr Dickinson had simply instructed solicitors to produce the sale documents, including the minute, and signed it himself, which he regarded as sufficient". At some point in 2010, Mr Dickinson transferred the property into the joint names of himself and his wife. In 2011, Mr Dickinson increased the rent payable by NAL to £120,000 per annum with effect from October 2010.

5. By then, NAL was facing claims for nuisance from local residents in respect of odours, noise, smoke and dust from the foundry. Solicitors acting for potential claimants had sent a letter of claim in 2007 and by the beginning of 2010 they had indicated that they intended to apply for a group litigation order. In the event, a group litigation order was made on 26 May 2010, at that stage with 72 claimants named, and the matter came on for trial before His Honour Judge McKenna on 28 May 2012. In August 2012, Judge McKenna circulated a draft judgment in which he dismissed the claims based on noise, smoke and dust, but upheld 15 of the 16 lead claims in so far as based on odour. Extrapolating to other claimants, the damages were estimated at about £1.2 million, aside from the legal costs that the claimants could be expected to seek. After consulting an insolvency practitioner, NAL went into administration on 18 September 2012, and the administrators sold most of its assets to a company controlled by Mr Dickinson for £425,000. NAL went into liquidation on 29 January 2013. Its liquidators, Mr Kevin Hellard and Mr Gerald Krasner, are respondents.

6. Returning to events in 2010, NAL sought to buy back most of its issued shares pursuant to contracts dated 10 May 2010 with respectively Mr Dickinson, the Settlement and the Pension Scheme. In all, the company was to acquire 2.5 million shares. Each of the three contracts provided for the consideration for the relevant shares to be "nominal value payable in full upon completion" (in total, therefore, £2.5 million) and for completion to take place on 10 May.

7. As regards payment for the shares, the Judge said this in paragraph 42 of his judgment:

> "The company did not make actual payment of the purchase price of the shares, in the sense of a transfer of funds to bank or similar accounts of the shareholders. Mr Dickinson's intention, as appears from the earlier emails, was that the funds should be left in the company. He did not however immediately execute any document to record the terms on which this was to happen. His evidence was that he gave instructions on that day to Mr Tranter to make appropriate entries in the company's books. Journal entries were made, dated 31 May 2010, recording transfers from share capital account to loan accounts. Mr Tranter's evidence was that the entries were probably actually made in the books during the first week of June, but dated for convenience on the last day of the previous month. Though his witness statement referred to a 'verbal loan agreement' he said he had only had a brief conversation with Mr Dickinson when he was told that the buyback would be going ahead and the money would be left in as a loan. At the time the terms had not been agreed so he assumed it would be 'normal commercial terms'. He recalled being told it would be interest free."

8. The Judge went on to say in paragraph 43 that Mr Dickinson "began to explore the process of documenting the intended loans afterwards". A debenture in favour of Mr Dickinson, the Settlement and the Pension Scheme was subsequently executed by NAL. As to that, the Judge said in paragraph 46:

> "After revision the debenture was executed and sent to the solicitor for registration, probably on or about 9 June, as he

> received it on 10 June. The document then bore the date 20 May 2010, but the solicitor with Mr Dickinson's authority redated it twice before it was eventually successfully registered on 25 June with the date of creation said to be 3 June 2010 …."

9. The present proceedings were issued on 24 June 2013 by Mr Dickinson, seeking to recover sums which he said were secured by the debenture. NAL and its liquidators counterclaimed in respect of, among other things, the transfer of the company premises in 2005 and the share buy-back in 2010. Judge Cooke upheld each of these counterclaims. So far as the property transfer is concerned, he concluded that it had been made without authority and declined to grant Mr Dickinson relief under section 1157 of the Companies Act 2006 ("the 2006 Act"). As regards the share buy-back, the Judge concluded that it was void for non-compliance with section 691 of the 2006 Act. He also considered that should be set aside as a transaction defrauding creditors under section 423 of the Insolvency Act 1986 ("the 1986 Act"). He considered that "a payment for purchase of a company's own shares is to be regarded as equivalent to a dividend or distribution to shareholders in return for which the company receives no consideration" (paragraph 99) and so a "transaction at an undervalue" within section 423(1)(a) of the 1986 Act. The Judge further found that Mr Dickinson's dominant purpose was "to ensure that if the worst came to the worst he would be able to retain control of the business and its future profit potential and that little would be available in terms of realisable assets from which an adverse judgment could be satisfied" (paragraph 105) and that Mr Dickinson "wanted to achieve his objective in the most tax efficient way, but that objective was primarily to reduce the net asset value of the company and ensure that his interests (in which I include the interests of the pension scheme and the settlement) ranked ahead of the environmental claimants" (paragraph 106).

10. By his order, the Judge declared both the purported property sale and the share buy-back to be void and of no effect. He further declared that the Dickinsons held the property on trust for NAL, in which the entirety of the beneficial interest was vested, and that Mr Dickinson and NAL were liable to account to each other for respectively rent and the £224,000 price of the property. The Dickinsons were also ordered to transfer legal title to the property to NAL.

11. The unravelling of the property transfer that the Judge had held to have been effected without authority could alternatively, perhaps, have been approached by reference to principles governing rectification of title to registered land (compare e.g. *Knightsbridge Property Development Corporation (UK) Ltd v South Chelsea Properties Ltd* [2017] EWHC 2730 (Ch)). That, however, is of no significance to this appeal. The parties' focus has been on the substance of the Judge's decision rather than the mechanics of giving effect to it.

12. I turn, then, to consider, first, the property transfer and, secondly, the share buy-back.

The property transfer

13. Mr Stephen Davies QC, who appeared for Mr and Mrs Dickinson, challenged Judge Cooke's conclusions in respect of the property transfer on the basis that the *Duomatic* principle applied or, were that wrong, that relief ought to have been granted under section 1157 of the 2006 Act.

The Duomatic *principle*

14. The *Duomatic* principle takes its name from the decision of Buckley J in *Re Duomatic Ltd* [1969] 2 Ch 365. In that case, Buckley J said at 373:

> "where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be".

More recently, Neuberger J summarised the principle in these terms in *EIC Services Ltd v Phipps* [2003] EWHC 1507 (Ch), [2004] 2 BCLC 589 at paragraph 122:

> "The essence of the *Duomatic* principle, as I see it, is that, where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. Whether the approval is given in advance or after the event, whether it is characterised as agreement, ratification, waiver, or estoppel, and whether members of the group give their consent in different ways at different times, does not matter."

15. Before Judge Cooke, it was accepted by the Dickinsons' counsel that, the property transfer not in fact having been approved at a board meeting, "the purported agreement for sale was prima facie void and Mr Dickinson held the property on trust for the company" (paragraph 70 of the judgment). Further, the Judge "reject[ed] the case that the purchase was authorised or ratified by the unanimous approval or acquiescence of the shareholders". The difficulty, as the Judge saw it, lay with the Pension Scheme. In that connection, the Judge said:

> "71. … [Mr Dickinson] was not however the sole trustee of the pension scheme and cannot be regarded as being the alter ego of the trustees collectively. There is no plea that he had authority to act on behalf of the other trustees of the pension scheme, nor is there any evidence from which I can conclude that he had such authority.
>
> 72. Mr Dickinson said in evidence that he regarded himself as able to act on behalf of the pension scheme in all matters since he had established it and he and his wife are the beneficiaries of it. The best evidence he could produce in support of that however was a letter written by the professional trustee to a firm of stockbrokers confirming that the brokers could act on Mr Dickinson's instructions in relation to individual purchases and sales of investments. That was very far from a general authority even in relation to handling trust investments; the same letter makes clear that all investment proceeds are to be paid into an

> account over which the professional trustee has control. A further indication against the existence of any general authority is that when the professional trustee found out that Mr Dickinson had entered into the share buyback agreement on the basis that the purchase price would be left outstanding on loan account, it did not agree to accept those terms and insisted that the proceeds payable to the pension scheme should be actually paid by the company into a separate account over which it had control.
>
> 73. There is no evidence that the professional trustee was even told about the property sale, let alone that it actually consented to it or authorised Mr Dickinson to enter into it. Nor is there any pleaded case, or evidence, that the professional trustee came to learn of the property sale and, being aware of its potential invalidity, subsequently consented to it or acquiesced in it."

16. Before us, Mr Davies advanced essentially two arguments for the *Duomatic* principle applying to the property transfer. The first was based on Mr and Mrs Dickinson's membership of the Pension Scheme. Mr Davies argued that they were the only members, that they had assented to the property transfer and that that sufficed for *Duomatic* purposes. The result would be the same, Mr Davies suggested, even if the Pension Scheme had other potential beneficiaries, in the light of the decision of the Court of Appeal in *Butt v Kelson* [1952] Ch 197. As for Mrs Dickinson's position, Mr Davies said that it was enough for his purposes that she could be seen to have left matters to her husband.

17. In the alternative, Mr Davies argued that Mr Dickinson could on his own have represented the Pension Scheme at a meeting of NAL's shareholders, and voted its shares, and that it followed that Mr Dickinson's support for the property transfer satisfied the requirements of the *Duomatic* principle. In this context, the register having been checked since the trial, it is to be noted that the Pension Scheme was entered in NAL's register of members as "The Trustees of the STB Engineering Limited Directors SSAS".

18. Mr Barker pointed out that the argument outlined in the previous paragraph did not feature either at trial or in the grounds of appeal. In response, Mr Davies sought permission to amend the grounds of appeal. Mr Barker opposed that, but he fairly accepted that he was not prejudiced in a relevant way by the late appearance of the point. In all the circumstances, I consider it appropriate to accede to the application to amend the grounds of appeal.

19. Turning to the contention based on the Dickinsons' membership of the Pension Scheme, I noted in *Re Tulsesense Ltd* [201] EWHC 244 (Ch), [2010] 2 BCLC 525 that the question whether the approval of a share's beneficial owners can satisfy *Duomatic* requirements had been touched on in several authorities, including *Domoney v Godinho* [2004] 2 BCLC 15 and *Shahar v Tsitsekkos* [2004] EWHC 2659 (Ch), in each of which the point was considered unsuitable for summary determination. In *Shahar v Tsitsekkos*, Mann J said this in paragraph 67:

> "It seems to me that the point of principle relied on by [counsel for the claimant] (namely that the *Duomatic* principle can never

> apply to the consent of a beneficial but non-registered owner) is not clearly right, and it should not be determined on a summary judgment application such as this. In fact my view is that as a statement of principle it is wrong. I do not see why in an appropriate case the principle should not operate in relation to the consent or informed participation of a beneficial owner of shares if the facts justify it. It may well be that the appropriate analysis is the agency argument - in many cases it will doubtless be possible to argue that a nominee shareholder has left all the real decisions to his beneficiary so that technically the consent of the beneficiary is the consent of the registered shareholder."

20. In *Tulsesense*, I assumed, without deciding, that the assent of the beneficial owners of a share can meet *Duomatic* requirements. I am prepared to make the same assumption in the present case. Even so, Mr Davies' argument seems to me to face insuperable obstacles.

21. First, it has not been established that Mrs Dickinson approved the property transfer. The point was not important to the submissions being advanced at trial and so was not explored fully. Such evidence as there is, however, does not show Mrs Dickinson to have given the transfer any thought, let alone to have assented to it. When, for example, she was asked whether she remembered anything about the transaction, she said that she did not, that her husband "might or might not have mentioned it" and that she could not recall whether she had given any consideration to it. Mr Davies countered that it is enough for his purposes that Mrs Dickinson had left matters to her husband, but I do not agree. In *Schofield v Schofield* [2011] EWCA Civ 154, [2011] 2 BCLC 319, the Court of Appeal, endorsing a passage from *Tulsesense*, said at paragraph 32 that "nothing short of unqualified agreement, objectively established, will suffice" for the *Duomatic* principle. In the present case, it is abundantly clear that Mrs Dickinson did not give such agreement to the transfer itself, and neither has it been satisfactorily demonstrated that she delegated matters as regards the Pension Scheme to her husband.

22. Secondly, while Mr and Mrs Dickinson were the Pension Scheme's only members, they were not its only potential beneficiaries. The version of the Pension Scheme's rules which was current at the time of the property transfer has not been produced, but we do have rules dated 19 January 2007 which had effect from 6 April 2006. As might be expected, these provided for sums to be paid in certain circumstances to or for the benefit of one or more dependants or "Eligible Recipients", that expression being defined to refer to a person's "Spouse, his grandparents, such grandparents' descendants, such descendants' Spouses, his Dependants, persons interested in his estate and persons or unincorporated associations whom or that he has nominated to the Trustees in writing". The position is akin to that in *Thorpe v Revenue and Customs Commissioners* [2010] EWCA Civ 339, [2010] STC 964, where the rule in *Saunders v Vautier* (1841) Cr & Ph 240, to the effect that "In a case where the persons who between them hold the entirety of the beneficial interests in any particular trust fund are all sui juris and acting together … , they are entitled to direct the trustees how the trust fund may be dealt with" (to quote Walton J in *Stephenson v Barclays Bank Trust Co Ltd* [1975] 1 WLR 882, at 889), was held not to apply. *Thorpe*, like the present case, concerned a small self-administered pension scheme. Lloyd LJ said at paragraph 25 that the *Saunders v Vautier* principle "can in theory apply to a pension trust", but said

that it was clear to him that it was not applicable on the facts. He explained in paragraph 25:

> "At that time the fund was held to be applied in accordance with the rules so as to provide benefits as mentioned in the rules. On his retirement Mr Thorpe could take benefits including a limited lump sum and an annuity. He had not yet retired. If he had died in service the payment fell to be made at the trustees' discretion under rule 6, which would have gone, it is likely, to all or some of his children and his grandchildren. If he remarried or came to have other dependants, his widow or dependant might be entitled to benefits themselves. As the special commissioner said at para 46 of his decision, Mr Thorpe was not then entitled to the whole beneficial interest in the trust fund. It would have been a breach of trust to pay the fund over to him except in accordance with the terms of the deed and rules. [Counsel for Mr Thorpe] argued that the contingent benefits were only contractual and did not take effect by way of trust. I disagree. The fact that they could be varied, within limits, under cl 8 does not provide to me the slightest indication that they were contractual rather than taking effect as the beneficial trusts of the scheme which, within limits, were capable of being varied, as is true in many trusts. The contingent benefits, in particular those under rule 6, arose directly under the rules which gave effect to the trusts of the scheme. They were a good deal more real than, to take an example from the books, the possibility of a 65-year-old woman having a further child which in 1926 prevented the class being regarded as closed under *Saunders v Vautier*: see *Re Deloitte, Griffiths v Deloitte* [1926] Ch 56, [1925] All ER Rep 118."

Likewise, Mr and Mrs Dickinson were never entitled to the whole beneficial interest in the Pension Scheme, with the result that the *Saunders v Vautier* principle cannot have entitled them to require a transfer to themselves of the Pension Scheme's shares in NAL.

23. Thirdly, the Dickinsons cannot rely on an agency argument such as Mann J found plausible in *Shahar v Tsitsekkos*. Judge Cooke noted in paragraph 71 of his judgment that there was "no plea that [Mr Dickinson] had authority to act on behalf of the other trustees of the pension scheme, nor is there any evidence from which I can conclude that he had such authority".

24. Fourthly, in circumstances where (as in the present case) neither the trustees as a body nor all those beneficially interested delegated decision-making to one or more individuals, there can be no question of the *Duomatic* principle applying unless all those with beneficial interests in the shares approved the relevant matter. Arguing otherwise, Mr Davies cited *Butt v Kelson*, where the Court of Appeal held trustees to be obliged to allow a beneficiary to inspect documents of a company in which the trust held most of the shares if, among other things, he made out a proper case for inspection and was "not met by any valid objection by the other beneficiaries" (see 207). In the course of his judgment, Romer LJ said this at 207:

> "What I think is the true way of looking at the matter is that which was presented to this court by Sir Lynn Ungoed-Thomas, that is that the beneficiaries are entitled to be treated as though they were the registered shareholders in respect of trust shares, with the advantages and disadvantages (for example, restrictions imposed by the articles) which are involved in that position, and that they can compel the trustee directors if necessary to use their votes as the beneficiaries, or as the court, if the beneficiaries themselves are not in agreement, think proper, even to the extent of altering the articles of association if the trust shares carry votes sufficient for that purpose."

25. *Butt v Kelson* is a problematic case. In *Re George Whichelow Ltd* [1954] 1 WLR 5, Upjohn J said at 8 that the decision was "difficult to reconcile" with cases such as *Re Brockbank* [1948] Ch 206, which were not cited in *Butt v Kelson.* In *Re Brockbank*, Vaisey J concluded that even beneficiaries who were between them absolutely entitled to trust property could not control the exercise by their trustees of the power of appointment of new trustees. He said at 209:

> "It seems to me that the beneficiaries must choose between two alternatives: Either they must keep the trusts of the will on foot, in which case those trusts must continue to be executed by trustees duly appointed pursuant either to the original instrument or to the powers of s. 36 of the Trustee Act, 1925, and not by trustees arbitrarily selected by themselves; or they must, by mutual agreement, extinguish and put an end to the trusts, with the consequences which I have just indicated.
>
> The claim of the beneficiaries to control the exercise of the defendant's fiduciary power of making or compelling an appointment of the trustees is, in my judgment, untenable."

"[A]s long as the trust subsists," Vaisey J said at 210, "the trust must be executed by persons duly, properly and regularly appointed to the office". In a similar vein, Walton J said in *Stephenson v Barclays Bank Trust Co Ltd* at 889 that the fact that beneficiaries "are entitled to direct the trustees how the trust fund may be dealt with" "does not mean … that they can at one and the same time override the preexisting trusts and keep them in existence" and that neither are beneficiaries "entitled to direct the trustees as to the particular investment they should make of the trust fund". In *Holding and Management Ltd v Property Holding and Investment Trust plc* [1989] 1 WLR 1313 at 1324, Nicholls LJ took *Brockbank* as authority for the proposition that "So long as a trust continues, beneficiaries may not control the trustee in the exercise of his powers".

26. *Lewin on Trusts*, 19th ed., says of *Butt v Kelson* at paragraph 24-025:

> "At any rate since the restatement of the extent of trustees' obligation to permit disclosure of information, we think the decision is best viewed not so much as an interference with the trustees' discretionary powers as a decision that once a beneficiary had made out a proper case for disclosure the trustees

> were under a positive duty to exercise their voting rights to allow disclosure to take place."

Whether or not that is correct, *Butt v Kelson* should not be taken as derogating from the general principle stated in paragraph 24-024:

> "Though the beneficiaries acting together can bring the trust to an end … , they cannot, apart from statute, dictate how the trustees of an existing special trust are to exercise their powers."

Still less can any individual beneficiary or beneficiaries (such as, say, Mr and Mrs Dickinson) compel trustees to take a particular course.

27. In all the circumstances, I do not accept that the Dickinsons' membership of the Pension Scheme enables them to satisfy the requirements of the *Duomatic* principle.

28. Mr Davies' alternative argument was based on the proposition that Mr Dickinson could have represented the Pension Scheme at a meeting of NAL's shareholders, and voted its shares, on his own. In this connection, he relied on *Re Gee & Co (Woolwich) Ltd* [1975] 1 Ch 52, a decision of Brightman J. In that case, there had been a general meeting about which Brightman J said this at 62:

> "The general meeting was attended by Mrs. Campbell, who was the sole owner of 50 ordinary and 50 preference shares; she was also at that time a joint holder with Mrs. Saynor of 500 ordinary and 950 preference shares; Mrs. Campbell also attended as the representative of J. I. Campbell (Holdings) Ltd., which held 500 ordinary shares. The meeting was also attended by Mrs. Blanchard who held 50 ordinary shares. It is therefore correct to say that all the members of the company attended or were represented at that meeting. Resolutions were passed adopting the accounts and confirming the credit balance on the Eccles account similar to the resolutions passed at the board meeting."

In the context of an issue as to whether it was competent for directors to acknowledge a debt due to themselves, Brightman J said this at 71:

> "It seems to me plain that an acknowledgment signed by the directors in relation to their own debt would be fully effective if sanctioned by every member of the company. If so sanctioned I do not see how it could be said that the directors were acting in breach of their fiduciary duty. If authority is needed for that proposition, see for example *Parker and Cooper Ltd. v. Reading* [1926] Ch. 975 and *In re Duomatic Ltd.* [1969] 2 Ch. 365. The general meeting of the company at which the accounts were adopted and the state of the Eccles account confirmed, was in fact a meeting attended by, or by the representative of, every member of the company. The only absentee was one of the two joint holders of shares, which is irrelevant because the holder present could vote on behalf of both. In these circumstances, it

> seems to me plain that all the corporators must be taken to have agreed to the directors' written acknowledgment of the debt."

Mr Davies focused on Brightman J's reference to one of two joint holders of shares being able to vote on behalf of both.

29. Brightman J did not expand on why he considered that the jointly-owned shares could be voted by a single holder, but it may very well be that he had in mind article 63 of the Companies Act 1948's Table A, which provided that, "In the case of joint holders the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint holders". NAL adopted that article, but it was common ground before us that, there being no "senior" holder of the Pension Scheme's shares, it could not assist with the present case.

30. At all events, I do not accept that the trustees of the Pension Scheme are to be taken to have assented to the property transfer for *Duomatic* purposes. Had the transaction been considered at a general meeting of NAL, Mr Dickinson could not, as it seems to me, have voted the Pension Scheme's shares without authority from the trustees as a body, and he did not have that. In any case, as Mr Barker pointed out in his able submissions, Mr Davies' argument would imply that any of the three trustees of the Pension Scheme could have voted its shares, and there is no good reason to take Mr Dickinson's views as determinative. The *Duomatic* principle applies where "all shareholders who have a right to attend and vote at a general meeting" assent to a matter (to quote Buckley J in the *Duomatic* case) or "all members" of a group of shareholders approve (to quote Neuberger J in *EIC Services Ltd v Phipps*). Here, "The Trustees of the STB Engineering Limited Directors SSAS" were registered as shareholders and entitled to vote, but they did not approve the property transfer.

31. In short, I have not been persuaded that the *Duomatic* principle applied in relation to the property transfer.

Relief under section 1157

32. Section 1157(1) of the 2006 Act provides as follows:

> "If in proceedings for negligence, default, breach of duty or breach of trust against–
>
> (a) an officer of a company, or
>
> (b) a person employed by a company as auditor (whether he is or is not an officer of the company),
>
> it appears to the court hearing the case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit."

33. The origins of section 1157 of the 2006 Act can be traced back to section 3 of the Judicial Trustees Act 1896, which empowered the Court to relieve a trustee from

"personal liability" for a "breach of trust" if he had "acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach". That provision was essentially re-enacted as section 61 of the Trustee Act 1925. In the meantime, a comparable power to relieve company directors had been introduced by the Companies Act 1907, soon to become section 279 of the Companies (Consolidation) Act 1908, which allowed relief to be granted in respect of "negligence or breach of trust". Section 279 was replaced by section 372 of the Companies Act 1929, which referred to liability for "negligence, default, breach of duty or breach of trust". That, in turn, was substantially replicated in section 448 of the Companies Act 1948, section 727 of the Companies Act 1985 and, today, section 1157 of the 2006 Act.

34. The Courts' approach to relief under section 1157 of the 2006 Act can be illustrated by reference to *Re D'Jan of London Ltd* [1994] 1 BCLC 561, where relief was sought and granted under section 727 of the Companies Act 1985. Hoffmann J observed at 564:

> "It may seem odd that a person found to have been guilty of negligence, which involves failing to take reasonable care, can ever satisfy a court that he acted reasonably. Nevertheless, the section clearly contemplates that he may do so and it follows that conduct may be reasonable for the purposes of s 727 despite amounting to lack of reasonable care at common law."

Hoffmann J went on:

> "In my judgment, although Mr D'Jan's 99% holding of shares is not sufficient to sustain a *Multinational* defence, it is relevant to the exercise of the discretion under s 727. It may be reasonable to take a risk in relation to your own money which would be unreasonable in relation to someone else's. And although for the purposes of the law of negligence the company is a separate entity which Mr D'Jan owes a duty of care which cannot vary according to the number of shares he owns, I think that the economic realities of the case can be taken into account in exercising the discretion under s 727. His breach of duty in failing to read the form before signing was not gross. It was the kind of thing which could happen to any busy man, although, as I have said, this is not enough to excuse it. But I think it is also relevant that in 1986, with the company solvent and indeed prosperous, the only persons whose interests he was foreseeably putting at risk by not reading the form were himself and his wife. Mr D'Jan certainly acted honestly. For the purposes of s 727 I think he acted reasonably and I think he ought fairly to be excused for some, though not all, of the liability which he would otherwise have incurred."

The burden of proving honesty and reasonableness lies on those seeking relief (see *Bairstow v Queens Moat Houses plc* [2001] 2 BCLC 531, at paragraph 58).

35. In the present case, the Judge said that, "[a]ssuming that the jurisdictional qualification is satisfied", he was not persuaded that it was appropriate to grant relief (see paragraph 76 of the judgment). He explained as follows:

> "76. … I do not consider that Mr Dickinson can be said to have acted 'honestly and reasonably' in a situation where he has not, in my judgment, sought to act in the best interests of, or even with any proper regard to the interests of, the company as distinct from himself. The provisions of the Articles that he was in breach of existed to ensure that the interests of the company were properly considered either by members or by disinterested directors. It is difficult, in my view, to regard it as appropriate to excuse a director from the consequences of breach of duty to the company if he has not himself given the consideration to the interests of the company, as distinct from his own, that compliance was intended to ensure. Further, insofar as the relief sought would have the effect of validating the transfer it seems to me this would be more than relief from a breach of trust and amount to the discharge of the trust itself. I doubt whether that could be justified (if at all) in any but the most unusual circumstances.
>
> 77. There is no indication what benefit the company obtained from selling the site of its premises. There is no evidence that it needed to realise cash (I am not clear from the documents whether the purchase price was actually paid or simply charged to a loan account). There is no evidence that any valuation was obtained, and the sale price was less than 40% of the book value of the land and buildings …. It seems the company did not recognise in its accounts the extent of this loss, since it continued to show the buildings (but not the land) as included in its fixed assets even though those buildings must have transferred with the freehold and their value could not be realised separately from that freehold. This indeed was a point Mr Dickinson was keen to make when seeking to show that the company would be unable to satisfy a judgment against it.
>
> 78. Although there is no pleading that the transaction was at an undervalue, it seems clear that Mr Tranter at least was concerned that it might have been. It appears from the terms of the board minute that there must have been some discussion about the sale with Mr Tranter, and Mr Dickinson chose or agreed to record those concerns in the minute. His reason for dismissing those concerns was in part his own assessment, not supported by evidence before me, that he regarded the price as consistent with another local property sale. Had Mr Dickinson been acting honestly and reasonably in the interest of the company rather than himself, in my view he would have obtained a professional valuation to support the price being paid and put forward a

> reason why it was in the company's interests to sell and subsequently pay rent.
>
> 79. There is similarly no indication why it was in the company's interests to agree to a lease excluded from the provisions of the 1954 Act. The price is also said to have been justified by the payment of a rent substantially below market value, but there was no guarantee that this rent concession would be maintained after four years (and indeed in this case it is pleaded that the 'undertaking' to enter into a further lease on similar terms was no more than a non-binding statement of intent). The rent being paid already represented a substantial yield on the sale price, and that fact, together with the possibility that the yield might increase very substantially if the rent increased in future, is another indication why the price may have been questionable.
>
> 80. In his evidence, particularly in relation to the share buyback, Mr Dickinson maintained strongly that whilst the company was solvent, its own interests were to be equated with those of the members. That however can be no justification for the sale of the property to himself, since he was only one of the members and he failed to ensure, or at least to demonstrate, that the interests of the other members were properly protected by ensuring that the sale and lease back were for full value and on commercial terms.
>
> 81. I therefore refuse the application for relief. The consequence will be that (inter-alia) Mr Dickinson will be found to have held the property on trust for the company throughout and liable to restore it to the company and to pay compensation equal to the amount of rent paid or credited to him, which is put at £415,000 in the Defence."

36. As regards Mrs Dickinson, the Judge said this in paragraph 83:

> "Finally on this topic, although the Liquidators plead a breach of duty against Mrs Dickinson on the basis that she participated in the meeting authorising the transfer of the property, and notwithstanding that she did not originally deny any such participation, since it is now clear on the evidence that she played no part in the transaction it would be wrong, in my judgment, to hold her liable for breach of duty arising from the transfer itself. She is now a joint owner of the property following the transfer into joint names by Mr Dickinson. If there is any dispute about whether she ought to be ordered to join in a re-conveyance to the company I will hear submissions, but provisionally it appears to me that it would be difficult for her to resist such an order unless she was a bona fide purchaser for value, which is not I think suggested."

37. Two issues now arise. First, did the Judge in fact have jurisdiction to grant relief under section 1157 of the 2006 Act? Mr Barker said that he did not. If, secondly, there was jurisdiction, was the Judge wrong to decline to exercise it? Mr Davies said that he was.

38. As regards jurisdiction, Mr Barker argued that the conclusion that the property transfer was void did not depend on any finding of "negligence, default, breach of duty or breach of trust" but was based on the simple fact that the transfer was not authorised. Had the transfer instead been to someone who was not a director (say, a relative of the Dickinsons), there could have been no question of section 1157 applying: NAL would simply have claimed the return of its property. It would be illogical, Mr Barker said, if Mr Dickinson were in a more favourable position because he happened to be a director. The claim was against Mr Dickinson as recipient of property, not miscreant director, and so the jurisdiction to relieve from liability for "negligence, default, breach of duty or breach of trust" was irrelevant.

39. Mr Barker relied in support of his submissions on *Guinness plc v Saunders* [1990] 2 AC 663. In that case, Guinness claimed the return of £5.2 million from a Mr Ward on the basis that the payment had not been authorised by the company's board. The House of Lords held that Mr Ward had no arguable defence to the claim. Lord Templeman, with whom Lords Keith, Brandon, and Griffiths expressed agreement, said this at 695-696:

> "Mr. Ward requested the committee to pay him and received from the committee out of moneys belonging to Guinness the sum of £5.2m. as a reward for his advice and services as a director. Mr. Ward had no right to remuneration without the authority of the board. Thus the claim by Guinness for repayment is unanswerable. If Mr. Ward acted honestly and reasonably and ought fairly to be excused for receiving £5.2m. without the authority of the board, he cannot be excused from paying it back. By invoking section 727 as a defence to the claim by Guinness for repayment, Mr. Ward seeks an order of the court which would entitle him to remuneration without the authority of the board. The order would be a breach of the articles which protect shareholders and govern directors and would be a breach of the principles of equity to which I have already referred."

Lord Goff, with whom Lord Griffiths also agreed, arrived at these conclusions at 702:

> "Finally, I cannot see any prospect of success in a claim by Mr. Ward to relief under section 727 of the Act of 1985. Given that Guinness's claim must be one for the recovery of money paid to Mr. Ward under a void contract and received by him as a constructive trustee, there is no question of his being able to claim relief from liability for breach of duty, as might have been the case if Guinness's claim had been founded upon breach by Mr. Ward of his duty of disclosure.
>
> I have been very conscious, throughout this case, that Guinness is seeking summary judgment for the sum claimed by it, without any trial on the merits. Even so, I have come to the conclusion

> that Mr. Ward has no arguable defence to Guinness's claim. The simple fact emerges, at the end of the day, that there was, in law, no binding contract under which Mr. Ward was entitled to receive the money and that, as a fiduciary, he must now restore that money to Guinness. For these reasons, I would dismiss the appeal."

40. Mr Barker stressed Lord Goff's remarks in particular. He also referred us to *Customs and Excise Commissioners v Hedon Alpha Ltd* [1981] 1 QB 818. In that case, Customs and Excise claimed general betting duty from a company and its directors pursuant to the Betting and Gaming Duties Act 1972. The directors asked for relief under section 448 of the Companies Act 1948, but the Court of Appeal held that the section applied only to company claims, not to claims by third parties such as Customs and Excise. The Court further considered that Customs and Excise's claim was not one for "default" within the meaning of section 448. Stephenson LJ said at 824:

> "But I also agree that if section 448 could apply to claims by third parties the commissioners' claim is not a proceeding for default, since section 2 (2) gives a right to recover a debt against a director who is not in breach of any duty except a duty to pay on demand which he would not owe had it not been placed on him by the Act of 1972. If there was any default it was the company's and the third defendant did not even, in the words of section 4 of the Statute of Frauds 1677, 'promise to answer for the debt, default or miscarriages' of the company: he was required by the Act of 1972 to answer for it and the commissioners' action against him was not a proceeding in respect of default even if their action against the company was."

Ackner LJ said at 825-826:

> "Assuming that the word 'default' should be given its ordinary meaning not in any way limited by the context in which it appears in section 448, I would nevertheless take the view, as did the judge, that it was the company, as bookmaker, who was in default, by failing to comply with the obligation imposed upon it by section 2 (1). Since section 2 (2) imposed no duty upon the third defendant but merely gave the commissioners the right to sue in debt, there was no default by him.
>
> I do not, however, take the view that an unrestricted construction should be given to the word 'default.' In the context in which it appears in section 448, it signifies a species of misconduct by an officer of a company or a person employed by a company as auditor, against a liability for which a court may relieve him either wholly or in part. It is common ground that no element of misconduct is to be found in the foundation of a claim brought by virtue of section 2 (2) of the Act. Accordingly the question of default does not arise."

The third member of the Court, Griffiths LJ, said this at 827-828:

> "In my judgment section 448 has no application to the present claim. Although the section is expressed in wide language it is in my view clearly intended to enable the court to give relief to a director who, although he has behaved reasonably and honestly has nevertheless failed in some way in the discharge of his obligations to his company or their shareholders or who has infringed one of the numerous provisions in the Companies Acts, that regulate the conduct of directors.
>
> In these proceedings no allegation of any misconduct or breach of any obligation owed to the company or any other person is relied upon by the commissioners. It is true that the third defendant has not paid the betting duty when called upon to do so but I cannot regard that failure as a default within the meaning of that word where it appears in section 448. The word 'default,' where it appears in the section, is to be construed as a failure to conduct himself properly as a director of the company in discharge of his obligations pursuant to the provisions of the Act of 1948."

41. A further case which could be said to lend support to Mr Barker's case is *Re Clark* (1920) 150 LT Jo 94. In that case, property comprised in the estate of which the individual defendant was the executor had been leased and subsequently sold to another defendant, a company associated with the individual defendant. Eve J held that "the relationship of the [individual] defendant to the [defendant] company and his interest in it went to the root of the whole matter and disentitled the defendant company to retain the benefit of the lease, which was held to have been retained at an under-value from Nov. 1912 to April 1918, the sale to them on the footing that the lease was a subsisting lease being held void". Despite considering the individual defendant to have acted honestly, Eve J also declined to grant relief under the Judicial Trustees Act 1896. The report states in that connection:

> "the defendant having retained part of the trust estate, the Statute of Limitations and Judicial Trustees Act 1896 … , s.3, were not applicable to his case".

42. It is notable, too, that *Underhill and Hayton, "Law Relating to Trusts and Trustees"*, 19th ed., appears to assume that relief under section 61 of the Trustee Act 1925 is not available in respect of a proprietary claim. It states at paragraph 93.25:

> "All the above cases concerned trustees or personal representatives seeking relief from personal liability for losses arising from a breach of trust. In theory it could extend to relief from personal liability for profits, but this would be of little assistance if proprietary liability still remained in respect of the property (and its traceable product) acquired by the trustee. Thus, in practice, relief is accorded to honest hard-working trustees by awarding them an allowance for their endeavours."

43. On the other hand:

i) Framed as it is to extend to "negligence, default, breach of duty or breach of trust", section 1157 is broad in its scope;

ii) In *Re Claridge's Patent Asphalte Co Ltd* [1921] 1 Ch 543, section 279 of the Companies (Consolidation) Act 1908 was held to apply in relation to an ultra vires transaction. Astbury J said at 548:

> "In my opinion s. 279 clearly applies to a case of ultra vires. All applications of a company's money ultra vires the company are in fact breaches of trust on the part of the directors. The language of s. 279 is perfectly wide and general, and I see no reason for limiting the wide generality of that section to breaches of trust where no question of ultra vires comes in."

The transfer of property from NAL to Mr Dickinson without authority might be said to be comparable;

iii) In *Guinness v Saunders*, only Lord Griffiths expressed agreement with Lord Goff. Lord Templeman, in contrast, had the support of three other Law Lords, and, while he plainly saw the fact that Mr Ward was seeking an order which would "entitle him to remuneration without the authority of the board" as indicating that relief should not be granted under section 727 of the Companies Act 1985, it is not apparent that he considered that there was no jurisdiction to do so;

iv) At first instance in the *Guinness* litigation (see *Guinness plc v Saunders* [1988] BCLC 43, at 52), Browne-Wilkinson V-C said this about *Re Clark*:

> "There is authority on the statutory predecessor of s 61 of the 1925 Act (s 3 of the Judicial Trustee Act 1896) that a trustee who has retained part of the trust estate cannot be relieved from liability: *Re Clark* (1920) 150 LT 94. The case is inadequately reported and I have considerable doubt whether there is any absolute bar on relief in such circumstances, although relief must be improbable";

v) In *Coleman Taymar Ltd v Oakes* [2001] 2 BCLC 749, Judge Robert Reid, sitting as a Judge of the High Court, concluded that relief could be sought under section 727 of the Companies Act 1985 in respect of a claim for an account of profits arising from a director's breach of fiduciary duty. He said at paragraph 84:

> "In my judgment there is nothing in the wording of the section which disentitles a director from asking the court to excuse him under s 727 merely because the relief sought is an account of profits rather than damages. The section refers to relief from liability. Liability to account is just as much liability as liability to pay damages";

vi) *Re Duomatic* involved a claim by a liquidator to recover sums paid to a director which were alleged not to have been authorised. Buckley J granted relief under section 448 of the Companies Act 1948 in respect of some drawings which he

held not to have been duly approved, and there is nothing in the judgment to suggest that it mattered whether the claim was purely personal or also proprietary; and

vii) Mr Philip Sales, sitting as a Deputy High Court Judge, said in *Kinlan v Crimmin* [2006] EWHC 779 (Ch), 2007] BCC 106, albeit obiter, that, had he thought the claim otherwise well-founded, he would have considered it appropriate to grant relief under section 727 of the Companies Act 1985 in a case where the liquidators of a company established that an agreement under which the company had bought shares in itself from a director, Mr Crimmin, was void. Mr Sales said this:

> "62. Finally, I turn to consider whether Mr and Mrs Crimmin should be granted relief from any liability under s.727(1). The question of application of s.727 would only arise if I were wrong in my conclusion above that the claims against Mr and Mrs Crimmin should be dismissed. However, since I have heard the evidence given by Mr and Mrs Crimmin in these proceedings, it is right that I should express my view upon this point, in case the matter goes further.
>
> 63. In my judgment, if (contrary to the conclusions I have reached above on the law) Mr and Mrs Crimmin or either of them are to be regarded as having acted in breach of duty or trust, or as being in default in any way, by virtue of their part in causing the company to enter into the agreement, or by their playing a part in procuring the payment of the £122,500 to Mr Crimmin, or by Mr Crimmin receiving those monies and keeping them for his own benefit, this is a case in which it would be appropriate for the court to exercise its power under s.727 to relieve each of them from any resulting liability in respect of those monies. In my judgment, each of them has acted honestly and reasonably in all the circumstances, and ought fairly to be excused from liability in respect of the whole sum actually received by Mr Crimmin."

44. I have not found this an easy point, but I have in the end concluded that there was jurisdiction to grant relief under section 1157 of the 2006 Act in this case. Section 1157 applies to "proceedings for negligence, default, breach of duty or breach of trust". Here, Judge Cooke found Mr Dickinson to have caused company property to be transferred to himself without authority. The words "negligence, default, breach of duty or breach of trust" are, as it seems to me, apt to describe that conduct. The fact that "[a]ll applications of a company's money ultra vires the company" can be said to represent "breaches of trust on the part of the directors" (see paragraph 43(ii) above) lends support to that conclusion. It is true, as Mr Barker pointed out, that NAL is asserting a proprietary claim, but section 1157 is not stated to be limited to personal claims. It empowers the Court to grant relief from "liability" without distinguishing between different species. Moreover, construing section 1157 as limited to personal claims could produce arbitrary and unattractive results. Take a case such as *Duomatic* where remuneration has been paid without due authorisation. Relief would be available in respect of a personal claim but not, presumably, in so far as it remained possible to

identify the money in the director's hands. The fact that a claim might be proprietary rather than personal will very often, I think, be a weighty factor to put into the balance. After all, the grant may, in effect, transfer ownership. However, I do not consider there to be any absolute bar on the grant of relief as regards a proprietary claim.

45. If Judge Cooke did have jurisdiction to grant relief under section 1157 of the 2006 Act, can his decision to decline to do so be impugned? Mr Davies maintained that it can. The Judge, he said, had failed to have regard to the fact that the Dickinsons were to all intents and purposes the owners of NAL; the fact that the company was not yet in financial difficulties and so creditors' interests were unimportant; the fact that the property transfer could have been effected without any scope for criticism but for the existence of the Pension Scheme; and the fact that the failure to have the transfer duly authorised was understandable. In the circumstances, Mr Davies argued, this Court should consider the matter afresh and grant relief.

46. I have not been persuaded. It is abundantly clear from the Judge's thorough and careful judgment that he had in mind the identities of NAL's shareholders, the company's financial circumstances and the significance of the Pension Scheme's involvement. In fact, the Judge referred in terms in paragraph 80 of his judgment to Mr Dickinson's insistence that NAL was solvent and its interests were therefore to be equated with those of its members. The Judge did not refuse to grant relief because he overlooked matters such as those Mr Davies mentioned, but because he did not consider that they justified relief. He gave, moreover, sound reasons for his decision. Among other things, he observed that Mr Dickinson had "not … sought to act in the best interests of, or even with any proper regard to the interests of, the company as distinct from himself" (paragraph 76), that there was "no indication what benefit the company obtained from selling the site of its premises" (paragraph 77) or "why it was in the company's interests to agree to a lease excluded from the provisions of the 1954 Act (paragraph 79), that "the price may have been questionable" (paragraph 79) and that relief "would be more than relief from a breach of trust and amount to the discharge of the trust itself" which, the Judge thought, could be justified (if at all) only in "the most unusual circumstances" (paragraph 76). With regard to the price, the Judge noted both Mr Tranter's concern and the apparent disparity between the £224,000 price and even the £40,000 rent (let alone the later £120,000 figure), representing an 18% yield. As for the Judge's comment that relief would "amount to the discharge of the trust itself", Mr Dickinson was in effect asking for NAL to be deprived of property of which it was the beneficial owner. It was, in my view, entirely proper to take that into account. While, as I have said, there may be no "absolute bar" on such relief, it will typically be "improbable" (to use the words of Browne-Wilkinson V-C in *Guinness plc v Saunders* – see paragraph 43(iv) above).

47. In short, it seems to me that the Judge was amply entitled to decline to grant relief under section 1157 of the 2006 Act.

Conclusion

48. In my view, the appeal fails in so far as it relates to the property transfer.

The share buy-back

49. Turning to the share buy-back, Mr Davies took issue with Judge Cooke's conclusions as regards both section 691 of the 2006 Act and section 423 of the 1986 Act. To overturn the Judge's decision on the share buy-back, Mr Davies must succeed on both aspects. I shall consider the section 691 point next.

50. Section 658 of the 2006 Act imposes a general prohibition on a company acquiring its own shares. It states in subsection (1) that a limited company "must not acquire its own shares, whether by purchase, subscription or otherwise, except in accordance with the provisions of this Part" and provides that, if a company purports to act in contravention of the section, an offence is committed by the company and every officer who is in default and also, by subsection (2)(b), that "the purported acquisition is void".

51. Section 691 of the 2006 Act, which like section 658 is to be found in Part 18, lays down an exception. In its present form, section 691 provides as follows:

> "(1) A limited company may not purchase its own shares unless they are fully paid.
>
> (2) Where a limited company purchases its own shares, the shares must be paid for on purchase.
>
> (3) But subsection (2) does not apply in a case where a private limited company is purchasing shares for the purposes of or pursuant to an employees' share scheme."

Subsection (3) was added in 2013 by the Companies Act 2006 (Amendment of Part 18) Regulations 2013.

52. The Judge held that the share buy-back was void because section 691(2) of the 2006 Act had not been complied with. The respondents had argued that whatever arrangements there had been for the purchase price to be left outstanding on loan account at completion did not amount to payment "on purchase" (paragraph 84 of the judgment). The Dickinsons' counsel countered that the loan arrangements were to be treated as "payment" (see paragraph 85), but the Judge did not accept this. He concluded at paragraph 89 that there had been "no valid loan agreement at any stage", but said that he did not in any event agree with the Dickinsons' counsel in principle. He explained:

> "90. … If the consideration payable under a sale transaction is not actually satisfied at the time of the transaction (whether by payment of cash, transfer of funds, transfer of some other property, set off or in some other way) the result is that a debt automatically arises from the buyer to the seller. Recognition of this debt by making an entry in books of account does not constitute payment but an acknowledgement of the legal consequences of non-payment. Acknowledgement of it by entering into a loan agreement, whether written or oral and whether entered into before or after the due time for completion, does not constitute payment on purchase but making or varying

> the terms of the arrangement such that payment is to be made at a later date, with the result that those terms do not comply with the statute. It would be wholly artificial to regard such a loan agreement as creating one obligation to pay money to the company by way of loan which was then 'set off' against the company's obligation to pay the purchase price.
>
> 91. It is true that very similar results could be achieved by structuring the transaction so that money was actually paid by the company at completion and an equivalent amount was very shortly thereafter paid back to the company by way of loan. Alternatively, it might borrow in advance from a third party and use the funds to pay the selling shareholders. Provided in each case that the two transactions were genuinely separate, such that the arrangement was not a sham, it seems to me that this would satisfy the requirements of the section. Such an arrangement was made in *Customs and Excise Commissioners v West Yorkshire Independent Hospital (Contract Services) Ltd* [1988] STC 443, in which cheques and credits for payment moved round between three parties so that the funds ended up where they started, but were held to have constituted 'payment' along the way. [Counsel for the Dickinsons] submitted that there was no difference in substance between such arrangements and what had happened in the present case. I do not accept that; the end result may be similar, but the difference of substance is that the company has had to find from some source, albeit temporarily, the funds from which to make payment.
>
> 92. If it were otherwise, nothing of substance would remain of the requirement the statute was intended to impose."

53. Companies were first permitted to purchase their own shares by the Companies Act 1981, which also, for the first time, empowered companies to issue shares other than preference shares as redeemable. Those provisions were taken forward into the Companies Act 1985 through sections 159 and 162. Section 159 was in these terms:

> "(1) Subject to the provisions of this Chapter, a company limited by shares or limited by guarantee and having a share capital may, if authorised to do so by its articles, issue shares which are to be redeemed or are liable to be redeemed at the option of the company or the shareholder.
>
> (2) No redeemable shares may be issued at a time when there are no issued shares of the company which are not redeemable.
>
> (3) Redeemable shares may not be redeemed unless they are fully paid; and the terms of redemption must provide for payment on redemption."

As originally enacted, section 162 stated:

> "(1) Subject to the following provisions of this Chapter, a company limited by shares or limited by guarantee and having a share capital may, if authorised to do so by its articles, purchase its own shares (including any redeemable shares).
>
> (2) Sections 159 to 161 apply to the purchase by a company under this section of its own shares as they apply to the redemption of redeemable shares, save that in the terms and manner of purchase need not be determined by the articles as required by section 160(3).
>
> (3) A company may not under this section purchase its shares if as a result of the purchase there would no longer be any member of the company holding shares other than redeemable shares."

54. In the past, therefore, the provisions dealing with purchase by a company of its own shares cross-referred to those relating to redeemable shares. In contrast, section 691 of the 2006 Act makes no reference to section 686 of the 2006 Act, which addresses "Payment for redeemable shares". Section 686 reads as follows:

> "1) Redeemable shares in a limited company may not be redeemed unless they are fully paid.
>
> (2) The terms of redemption of shares in a limited company may provide that the amount payable on redemption may, by agreement between the company and the holder of the shares, be paid on a date later than the redemption date.
>
> (3) Unless redeemed in accordance with a provision authorised by subsection (2), the shares must be paid for on redemption."

The explanatory notes for section 686 said:

> "This section replaces section 159(3) of the 1985 [Companies] Act …. It removes the current requirement, in section 159(3), that the terms of redemption must provide for payment on redemption. This means that the terms of redemption may provide for the company and the holder of the shares to agree that payment may be made on a date later than the redemption date."

55. We were taken to Park J's decision in *BDG Roof-Bond Ltd v Douglas* [2000] 1 BCLC 401. In that case, it was alleged that a purchase by a company of one of its own shares was invalid pursuant to sections 159(3) and 162(2) of the Companies Act 1985 on, among others, the ground that the requirement that "the terms of the purchase agreement must provide for payment on the purchase" (to quote Park J at 412) meant, and meant only, a payment in money whereas the consideration for the relevant acquisition consisted only partly of money: the share in question "was acquired for £60,000 in money, a property in Cardiff, and a Jaguar car" (see 412). Rejecting the contention, Park J said at 412 that he was "not convinced that the words 'payment on redemption' are limited to payment in money". He went on at 412:

> "But secondly, even if Mr Thornton is right that the agreement has to provide for a money consideration, the agreement in this case did provide for a money consideration. The relevant clause reads as follows:
>
> > 'The aggregate purchase price for the Shares shall be the sum of £135,000.00 which shall be payable in full to the Vendor.'
>
> It is quite true that as part of the same wider transaction, Mr Douglas was to acquire from the company the Cardiff property and the car, but in my judgment that does not make any difference. Prices of £65,000 and £10,000 were placed on the property and the car, and although only £60,000 in cash changed hands, that must, in my judgment, have been because the £75,000 which Mr Douglas owed to the company for the property and the car was set off against £75,000 out of the £135,000 which the company owed to him for his share. It is well settled that a bona fide set-off of one debt against another constitutes payment of both debts: see for example *Re Harmony and Montague Tin and Copper Mining Co* (*Spargo's Case*) (1873) LR 8 Ch App 407. I note that the prices in this transaction were agreed at arm's length between Mr Douglas and Mr Bailey, and there is nothing in any way colourable or artificial about them. I would reserve for a future occasion (when it might matter) whether it would make any difference if at the time of an own-shares repurchase, assets which were being transferred to a shareholder were valued at artificially high or low prices. That question does not matter in this case, and I conclude that the transaction is not invalidated by the feature that Mr Douglas acquired the property and the car."

56. Park J thus observed that, where a company purchases its own shares, "the terms of the purchase agreement must provide for payment on the purchase". Judge Cooke doubted that Park J was "to be taken as holding that a provision in the contract for payment on completion was sufficient if payment was not actually made" (see paragraph 86). I entirely agree. Had Park J considered the terms of the contract to be decisive of themselves, he would not have needed to consider all the points he went on to address at 412-413.

57. In any case, while section 159(3) of the Companies Act 1985, applied mutatis mutandis to own-share purchases by section 162(2), stipulated that "the terms of redemption must provide for payment on redemption", section 691(2) uses different language. It states that "the shares must be paid for on purchase".

58. Mr Davies summarised the interpretation of section 691(2) of the 2006 Act for which he contended in these terms in his skeleton argument:

> "Correctly interpreted, the material requirement in s.691(2) ('must be paid for on purchase') is temporal in nature – requiring only that the terms of the acquisition should provide for the shares to be paid for at completion, i.e. not on deferred terms. It

> is enough if the liability to pay the full consideration arises at completion. What is prohibited by s.691(2) is deferred payment, such as payment by instalments."

59. I cannot accept that submission. Section 691(2) states that shares "must be paid for on purchase". Park J's decision in *BDG Roof-Bond Ltd v Douglas* indicates that payment need not necessarily be in money, but it strikes me as clear that payment, in whatever form, must be made when the purchase is effected. Payment has to be "on purchase". It is not enough that a contract provides for payment forthwith; it must in fact be made. Whether or not that was always the law, the change from the old "the terms of redemption must provide for payment on redemption" to section 691(2)'s "the shares must be paid for on purchase" leaves no room for doubt. That the position is now different as regards redeemable shares (where the terms of redemption may provide for payment to be made "on a date later than the redemption date" – see section 686(2)) and employees' share schemes (since section 691 was amended in 2013) lends no support to the Dickinsons' case.

60. In the circumstances, I agree with the Judge that the share buy-back did not comply with section 691(2) of the 2006 Act and was therefore void. That being so, I do not need to go on to consider section 423 of the 1986 Act.

Conclusion

61. I would dismiss the appeal.

Lord Justice Baker:

62. I agree.

Lord Justice Dingemans:

63. I agree that this appeal should be dismissed for the reasons given by Newey LJ. I wish only to add a few words in relation to section 1157(1) of the 2006 Act, which has been addressed by Newey LJ from paragraph 32 to 47 of his judgment.

64. In my judgment the natural and ordinary meaning of the words "proceedings for negligence, default, breach of duty or breach of trust" in section 1157(1) of the 2006 Act is wide enough to cover claims to enforce proprietary rights which have arisen because of negligence, default, breach of duty or breach of trust by a director. It is clear that there has been some disagreement in previous cases about the proper interpretation of section 1157(1) with the dicta considered in paragraphs 39 to 42 of Newey LJ's judgment supporting a narrow interpretation, and the dicta considered in paragraph 43(ii) to (vii) supporting a broad interpretation.

65. I cannot discern anything in the legislative background or purpose of section 1157(1) to support a narrow interpretation. I also consider that a narrow interpretation which excluded potential relief for claims for breach of duty giving rise to proprietary claims, but included potential relief for claims for breach of duty which had not been framed as giving rise to proprietary claims, would lead to claimants seeking to frame their claims to exclude the possibility of relief without any regard to the underlying realities of the director's actions. I agree with Newey LJ that such a narrow interpretation is

likely to lead to "arbitrary and unattractive results". I therefore agree that an interpretation giving effect to the natural and ordinary meaning of the words in section 1157(1) is the correct interpretation. This would mean that section 1157(1) does apply to claims for "negligence, default, breach or duty or breach of trust" which are proprietary in nature.

66. However the existence of the jurisdiction to grant relief pursuant to section 1157(1) does not mean that the relief should be granted. I agree with Newey LJ that His Honour Judge David Cooke was right to refuse relief in this case.