THE JUDICIAL AUTHORITY OF THE DUBAI INTERNATIONAL FINANCIAL CENTRE

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF FIRST INSTANCE

BETWEEN

BEFORE HIS HONOUR JUSTICE MICHAEL HWANG

DUTCH EQUITY PARTNERS LIMITED

Claimant

- and -

DAMAN REAL ESTATE CAPITAL PARTNERS LIMITED

Defendant

30 January, 31 January, 1 February 2007

Judgment reserved

24 July 2007

JUDGMENT

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1. This is the first full trial to be heard in this Court. It involves a number of interesting questions of company law but, for reasons which appear later, only a limited number of those issues are critical to the outcome of this case as pleaded.
2. The Claimant, Dutch Equity Partners Limited ("DEP") is a company registered in the Jebel Ali Free Zone Authority.
3. The Defendant, Daman Real Estate Capital Partners Limited ("RECAP"), is a company registered in the Dubai International Finance Centre ("DIFC"), incorporated on 27 September 2004. The Defendant has 14 shareholders, including the Claimant, which owns a 5% shareholding. It was incorporated with two incorporators, Mr Shehab M. Gargash ("Mr Gargash") and Mr Mohammed Sulaiman ("Mr Sulaiman"), each subscribing for 1000 shares each.

4. In its amended Brief Details of Claim filed on 14 January 2007, the Claimant seeks the following declarations:

> (a) A declaration that the Articles of Association of [RECAP] in force as at 25 May 2006 (the date the original claim was filed) were those contained in the signed document dated 27 September 2004 and which were those lodged with the Registry of [Companies of] the [DIFC] . subject only to the amendment contained in the written resolution signed by Mr Bessem (see paragraph 6 below) on behalf of the Claimant dated 3 May 2005 ('the First Declaration').
> (b) A declaration that the purported entry by RECAP into the Management Agreement with Daman Asset Management [Limited] on or about 9 October 2004 (see paragraphs 13 and 18 below) was invalid ('the Second Declaration').

Background to the dispute

5. Daman Asset Management Limited ('DAM') is a company incorporated by shares registered under the Bermuda Companies Act 1981. The Managing Director of DAM was Mr Shehab M. Gargash. ("Mr Gargash")
6. In February 2004, Mr Gargash invited Mr Maarten Diederik Bessem ('Mr Bessem') (a director of the Claimant Company) to support him in making a bid for land in the DIFC. With Mr Gargash's consent, Mr Bessem then invited Mr Andrew Butter ('Mr Butter'), the sole proprietor of Andrew Butter Management Consulting ('ABMC'), to join him in preparing the bid.
7. DAM, acting on behalf of itself and a limited group of investors, submitted a winning bid to the DIFC to purchase and develop two adjoining plots of land within the DIFC. This was known as the "Buildings by Daman" Project. ('the Project')
8. After the successful bid, Mr Bessem and Mr Butter made a proposal to provide development management for the project under the name of "Multi Property Development" ('MPD'). This was agreed in principle by Mr Gargash, but the Project Development Agreement was never officially signed, even though there were various drafts prepared in 2005.
9. Meanwhile, in May 2004, ABMC agreed with Mr Gargash to provide support for the development management until MPD was formed, at which point MPD would take over. It was understood that MPD, when formed, would operate under the direction of Mr Bessem and Mr Butter, along with other key personnel, including Mr John May.
10. In fact, MPD was never formed, and ABMC continued to provide support for the next 16 months, until the arrangements between ABMC and DAM were terminated in September 2005 owing to a number of disputes.
11. After DAM won the bid for the land for the Project, preparations began for the incorporation of the Defendant, RECAP, (which was to act as an investment vehicle to finance the Project) as well as arrangements for the management of the Project.
12. On 30 June 2004, DAM issued a Private Placement Memorandum ('PPM') to prospective investors in RECAP. However, at that time, the Management Agreement had not yet been signed.
13. The PPM contained a summary of certain rights of, and restrictions on, the shareholders and directors, which were later reflected in a disputed amendment of the Incorporation Articles that took place at a shareholders' meeting on 5 April 2005. The PPM also referred to a Management Agreement ('the Management Agreement') that was to be entered into between RECAP (which had not yet been incorporated) and DAM. Mr Bessem disputes that the PPM was an adequate summary of such rights, as compared to the actual rights given to the Manager in the Management

Agreement.
14. Mr Bessem admits that he was aware of the existence of the PPM which stated that DAM would be entering into the Management Agreement.
15. On 27 September 2004, RECAP was incorporated as a private company limited by shares under DIFC Companies Law No. 2 of 2004 ("the 2004 Companies Law"). On incorporation, the Articles of Association adopted by RECAP were the statutory form prescribed by Appendix 2 of the DIFC Companies Regulations and Article 10 of the 2004 Companies Law without amendment or addition ("the Incorporation Articles"). These were the articles "on file" with the Registry of Companies.
16. At the time of its incorporation in 2004, there were only two directors of RECAP (its first directors), Mr Gargash and Mr Mohammed Sulaiman. One day after its incorporation, on 28 September 2004, RECAP held its first board meeting and a copy of the Incorporation Articles was produced to the meeting. A Directors' Resolution was passed under which Mr Gargash and Mr Sulaiman vested themselves with all the customary powers of a director as well as the authority to sign and execute all documents required to be signed and executed by the Defendant.
17. Three days later, on 1 October 2004, Mr Gargash and Mr Sulaiman, as directors of RECAP, provided a written notice to RECAP, declaring that they were to be regarded as interested in any transactions with DAM and Daman Securities, another company in the Daman group. This notice was purportedly given pursuant to Article 47 of the 2004 Companies Law, which set out the duty of directors to disclose any conflicts of interest.
18. On 9 October 2004, RECAP entered into the Management Agreement with DAM. As at 10 November 2006, DAM had five directors, and Mr Gargash was its President. DAM was given very wide powers as Manager of RECAP under this Agreement. The Management Agreement was signed by Mr Gargash, the managing director of DAM, and Mr Sulaiman, a director of RECAP. This Management Agreement was later amended, but there is a dispute as to when the execution of the amended Management Agreement took place. For reasons discussed in paragraph 227 below I find that the amended Management Agreement was probably executed around the end of December 2004.
19. There are a number of discrepancies between the PPM and the Management Agreement. Under the PPM, the Manager (i.e. DAM) had the delegated authority to conduct and manage the day to day affairs of RECAP, and to take key decisions. Further, the Board of Directors had guidance and oversight of the Project.
20. The PPM stated that DAM would have "*the delegated authority to conduct and manage the day to day affairs of the Company, as well as to take investment, financing and other key decisions related to the execution of the Buildings by Daman Project*". The word 'delegated' implied delegation from RECAP's Board. The PPM was ambiguous about the exact powers of the directors vis-a-vis DAM. On the one hand, the PPM stated that "*[t]he board of directors of the Company will oversee performance of Daman, as well as the overall progress of the Project. Daman is expected to hold an equity share in the Company of between 5-10%.*". On the other hand, it also stated that '*Approval of the board of directors will be required only for certain predetermined significant decisions, including approval of the annual budget and the sale or disposition of major assets of the Company*. [DAM]*will have overall control of all financial, investment and budgetary matters as well as control and oversight of the Project Developer.*"
21. However, under Articles 3.3, 3.2 and 3.4 of the Management Agreement, the Board had virtually no power to override the decisions of the Manager except for certain specified activities under Article 3.3, and only by a two-thirds majority. In the Management Agreement, there was only a narrow list of specific matters where the Board would be able to override the Manager's decisions with a two-thirds majority taken within ten days of the Manager's proposed decision to undertake the activity. There were high financial thresholds required before the Board had the power to override the Manager's decisions for entering into significant agreements. The requirement of a majority and the financial thresholds were not mentioned in the PPM. The conditions under which the Management Agreement could be terminated were more restrictive than the PPM represented, and there were very favourable limitations of liability and indemnity provisions in favour of the Manager.
22. As a result, the discrepancies between the PPM and the Management Agreement became part of the dispute. The Claimant alleges, on various legal grounds, that the Management Agreement should be declared invalid because the Manager (DAM) had been given wide powers by the then sole directors of RECAP, who were also directors of the Manager, and no shareholder was or could have been aware of such powers.
23. On or about 30 December 2004, the Claimant became a 5% shareholder of RECAP. This was pursuant to a Subscription and Shareholders' Agreement ("SSA") under which the Claimant purchased 50,000 shares for a consideration of USD 5 million. Although the SSA had been dated 30 December 2004, Mr Bessem contends that it was actually signed in February or March 2005, and then backdated. Mr Sulaiman agreed that it could have been backdated. The exact date of execution of the SSA is not crucial to the resolution of this dispute, and it is not disputed that the Claimant was a 5% shareholder of RECAP at the commencement of these proceedings.
24. On 15 March 2005, a notice was sent to all shareholders calling for a shareholders' General Meeting ("AGM") to be held on 5 April 2005 ("the 5 April 2005 Meeting")[1]. One of the items on the enclosed Agenda was stated to be "Ratification of the Memorandum and Articles of Association". However, the proxy form stated "Special Resolution - to adopt new articles" beside the check-boxes "For" or "Against". It is undisputed that the form of the Articles of Association to be ratified or adopted was not enclosed with the notice.

25. Mr Bessem attended the 5 April 2005 Meeting in person. Along with other shareholders, he was given a personalised blue leather folder, which the Defendant contends included a copy of the New Articles of Association ("New Articles"), which were a new set of Articles different from the Incorporation Articles[2]. It also contained a revised Agenda in which the order of the items was rearranged. At the meeting, it was resolved that the New Articles would be adopted as the Articles of Association of RECAP in substitution for the Incorporation Articles. It is unclear who recorded the minutes of the meeting. Although Mr Gargash indicated that it could have been Mr Buderi or Mr Sulaiman, neither Mr Buderi or Mr Sulaiman had confirmed this hearsay evidence. I find that the minutes were, in all likelihood, prepared by Mr Charles Buderi (the solicitor for RECAP) because the bottom left corner of the minutes was marked with a version number which Mr Gargash had identified as characteristic of documents generated from Mr Buderi's office. The minutes of the meeting read as follows:

> "*11. The Chairman proposed that the Articles of Association contained in the printed document produced to the meeting marked "A" and for the purpose of identification signed by the chairman thereof be and the same are approved and adopted as the Articles of Association of the Company in substitution for and to the exclusion of all the existing Articles of Association of the Company. The Chairman put the resolution to the meeting, took a vote on a show of hands and declared the resolution carried as a special resolution of the Company (as notice of intention to propose the resolution had been given and the resolution had been passed by at least 75% of the members entitled to vote on the resolution.*"

26. However, there was also a tape recording of the 5 April 2005 meeting provided by Mr Bessem and (according to his witness statement) recorded by Mr. William Broekhoven, an intern in Mr Bessem's office.[3]Contrary to what the minutes recorded, the transcript confirmed Mr

Bessem's evidence that no vote was taken. The transcript of the 5 April 2005 Meeting set out the following exchanges relating to the approval of the special resolution for the adoption of the New Articles:

> *"Shehab: We move on to number eleven.The memorandum and Articles of Association of the company as were . as are set here .. need to be ratified by you as er . the General Assembly of the company basically.*Err . umm . these are the effectively the constitution of the company we . the memorandum we propose them these memorandum as set forth here er. be ratified by the shareholders. are you ok?
> *Unknown: Question - the capital is how much?*
> *Shehab: Sorry?*
> *Unknown: The capital is how much?*
> *Shehab: The capital is er . (confers with Mohammed Sulaiman) . one hundred thousand dollars*
> *Arabic + background noises [15 Seconds - (Shehab does not speak)]*
> *Shehab: Shall we take this as ratified?*Is that ok?Thank you."

27. The transcript of the meeting provided by Mr Bessem showed that the chairman had not called for a formal vote on the adoption of the new Articles of Association which the Respondent now claims to have been adopted on 5 April 2005 (see paragraphs 99 to 104 below). The ratification process occupied just over one minute of a meeting which lasted over an hour and a half.
28. The Shareholders also resolved to modify the New Articles to allow a shareholder to nominate one representative to the Board of Directors. It was agreed that the Board Secretary would implement this change. It was noted that all the shareholders were present at the 5 April 2005 Meeting and unanimously approved this modification. Each of the shareholders (including Mr Bessem on behalf of the Claimant) later signed a written shareholder resolution to implement this modification.

29. RECAP held a board meeting immediately after the AGM on 5 April 2005. The meeting was only attended by Mr Gargash (Chairman) and Mr Mohammed Sulaiman (Secretary and Director). The minutes of the meeting stated that:

"*2. It was noted that at a meeting held earlier in the day attended by all the members of the Company a special resolution had been passed unanimously adopting new Articles of Association of the Company. The new Articles of Association were produced to the meeting and it was resolved that the new articles have been duly adopted by members of the Company.*"
30. On 23 April 2005, a copy of the proposed written resolution to amend the Articles of Association supposedly adopted on 5 April 2005, by substituting the provisions with respect to the appointment and nomination of directors to allow a shareholder to nominate one representative to the Board of Directors, was sent to all shareholders. In fact the resolution only referred to changing articles 67 and 68 of the New Articles by new articles providing, firstly, that the board of directors should consist of no more than 14 directors, and secondly, that the Company would arrange for the nomination and appointment of voting directors. Mr Bessem signed his copy of the written resolution on 3 May 2005.
31. After September 2005, when the business arrangements between Mr Bessem (and his partner, Mr Butter) and the Daman group had been terminated, Mr Bessem began to demonstrate concern about the relationship between DAM and RECAP in general, and the Management Agreement in particular.
32. On 12 March 2006, Counsel for the Claimant sent a request to RECAP for copies of the Management Agreement and the New Articles. RECAP replied that it was under no obligation to provide the Claimant with the requested documents. The Claimant informed RECAP that it would instead obtain a copy of the New Articles of RECAP from the Registrar of Companies. In response, RECAP agreed to provide a copy of the New Articles of the Company, but not the Management Agreement. At the same time, the Registrar of Companies sent a copy of the Incorporation Articles to the Claimant.
33. RECAP supplied a copy of the New Articles on 3 April 2006. Mr Sulaiman gave evidence that his initial refusal to supply the New Articles and Management Agreement was because Mr Bessem was hostile to the Company. However, he contended that during 2005, after the subscription period, RECAP would have considered any request by a shareholder for the Management Agreement on a case-by case basis.
34. The present action was subsequently commenced on 25 May 2006.
35. On or about 9 June 2006, a notice to convene an AGM on 27 June 2006 ("the 27 June 2006 Meeting") was sent to the shareholders of RECAP proposing to pass a special resolution to 'confirm and ratify' the vote to adopt the New Articles which had been taken at the 5 April 2005 Meeting. At the 27 June 2006 Meeting, the special resolution was adopted and approved through a written ballot by 13 shareholders in favour (representing 95% of the shareholders) and one abstention (made on the Claimant's behalf by its solicitor and proxy, Mr Nicholas Carnell). Mr Bessem did not attend the meeting.
36. On 17 August 2006, RECAP issued a notice to convene an Extraordinary General Meeting ("EGM") of its shareholders on 10 September 2006 ("the 10 September 2006 Meeting"). The covering letter set out the proposal to pass a special resolution to adopt a further set of Articles of Association ("the Current Articles") in substitution for the New Articles. The notice also set out verbatim the proposed special resolution. Apart from a complete Agenda for the EGM, a copy of the proposed Current Articles was also enclosed, and the shareholders were advised in the covering letter to review them carefully.
37. At the 10 September 2006 Meeting, 12 out of the 14 shareholders (representing 90% of the shareholding of RECAP) approved by poll the special resolution approving the adoption of the Current Articles. One shareholder representing 5% of the Defendant's shareholding was not present at the meeting, while the Claimant, who also held 5% of the shares in RECAP, voted against the resolution.

History of proceedings

38. The Claimant commenced this action on 25 May 2006 claiming the following principal reliefs (using the wording set out in the English Civil Procedure ('CPR') Part 8 Claim Form[4]):-

> *"(a) A declaration that the Articles of Association of Daman Real Estate Capital Partners Ltd ("the Company") currently in force are those contained in the signed document dated 27th September 2004, and which are those lodged with the Registry of the Dubai International Financial Centre as confirmed by the letter dated 30th March 2006, a copy of which is at exhibit "MDB1" to the witness statement of Maarten Diederik Bessem served herewith.*
> *(b) Further or other relief.*
> *(c) Costs.*"
> The reliefs sought were later amended in the course of the proceedings (see paragraphs 42 to 43 below)

Order for directions

39. The Parties came before Chief Justice Sir Anthony Evans on 24 July 2006, when he issued an Order for Directions directing that the Claim was to proceed as a Part 7 Claim under the CPR. The Order also set out the procedural timelines with regard to submissions for the main trial.

Interlocutory hearing on the Defendant's application to strike out the Claimant's claim

40. The Respondent then filed an application to strike out the claim pursuant to Rule 3.4(2) of the CPR or alternatively for summary judgment in its favour under Rule 24.2 of the CPR. In response, the Claimant filed an application for summary judgment in terms of the declaration sought on its Claim Form on 7 January 2007 under Rule 24.2 of the CPR. Both applications came before me for hearing on 9 January 2007.
41. In the course of this hearing, it became clear that the Claimant's real complaint related to the validity of RECAP's entry into the Management Agreement. I expressed concern that it might be difficult to grant the declaration that the Claimant sought, namely, that the Articles of Association currently in force were the Incorporation Articles, as the adoption of the Current Articles on 10 September 2006 (which was not challenged in these proceedings) would make the status of the Incorporation Articles of only academic interest and might therefore militate against the grant of declaratory relief. Furthermore, there were clear procedural irregularities in the convening and conduct of the three shareholders' meetings.
42. Accordingly, at the end of the hearing, I invited the Parties to amend their pleadings. The Claimant was invited to amend its Claim Form to include a claim for an additional declaration that the Management Agreement was invalid, and the Defendant was invited to apply for a validation of the procedural irregularities under Article 157 of the DIFC Companies Law 2006 ('the 2006 Companies Law')[5].
43. The Claimant thus amended the Claim Form to seek the declarations set out in paragraph 4 of this judgment, and the Defendant made an application pursuant to Article 157 to validate the procedural irregularities at the three shareholders' meetings.

The Shareholders' letter to the Court expressing support of the Current Articles

44. Just before the commencement of the main trial on 30 January 2007, 11 out of the 14 shareholders of RECAP sent individual letters to me all dated 23 January 2007. Those 12 letters contained the same wording and asked the Court to validate (among other acts and notwithstanding any procedural irregularities which might have occurred), the resolutions agreed on at the 10 September 2006 Meeting, including the approval of the Current Articles. The main text of the letters is reproduced as follows:"*Dear Justice Hwang*We are writing to you in our capacity as shareholders or representatives of shareholders in Daman Real Estate Capital Partners Limited.We are aware of the DIFC Courts proceeding currently ongoing between the Company and Dutch Equity Partners Limited. In that regard, we have been advised by the Company that a number of procedural irregularities occurred in relation to the Annual General Meetings which were held on 5 April 2005 and 27 June 2006, as well as in relation to the Extraordinary General Meeting held on 10 September 2006. We have been advised by the Company that the irregularities in question are the following:***The 5 April 2005 Meeting***

> *(a) The meeting was called with less than 21 business days' advance notice, as required by Article 58(1) of the 2004 Companies Law and Article 22 of the articles then in effect.*
> *(b) The Agenda set forth in the notice of meeting did not specifically set out the intention to propose a "special resolution" nor did it state what that special resolution was (i.e. "to adopt new articles"), as required under Article 58(3)(c) of the 2004 Companies Law.*
> *(c) The language used in the Agenda to describe the act which the Company was proposing ("ratification") may be questioned on the basis that, in English, the word "adopted" would have more appropriately described what the Company wanted to do, that is, "adopt" the New Articles.*
> *(d) The amended Articles of Association were not attached to the notice of meeting sent to the Shareholders. Under Article 58(a) and (b) of the 2004 Companies Law, a notice of a general meeting of a company shall "set out the time, place and date for the meeting" and "state the general nature of the meeting's business". Under Article 22 of the articles then in effect, a notice of an annual general meeting "shall specify the time and place of the meeting and the general nature of the matters to be considered".*Although attachment of the amended articles to the notice was thus not specifically required by those provisions, Dutch Equity Partners Limited has argued that under the practice customary in England and Wales, it w*did not specifically ask who was 'in favour" of approving the new articles, nor did he specifically ask whether there were any negative votes or abstentions.*
>
> ***The 27 June 2007 Meeting****The notice convening the meeting held on 27 June 2006 was not sent to the Shareholders with the advance notice required by Article 65(1) of the 2006 Companies Law, which provides that any general meeting may be called by at least 21 business days' notice in writing (the notice having been sent on 5 June 2006).****The 10 September 2006 Meeting****The notice convening the meeting held on 10 September 2006 was not sent to the Shareholders with the advance notice required by Article 65(1) of the 2006 Companies Law, which provides that any general meeting may be called by at least 21 business days' notice in writing (the notice having been sent on 17 August 2006).*We are writing to advise you that, notwithstanding these procedural irregularities, we support all of the resolutions reached at each of the three meetings mentioned above, including the approval of new Articles of Association at the meeting of 5 April 2005, the confirmation of that approval given at the meeting of 27 June 2006 and the approval of further amended articles at the meeting of 10 September 2006, and we do not feel that we were prejudiced in any way due to these irregularities.We also wish to advise you that we fully support the request made by the Company to the Court to issue an order to validate the proceedings of the Company at these three meetings notwithstanding any procedural irregularities.Finally, we have been advised by the Company that the Court expressed some concern that the shareholders did not have a copy of the management agreement under which the Company's affairs are managed by Daman Asset Management. In that regard, we wish to confirm that we have received a copy of the management agreement and continue to believe that it is the best interests of the Company that it continue to be managed by Daman pursuant to that agreement. Our receipt of that agreement does not change our support for the resolutions of the Company or its adoption of the Articles of Association referred to in this letter.We sincerely hope this letter will assist in some way in bringing this dispute to a close, as we believe the disruption which has been caused to the Company has been unduly prolonged."

Evidence given during the main trial

45. The main trial took place between 30 January 2007 and 1 February 2007. At the trial, Mr Bessem, Mr Gargash, Mr Mohamed Sulaiman, Ms Michelle Smith-Motiwalla, and nearly all of the shareholders of RECAP (or their representatives), namely, Mr Raju Shroff, Mr Varouj Nerguizian,

Mr Musab Al Wandawi, Mr Abdul Radack Shiwani, Mr S. B. Jeyaseelan, Mr Al Metawi, Mr Abdul Majid Al Fahim, Mr Abdul Aziz Husain Ahmed, Mr Ahmed Saeed Al Raqbani and Mr Ahmed Rashid Al Nuami gave evidence.

(a) Evidence verifying the shareholders' letter

46. In total, 10 out of 14 shareholders (except Mr Bessem, Mr Ahmed Rashid Al Nuami, Mr Rachid Mikati and Mr Al Zakhary) gave evidence verifying the contents of their letters to the Court. Mr Ahmed Rashid Al Nuami did not submit a letter to the Court, but indicated in his oral evidence his approval of such a letter, and Counsel for the Claimant stated that he would not challenge the authenticity of any letter subsequently submitted by Mr Al Nuami to the Court in terms similar to what the other shareholders had submitted. The only two shareholders who did not give evidence were Mr Rachid Mikati and Mr Al Zakhary. Mr Al Zakhary had before the hearing submitted a shareholder's letter to the Court in terms of paragraph 44 above but Mr. Rachid Mikati did not seem to have submitted a similar letter, although Counsel for the Defendant asserted that he had done so. During the trial, Counsel for the Claimant stated that he had no issue with the authenticity of Mr Rachid Mikati's letter, but later pointed out in the Claimant's Post Hearing Brief that he had not received any letter from Mr Rachid Mikati.
47. In short, at least 90% [and possibly 95%, if Mr Rachid Mikati had in fact signed a similar letter] of the shareholders agreed formally, either in writing or in oral evidence or both, with the contents of the shareholders' letter set out in paragraph 44 above.

(b) Evidence as to whether there was a show of hands with regard to the adoption of the New Articles at the 5 April 2005 Meeting

48. Some of the shareholders who gave evidence at the main trial were asked about the 5 April 2005 Meeting. These shareholders, however, had varying accounts of the proceedings at the 5 April 2005 Meeting on the adoption of the New Articles. Mr Shroff, for example, could recall that there was a show of hands, and he gave evidence on the proceedings at that meeting as follows:"*Mr Black: Okay. You say that they were approved by the shareholders including myself through a vote. What do you mean through a vote?*Mr Shroff: I think Shehab Gargash had asked, you know, these are the new Articles and if everybody approved, and pretty much everybody approved it, yeah.Mr Black: Okay, was there a show of hands or anything like that?Mr Shroff: I think so, yes.Mr Black: There was a show of hands.Mr Shroff: There was a show of hands from what I'm recollecting..

> Mr Black: [referring to paragraph (e) in the letter from the shareholders to Justice Hwang dated 23 January 2007] So that seems to indicate in this letter which you say you were happy to sign and [Sic] accurate that there was not actually a vote?
>
> Mr Shroff: Well, everybody was asked.It was not in this language of in favour or against.It was asked if this was okay and if it is okay.
>
> Mr Black: Sure, so there was not actually a show of hands then?
>
> Mr Shroff: No, it was okay. I mean if they're asking I said yes.
>
> Mr Black: Yes, but did people put their hands up or not?
>
> Mr Shroff: To my recollection, yeah, I think I did, and every time I wanted to vote for something you do this, yeah?
>
> Mr Black: So you actually believe that there was a show of hands?
>
> Mr Shroff: I think so, yes, and in my opinion, yes.
>
> Mr Black: Okay
>
> Mr Shroff: Now, whether it was saying okay verbally and putting your hand up or just by putting your hand up I don't recollect that exactly but-"

[emphasis added]

49. Mr Al Wandawi also confirmed that there was a show of hands at the 5 April 2005 Meeting. He recalled that Mr Gargash referred to the New Articles as the "constitution of the company", and asked whether anybody agreed or disagreed with it. That was followed by a show of hands, and some people nodded. Mr Al Wandawi also stated that Mr Gargash asked whether anybody disagreed. Although no one objected, Mr Al Wandawi stated that he did not remember exactly if every hand was up; he was also not certain if anybody counted the number of people who put their hands up.
50. At the main trial, Mr Nerguizian remembered that he put up his hand at the 5 April 2005 Meeting, but he did not remember whether anyone else did. He also described the proceedings at shareholders' meetings in the UAE in the following terms:"*I am the manager of a bank and we have board meetings and general assemblies, extraordinary general assemblies. And very often here it is said is if everybody is agreeing and everyone says "Yes", a few people say "Yes" and nobody answers, it goes through. This is the way it happens.*"
51. However, Mr Shiwani did not remember whether there was a show of hands at the 5 April 2005 Meeting. He only recalled that the shareholders said "okay" when the vote to adopt the New Articles was taken.
52. Mr Jeyaseelan stated that the chairman asked whether everybody was in agreement, and Mr Jeyaseelan remembered that he said "yes", and put up his hand.
53. Mr Al Nuami agreed in his oral evidence that it was a formal requirement to approve the articles of the company. He stated that the shareholders voted at the 5 April 2005 Meeting and that they were satisfied with it at that time. He was not asked whether there was a show of hands at that meeting or not.
54. At the main trial, Mr Husain could not recall what happened at the 5 April 2005 Meeting.
55. The remaining shareholders at the main trial, namely, Mr Al Metawi, Mr Al Fahim, and Mr Al Raqbani did not testify on whether there was a vote on a show of hands. In fact, Mr Al Metawi did not testify about the 5 April 2005 Meeting at all.

Claimant's contentions

56. Essentially, the Claimant seeks a declaration that the Articles of Association of RECAP in force as at 25 May 2006 (the commencement of this action) are the Incorporation Articles, and not the New Articles adopted at the 5 April 2005 Meeting. In support of this, the Claimant's main contention is that the 5 April 2005 Meeting was irregular for the following reasons.

56.1. The meeting was called with less than 21 days' notice as required by Article 58(1) of the 2004 Companies Law.
56.2. The New Articles could not be understood without reference to the Management Agreement, which was not enclosed with the Agenda for the meeting. Furthermore, access to the Management Agreement was denied to the Claimant until the disclosure process in relation to the present proceedings.
56.3. The notice of the meeting referred to "ratification" of the (existing) Memorandum and Articles of Association rather than adoption of a new set of Memorandum and Articles of Association. (Only the form of proxy indicated that the special resolution was "to adopt new articles".)
56.4. There was no notice of a special resolution to be voted upon at the meeting that gave "a fair, candid and reasonable" explanation[6]of the business proposed for that meeting. (see paragraph 96 below)
56.5. The New Articles were not distributed before the meeting (at least not to Mr Bessem). In any event, it is undisputed that the New Articles were not attached and supplied with the notice (dated 15 March 2005) convening the meeting (and therefore the shareholders did not have 21 days' notice of what these New Articles contained).
56.6. No proper vote on a show of hands was taken.
56.7. There was no discussion of the amendments to the Incorporation Articles at the meeting.
57. Accordingly, the Claimant contends that the resolution purporting to adopt the New Articles of Association at the 5 April 2005 Meeting was invalidly passed.
58. The Claimant also contends that the 27 June 2006 Meeting and the September 2006 Meeting are irrelevant to any issue in the present action. At best, they can only be relevant to the adoption of the Current Articles. The Claimant argues that those meetings did not purport to ratify the Management Agreement. It also alleges that none of the shareholders had access to the Management Agreement before either of the meetings, and, accordingly, since the New Articles could not be understood without the Management Agreement, no proper notice of either meeting was given.

The 5 April 2005 Meeting

59. The Claimant argues that the 5 April 2005 Meeting was called with less than 21 days' notice, and that copies of the New Articles that were purportedly adopted were not distributed to the shareholders prior to or at the 5 April 2005 Meeting itself. In any event, the notice sent out on 15 March 2005 did not adequately inform the shareholders of the special resolutions that were to be passed at the 5 April 2005 Meeting. Further, no vote was taken at the meeting.
60. At the evidentiary hearing, Mr Bessem confirmed that he had reviewed the revised Agenda before the 5 April 2005 Meeting started. That Agenda was part of the materials that Mr Bessem received at the meeting itself. However, he asserted that, although he sat down prior to the meeting and went through the documents, he did not see the New Articles, which he therefore believed had never been made available to him before the resolution adopting the New Articles were passed. With regard to the proceedings at the 5 April 2005 Meeting itself, Mr Bessem stated that there was indeed no formal vote taken; nobody raised his hand, and the Chairman (Mr Gargash) did not ask if there were any objections to the approval of a special resolution which adopted the New Articles.
61. In fact, Mr Bessem did not believe that any of the shareholders were aware of the New Articles at the time of the 5 April 2005 Meeting. In his view, RECAP did not adopt the New Articles at that meeting.

The 27 June 2006 meeting

62. The Claimant initially alleged that there was no evidence about the 27 June 2006 Meeting, and that the resolution of 27 June 2006 did not in fact purport to ratify the adoption of the New Articles, but only recorded that the New Articles were adopted on 5 April 2005. Accordingly, the Claimant argued that the 27 June resolution did not address the irregularity of the 5 April 2005 Meeting.
63. Nonetheless, it was settled at the evidentiary hearing that there was some evidence regarding the 27 June 2006 Meeting. During the evidentiary hearing, Mr Bessem agreed that RECAP proposed a special resolution at the 27 June 2006 meeting confirming that the New Articles had been adopted at the 5 April 2005 meeting. Although Mr Bessem did not attend the 27 June 2006 Meeting, Mr Carnell attended that meeting as a proxy for the Claimant. Mr Bessem confirmed that he was aware that the resolution was passed by 95% of the shareholders, with Mr Carnell abstaining on the Claimant's behalf.
64. The Claimant, however, continues to maintain that RECAP refused to supply Mr Bessem with a copy of the New Articles and a copy of the Management Agreement prior to the 27 June 2006 meeting.

The 10 September 2006 meeting

65. The Claimant alleges that the requisite 21 days' notice was not given. In fact, it is clear that the 10 September 2006 Meeting was called with well short of the statutory notice period of 21 clear business days before the date of the meeting. The notice of the special resolution to be adopted at the 10 September 2006 Meeting was dated 17 August 2006, but it is not clear when the shareholders received this notice. However, considering that there were eight non-business days in that period, there is no question that the notice period was legally deficient (see also paragraph 80 below).
66. Mr Bessem confirmed at the evidentiary hearing that he was aware that a special resolution was proposed at the 10 September 2006 Meeting to amend the New Articles to the Current Articles. Mr Bessem stated that he voted against that resolution, but he did not recall that 90% of the shareholders voted in favour of the special resolution.

Management Agreement

67. At the evidentiary hearing, Mr Bessem agreed that, at the time he subscribed for his shares in RECAP, he was fully aware that RECAP intended to enter into a management agreement pursuant to which RECAP's operations would be run by DAM. It was also established that Mr Bessem was aware of the circumstances under which the Management Agreement could be terminated as well as RECAP's fee arrangements with DAM under the Management Agreement. Further, the oral evidence revealed that Mr Bessem did not specifically ask to read the Management

Agreement when it was supposedly available for the prospective shareholders' inspection. Subsequently, when Mr Bessem asked for a copy of the Management Agreement on 12 March 2006, it was denied to him.
68. The Claimant alleged that on 17 September 2006 RECAP only gave DEP and its solicitors limited access to the Management Agreement, and not a copy of the Agreement itself. However, RECAP did (after pressure from the Claimant's solicitors) supply a copy of the Management Agreement to the Claimant on 2 October 2006.

Defendant's contentions

69. The Defendant denies that the Claimant is entitled to the relief sought under the First Declaration, which is that the Articles of Association of RECAP that were in force as at 25 May 2006 were the Incorporation Articles. On the contrary, the Defendant submitted that the Articles of Association of the Defendant in effect as at 25 May 2006 were the New Articles. Those New Articles were adopted by special resolution unanimously passed by the shareholders at the 5 April 2005 Meeting, as amended by written resolution signed by all of the Defendant's shareholders on or around 3 May 2005.

70. In response to the Claimant's allegation that the special resolution was not validly passed at the 5 April 2005 Meeting because of procedural irregularities, the Defendant argued that:

70.1. Any such irregularities should be cured under Article 157 of the DIFC Companies Law 2006.
70.2. Alternatively, the Articles of Association of the Defendant in force as of 25 May 2006 were the Original Incorporation Articles, as amended by the written resolution unanimously approved by the Defendant's shareholders on 29 December 2004 and the written resolution unanimously approved by the Defendant's shareholders on or about 3 May 2005.

71. In respect of the irregularities at or in relation to the meetings of shareholders held on 5 April 2005, 27 June 2006, and 10 September 2006, the Defendant argues that the Court should either:

71.1. Confirm that, pursuant to Article 157(2) of the 2006 Companies Law, the resolutions at the meetings are treated as having been validly passed notwithstanding any procedural irregularity at or in relation to the meetings; and/or
71.2. Exercise its discretion under Article 157(3) of the 2006 Companies Law to declare that the resolutions are not invalid.
72. The Defendant further argues that, even if it is found that, owing to any procedural irregularities, the New Articles were not adopted at the 5 April 2005 Meeting, the Article 157 application should be accepted in its entirety by the Court. This is because, amongst other reasons, the shareholders holding 95% of the shares of RECAP supported the application. Accordingly, any such procedural irregularities should be validated and the proceedings at the 5 April 2005 Meeting (including the vote to adopt the New Articles) as well as the proceedings at the 27 June 2006 Meeting and the 10 September 2006 Meeting, should all be confirmed.
73. The Defendant also argues that a partial validation under Article 157 would render the Claimant's request "purely academic". Assuming that the Court only validated the procedural irregularity consisting of the short notice for the 10 September 2006 Meeting, the partial grant would confirm both the adoption of the Current Articles and the ratification of the Management Agreement by the shareholders at that meeting. According to the Defendant, the Claimant's request would become moot because its only purpose was to determine whether the shareholders ratified the Management Agreement.
74. In the alternative, the Defendant argues that, pursuant to Article 65(2) of the 2006 Companies Law, the letter dated 23 January 2007 from the shareholders holding 95% of the shares in RECAP constitutes the requisite statutory consent in writing to a short notice for the 10 September 2006 Meeting. Accordingly, the Defendant argues that RECAP has acted to validate the proceedings of that meeting, including the adoption of the Current Articles and the ratification of the Management Agreement.

75. The Defendant also argues that, if the Court denies the Article 157 Application and does not accept the argument pursuant to Article 65(2) of the 2006 Companies Law relating to the validation of a short notice, the Court should still deny the Claimant's request on the grounds that the Articles in effect at the commencement of these proceedings were the Incorporation Articles by virtue of an *ad hoc* amendment of those Articles effected by the following documents:

(a) The SSA, by which all the shareholders of RECAP agreed that their purchase of shares was "undertaken pursuant to the terms set forth in the [Private Placement] Memorandum" (whose terms included a provision that the Defendant would be managed by Daman pursuant to the Management Agreement, which was about to be made available for review by potential investors);
(b) The written RECAP shareholders' resolution dated 29 December 2004, which unanimously approved the Management Agreement between RECAP and DAM dated 9 October 2004;
(c) The closing letter dated 5 April 2005 ("the Closing Letter") signed by all the shareholders of RECAP (including the Claimant), by which they confirmed that the purchase and subscription of their shares was "pursuant to the terms set forth in the Subscription Agreement and this letter"; and
(d) The written resolution signed by RECAP's shareholders and (in Mr Bessem's case dated 3 May 2005), which unanimously amended the number and manner of selecting the directors of RECAP). (See paragraph 30 above)

The 5 April 2005 Meeting

76. The Defendant argues that the evidence established that the New Articles were distributed to the shareholders prior to the commencement of the 5 April 2005 Meeting. Further, the approval of the New Articles was raised by the chairman of the meeting, and the matter was left open for discussion and questions.
77. Addressing the question of whether a vote was taken at the 5 April 2005 Meeting, the Defendant argues that the shareholders were aware that they were being asked to vote to approve the New Articles when the chairman asked, "*shall we take that as ratified*?". Indeed, they unanimously voted in favour; in fact, many raised their hands and no one expressed any dissent.
78. The Defendant also points out that Mr Bessem could not have signed the written resolution on 3 May 2005 (which sought to amend Articles 67 and 68 of the New Articles) without knowing what those New Articles were or without having them in his possession. Indeed, his testimony at the evidentiary hearing was that he did not look at the New Articles (or any other articles) to see what provisions were being replaced; in fact he

"*really did not care which articles of the existing Articles of Association were being replaced*".[7]

The 27 June 2006 Meeting

79. The Defendant contends that the facts relating to the 27 June 2006 meeting as set out in Mr Buderi's witness statement supporting the Defendant's application under Article 157 of the 2006 Companies Law were uncontested by the Claimant at the evidentiary hearing.
80. In the Defendant's application under Article 157 of the 2006 Companies law, it concedes that the 27 June 2006 Meeting was not convened with the requisite 21 days' notice period under Article 65(1) of the 2006 Companies Law. The notice for this meeting was sent to the shareholders on 5 June 2006. Pursuant to Article 32E of the DIFC Companies Regulations 2006, the notice is deemed to have been given 48 hours later, i.e. on 7 June 2006. Applying the statutory interpretation of a "day" (i.e. a "business day" or a "normal working day in the DIFC") under Article 1(1)(d) of Schedule 1 to the 2006 Companies Law, and read together with Article 32E, it is apparent that the 27 June 2006 Meeting was called with less than the statutory period of 21 clear business days' notice.
81. The Defendant contends that the failure to provide the correct period of advance notice was an honest oversight by RECAP.

The 10 September 2006 Meeting

82. The Defendant asserts that the Claimant has not challenged the facts relating to the 10 September 2006 Meeting as set out in Mr Buderi's witness statement in support of the Defendant's application under Article 157 of the 2006 Companies Law. The Claimant has also not challenged the letter dated 23 January 2007 from the shareholders of RECAP to the Court setting out their support of all the resolutions at all these shareholders' meetings including the approval of further amended Articles at the 10 September 2006 Meeting.

Management Agreement

83. The Defendant points out that, during the evidentiary hearing, Mr Bessem acknowledged that he had reviewed the PPM. Mr Bessem agreed that it was clear from the PPM that the Defendant would enter into the Management Agreement immediately after its incorporation. Further, he also agreed that the PPM stated that the Management Agreement would be made available for review, and that all such investors were "urged" to review that agreement before investing.
84. The Defendant also argues that RECAP did in fact make the Management Agreement available for review by potential investors. This was supported by the testimony of Mr Shroff (of Dubai Alliance Investment Ltd, a shareholder of RECAP) that, prior to concluding his investment in RECAP, he retained Allen & Overy, a law firm, to conduct a due diligence review of his proposed investment in RECAP, which included a review of the Management Agreement.
85. In addition, the Defendant argues that the evidence and testimony of the shareholders shows that all of them (except the Claimant) are united in supporting DAM as the Manager under the Management Agreement. For instance, Mr Shroff testified as follows:"*Mr Black: Okay, but what about Daman Asset Management? You thought there was a conflict there?*Mr Shroff: No, they were the people who put the project together so they were aware of the project from day one. Without them I wouldn't have invested the money in the project."

Discussion

Preliminary remarks on the applicable law

86. The 2004 Companies Law was the applicable law in the DIFC until the 2006 Companies Law came into force on 30 April 2006.
87. As the statutory Companies Law in the DIFC is clearly based on common law principles, the common law jurisprudence of England and other Commonwealth countries is persuasive authority on principles of company law and the interpretation of similar statutory provisions. Further, there is express reference to the application of the laws of England and Wales under Article 8(2)(e) of the Law on the Application of Civil and Commercial Laws in the DIFC (DIFC Law No. 3 of 2004) ("DIFC Law No.3").
88. Article 8(2) of DIFC Law No. 3 provides a framework for ascertaining the applicable laws in each case. Since neither the 2004 nor the 2006 Companies Laws of the DIFC provide an exhaustive code of company law, the default position under Article 8(2)(e) of DIFC Law No. 3 is that the laws of England and Wales (particularly the common law) will apply to supplement the provisions of the DIFC Statutes.

Inadequate notice to convene 5 April 2005 Meeting

89. It is not disputed that the 5 April 2005 meeting was convened with less than 21 days' notice as required under Art 58(1) of the 2004 Companies Law which provides:"***58. Notice of meetings***

> *(1) Any meeting of the Company (other than an adjourned meeting) may be called by at least 21 days' notice in writing.*"

90. Article 22 of the Incorporation Articles also requires 21 days' notice for a meeting to be called:"***REQUISITION AND NOTICE OF GENERAL MEETINGS***

> *22. Subject to the Law, an annual general meeting and an extraordinary general meeting shall be called by at least 21 days' notice to all the members, the directors and auditors.*"

91. Paragraph (1)(e) of Schedule 1, Rules of Interpretation, in the Companies Law 2004 states that "*a day shall refer to a business day, being a normal working day in the DIFC*". At common law, 21 days' notice means 21 clear days between the day on which the member would receive the notice in the
ordinary course of post and the day of the meeting:*Re Railway Sleepers Supply Co*(1885) 29 Ch D 204.
92. The notice for that meeting was sent out on 15 March 2005. Since there were six non-business days between 15 March and 5 April 2005, it is apparent that the notice was served less than 21 clear business days before the meeting.

The shareholders had the opportunity to review the Management Agreement.

93. It is not disputed that the Management Agreement was not physically attached to the New Articles when the shareholders voted in favour of the adoption of those Articles. Both parties also accepted that not all of the shareholders had seen the Management Agreement prior to casting

their votes. However, I find that the New Articles cannot be understood without the Management Agreement, as there were numerous references to the Management Agreement in the New Articles. Notwithstanding that finding of fact, it has been clearly established at the evidentiary hearing that the shareholders had the opportunity to review the Management Agreement.
94. It cannot be disputed that all the shareholders had the opportunity to review the Management Agreement prior to investing; in fact they were encouraged by the Defendant to do so. It was also established at the evidentiary hearing that Mr Bessem had the opportunity to review the Management Agreement before entering into the SSA. However, as he did not ask for the Management Agreement, it was not shown to him.
95. In any event, this issue is now academic as all the shareholders now have the Management Agreement. This was established by the unchallenged evidence of the Defendant's witnesses at the hearing.

"Tricky" notice

96. The Claimant's allegations that the notice did not give a fair, candid and reasonable explanation of the proposed business at the meeting, and that the Agenda enclosed only states "Ratification of the Memorandum and Articles of Association" essentially amount to a charge that the notice was "tricky"[8]. The issue is academic in the context of the 5 April 2005 Meeting because the notice was deficient in so many other respects. By the time the later shareholders' meetings were held, the shareholders would have been put on notice that the PPM referred to the Management Agreement, which they could have asked for, but did not. In the circumstances of this case, I find that the notice was not tricky.

Whether the New Articles of Association were given to the shareholders at the 5 April 2005 meeting

97. It is not disputed that the proposed New Articles of Association were not enclosed with the notice (dated 15 March 2005) for the 5 April 2005 meeting. The only factual dispute relates to whether all the shareholders at the meeting were given the New Articles which were purportedly adopted in the course of the meeting.
98. The Claimant contends that, if the New Articles had been distributed at all, they would only have been supplied at the meeting itself. This is not disputed by the Defendant. However, Mr Bessem, in his witness statements, maintained that he did not receive the New Articles. At the evidentiary hearing, Mr Bessem stated that he did not recall the contents of the spiral bound "Blue Folder". Having reviewed the evidence given by some of the shareholders (as well as that of Ms Motiwalla, the employee in charge of marketing, who testified that she had personally placed copies of the New Articles in all the Blue Folders), I find that Mr Bessem's folder did in fact contain a copy of the New Articles.

No vote on a show of hands was taken

(a) ***The evidence***

99. There is a factual dispute as to whether a vote was actually taken. The Claimant maintained that no vote was taken at all; while the Defendant argued that a vote was taken, albeit that the chairman did not ask for a formal vote. Indeed, some of the shareholders of RECAP (Messrs Shroff, Nerguizian, and Jeyaseelan) gave evidence that they raised their hands. The minutes of the 5 April 2005 Meeting also state that a vote was taken in the approval of the special resolution to adopt the New Articles. However, the transcript of Mr Bessem's voice recording of the 5 April 2005 Meeting (reproduced at paragraph 26 above) indicates that no formal vote was taken because:

(a) He did not ask how many shareholders were in favour of the resolution and how many against (let alone ask for abstentions).
(b) He used the word "ratified" which would mean that he was referring to the Articles of Association which had been filed with the Registrar of Companies on incorporation, i.e. the Incorporation Articles (since he had not warned the shareholders that there was actually another set of new Articles of Association to be adopted.)

100. Mr Shroff's testimony (as set out in paragraph 48 above) was also consistent with the transcript of Mr Bessem's voice recording:"*Mr Black: [reading out item (e) in Mr Shroff's letter to the Court dated 23 January 2007] ""In taking the vote the chairman could have used more specific formal language although he asked two or three times whether all present, all right or okay with the Articles and no one expressed any dissent. He did not specifically ask who was in favour of approving the new Articles nor did he specifically ask whether there were any negative votes or abstentions."*So that seems to indicate in this letter which you say you were happy to sign and [Sic] accurate that there was not actually a vote?"Mr Shroff: "Well, everybody was asked.<u>It was not in this language of in favour or against.</u>It was asked if this was okay and if it is okay."

[emphasis added.]

101. At the evidentiary hearing, Mr Gargash confirmed that there was no show of hands at the 5 April 2005 Meeting, but "*an approving silence*" from some of the RECAP shareholders. Mr Gargash also confirmed at the trial that he did not say what was recorded in the minutes of the 5 April 2005 Meeting when he passed the special resolution to adopt the New Articles.
102. Mr Al Wandawi's evidence at the trial was also consistent with the transcript of Mr Bessem's voice recording of the 5 April 2005 Meeting:"*Mr Black: And you say it was approved by the shareholders, including yourself, through a vote. Can you just tell me how that vote was taken?*Mr Al Wandawi: Shehab was chairing this meeting. Shehab Gargash, and he indicated that the articles were in the folder and these are the new articles. And, to the best of my knowledge, he used the word, "This is the constitution of the company". And whether anybody agreed or disagreed with it. And there was a show of hands and some people nodded. He explicitly asked again, to the best of my knowledge, whether anybody disagreed and that was what happened. That's what I consider to be a vote.Mr Black:<u>Okay. So basically he asked whether people agree with it and spontaneously they put their hands up. Is that your recollection?Mr Al Wandawi: Yes</u>[after further questioning]*Mr Al Wandawi: No, maybe not. I don't remember exactly if every hand was up, extended up. That I don't know. One thing I do remember is no one objected.*"

[emphasis added]

103. In its application to validate proceedings under Article 157 of the 2006 Companies Law, the Defendant acknowledged that ".*when the matter of the articles was raised, the chairman asked whether the Shareholders were "alright" or "ok" with the articles, and, all present appearing to the chairman to have been in favor, he did not ask whether any of the Shareholders wished to abstain or vote against*". Similar words were inserted in the letter to the Court from the shareholders dated 23 January 2007 - ".*he did not specifically ask who was*

"in favor" of approving the new articles, nor did he specifically ask whether there were any negative votes or abstentions"
104. Based on the evidence before me, I find that no proper vote was taken at the 5 April 2005 Meeting, and accordingly the special resolution to adopt the New Articles was not properly passed. Some witnesses (including Mr Shroff) may have raised their hands voluntarily, but it was clear that this was a spontaneous expression of support rather than a response to a formal voting process. In addition, it was clear that the chairman, Mr Gargash, did not ask whether there were any objections to or abstentions from the passing of the special resolution at the 5 April 2005 Meeting. Indeed, he admitted that he did not count the number of abstentions or negative votes and was under the impression that he had 14 consenting shareholders.

(b) The legal position on voting by show of hands and affirmative voting

105. Although Counsel for both parties did not address this, it is useful to set out the law on what constitutes a vote properly taken at a shareholders' meeting.At common law, a vote at a general meeting is taken by a show of hands, unless the articles provide otherwise. This common law rule applies in the absence of express provision to the contrary in the Articles of Association. In*Re Horbury Bridge Coal, Iron and Waggon Co*(1879) 11 Ch D 109, a meeting was convened for the purpose of passing an extraordinary resolution under the Companies Act 1862 for voluntary winding up. Only five out of the 14 shareholders in the company attended the meeting, and the extraordinary resolution[9]was passed unanimously. The court had to decide whether the chairman was right in deciding that one of the liquidators was duly elected because the two persons, including himself, who voted for him held more shares in the company than the three who were against him. The court found that the chairman had decided incorrectly.
106. Accordingly, if a chairman fails to call for a show of hands and it is not apparent that every shareholder present positively voted in favour, a chairman's declaration that a resolution has been duly passed with unanimous approval as a special resolution may be struck down. A show of hands is a procedural safeguard against fraud, error or hasty judgment and the chairman has no power to waive the prescribed method of taking a vote [*Citizens Theatre*1946 SC 14].
107. Furthermore, affirmative votes are necessary to pass a resolution unanimously. Abstentions are not taken as affirmative votes.
108. Article 3 of Schedule 1 of the 2004 Companies Law defines a special resolution in the following terms:"*A resolution in respect of which notice of intention to propose the resolution has been given that has been passed by at least 75% of the members entitled to vote on the Resolution*".

109. Article 59(f) of the 2004 Companies Law sets out the meaning of a vote on a show of hands as follows:

> "*(f) on a show of hands, every member present in person at any such meeting has one vote and, on a poll, every member has one vote for every share held by him.*"

110. In*Gore-Browne on Companies*, the observation made on the s 283(4) of the English Companies Act 1985 is that:"*As to the requisite majority on a show of hands, it will be observed that there must be in favour of the resolution not less than three-fourths of such members as, being entitled so to do, vote in person, or where proxies are allowed, by proxy, and accordingly, any member present but not voting should be ignored.*"
111. Accordingly, an abstention may defeat a resolution that has to be passed unanimously or by a prescribed majority of those entitled to vote. In*Re Eynsham*(1849) 18 L.J.Q.B 210, a motion was to be "determined by a majority consisting of two-thirds of the votes of the ratepayers present" at a meeting as required under a statute. 37 ratepayers were present at this meeting, but the votes of 20 ratepayers in favour of the motion (the remainder abstaining) were deemed to be insufficient to comply with the statute.
112. In*Labouchere v Wharncliffe*(1879) 13 Ch. D 346, a committee of a club had power under its rules to call upon a member to resign and, if he refused to resign, the votes of two-thirds of those present at a general meeting were necessary to expel him. A meeting was called at which 117 members were present. Two thirds of 117 is 78. 77 voted for expulsion and 38 against, and the plaintiff and another person did not vote. Although the chairman declared the resolution carried, the court held that the result was improperly declared, as 77 was not the necessary two-thirds majority of those present under the rules. Jessel MR held that the expulsion was irregularly carried out, and he stated that:"*When a resolution is put to a meeting, the persons present may take one of three courses. They may vote for or against it, or, not wishing to express a positive opinion on the question, refrain from voting at all. This being so, those who do not vote may, by not doing so, turn the scale in favour of the accused member of the club.*"
113. Unanimous approval would therefore be different from approval*nemine contradicente*.*Nemine contradicente*means without opposition or dissent, and it expresses the lack of opposition of the members of a company to a resolution or vote. Approval that is*nemine contradicente*may therefore consist of abstentions, but abstentions may be construed as dissent in seeking unanimous approval or even special majorities. [Page 1066,*Black's Law Dictionary*, 8th Edition]

114. A special resolution can therefore only be passed where there is a positive affirmative vote of more than 75%:-

> (a) (In the case of a vote on a show of hands) of the shareholders entitled to vote at a meeting summoned with the requisite period of notice for that specific purpose of voting on that resolution as a special resolution;
> (b) (In the case of a vote on a poll) of the eligible shareholders or their proxies representing 75% or more of the voting rights of eligible shareholders present in person or by proxy and voting at a meeting summoned in the manner set out in (a) above.

(c) No formal vote on a show of hands was taken at the 5 April 2005 meeting

115. Since there is no record of how many votes were cast for and against the resolution supposedly passed on 5 April 2005 (as well as the number of abstentions), there is therefore no confirmation that the test set out in paragraph 114(a) above has been fulfilled.
116. Accordingly, I find that no formal vote on a show of hands was taken at the 5 April 2005 Meeting and (subject to the Article 157 application to be discussed below) the resolution was therefore not validly passed.

Defendant's Article 157 Application

117. Article 157 of the 2006 Companies Law allows a person to apply to the Court for a declaration that procedural irregularities do not invalidate the procedures of a company that do not meet the statutory criteria. As the application for declaration of validity was made after Article

133 of the 2004 Companies Law had been repealed and substituted by Article 157 of the 2006 Companies Law, the latter provision is the relevant legislation to consider. However, there is no difference between the 2004 and 2006 versions, and the criteria for granting of relief would accordingly be the same.
118. The Claimant is not attacking the validity of the resolutions passed at the 27 June 2006 Meeting and the 10 September 2006 Meeting. However, the Defendant is making the present counterclaim under Article 157 of the 2006 Companies Law to validate the resolutions passed at the 27 June 2006 and 10 September Meetings in addition to the resolution passed at the 5 April 2005 Meeting. As the resolutions are all closely related, in the interests of providing certainty as to the validity of the resolutions passed, I will decide on the validity of the resolutions passed at all three meetings in this case.

119. Article 157 of the 2006 Companies Law provides that:"***Irregularities***

(1) In this Article:
(a) "Procedure" is a reference to any procedure including but not limited to the making of a decision, the conduct of a hearing, the giving of a notice, and any proceeding whether a legal proceeding or not; and
(b) "Procedural irregularity" includes a reference to a defect, irregularity or deficiency of notice or time.
(2) A procedure under the Law or the Regulations or any other legislation administered by the Registrar is not invalidated because of any procedural irregularity unless the Court declares the procedure to be invalid.

(3) A person may apply to the Court for an order:

(a) declaring that:
(i) any act or thing purporting to have been done; or
(ii) any procedure purporting to have been commenced or undertaken;
under the Law or the Regulations or any other legislation administered by the Registrar is not invalid by reason of any contravention of a provision of such Law, Regulations or other legislation; or
(b) extending or abridging the period for doing any act, matter or thing or commencing or undertaking any procedure under the Law or the Regulations or any other legislation administered by the Registrar;
where any such act or thing, or procedure, is essentially of a procedural nature."
120. The Defendant concedes that the measures taken by RECAP relating to the three shareholders' meetings might have been in contravention of procedural requirements under the DIFC Companies Law 2004 and the Incorporation Articles (both of which were applicable at the material time).

121. The Defendant set out the following procedural irregularities in respect of the 5 April 2005 Meeting.

(a) The meeting was called on short notice of less than 21 days in contravention of Article 58(1) of the 2004 Companies Law and Article 22 of the Incorporation Articles.
(b) The Agenda for the meeting did not specify that the special resolution was to adopt new articles in contravention of Article 58(3)(c) of the 2004 Companies Law. (The word "ratification" instead of "adoption" was used in the Agenda.)
(c) The New Articles were not attached to the notice sent out to the RECAP shareholders but were distributed to them at the meeting itself.

122. With regard to the meetings of 27 June 2006 and 10 September 2006, the only procedural irregularity was that both meetings were called with less than 21 days' notice. The Defendant argues that the deficiency in notice period for both meetings was minimal; shareholders representing more than 75% of the company had attended the meetings and the subject matter of the proposed resolutions was well-known to the shareholders prior to the meetings. The Defendant also submits that the failure to comply with the required notice period was an honest oversight.
123. The Defendant argues that the Court should grant the validation order because the acts of giving notice and conducting the meetings constitute "procedures" within the meaning of Article 157(1)(a) of the 2006 Companies Law. Further, the Defendant submits that the irregularities would not cause any substantial injustice; the persons involved in the contravention of the statutory criteria acted honestly and it was just and equitable that the validation order be made. Further, the Defendant argues that, even if the procedures had been carried out without any irregularities, the results would have been exactly the same in each case as the RECAP shareholders representing at least 90% of the shareholders (and possibly Mr Rachid Mikati as well) have confirmed in each of their respective letters to the Court dated 23 January 2007 (and, where they have given oral evidence in their testimony) that they are in support of both the New Articles (5 April 2005) and the later amended Current Articles (10 September 2006) and that they have also received a copy of the Management Agreement, and nevertheless wish to maintain their support for the Current Articles.
124. With regard to Article 157 of the 2006 Companies Law (the applicable Law from 30 April 2006), the Claimant argues that it cannot, or alternatively should not, be used to cure the procedural irregularities of RECAP in convening meetings and placing special resolutions before the shareholders because the word "procedure" in Article 157 refers to procedures directed to regulating companies and not a company's internal administrative procedures. Alternatively, it contends that the Court should not exercise its discretion to validate the meetings convened irregularly and special resolutions passed because improper notice had been given. Further, Mr Gargash and Mr Sulaiman, being the promoters of RECAP, have interests in the Management Agreement; the Claimant thus argues that the promoters should be compelled to place all relevant information before all the shareholders at a properly convened meeting.
125. The Defendant relies on the Australian jurisprudence on the equivalent provision, namely, section 1322 of the Australian Corporations Act 2001 ("Corporations Act") and the Singapore jurisprudence under s 392 of the Singapore Companies Act (Cap. 50), both being broadly equivalent to Article 157. Both the Australian s 1322 and the Singapore s 392 contain a proviso that the Court will not validate procedural irregularities that have caused or may cause substantial injustice that cannot be remedied by any order of Court.

126. S 1322 of the Australian Corporations Act 2001 provides:

"*(1) In this section, unless the contrary intention appears:*

(a) a reference to a proceeding under this Act is a reference to any proceeding whether a legal proceeding or not; and

(b) a reference to a procedural irregularity includes a reference to:

(i) the absence of a quorum at a meeting of a corporation, at a meeting of directors or creditors of a corporation, at a joint meeting of creditors and members of a corporation or at a meeting of members of a registered scheme; and
(ii) a defect, irregularity or deficiency of notice or time.
(2) A proceeding under this Act is not invalidated because of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid.
(3) A meeting held for the purposes of this Act, or a meeting notice of which is required to be given in accordance with the provisions of this Act, or any proceeding at such a meeting, is not invalidated only because of the accidental omission to give notice of the meeting or the non-receipt by any person of notice of the meeting, unless the Court, on the application of the person concerned, a person entitled to attend the meeting or ASIC, declares proceedings at the meeting to be void.

(3A) If a member does not have a reasonable opportunity to participate in a meeting of members, or part of a meeting of members, held at 2 or more venues, the meeting will only be invalid on that ground if:

(a) the Court is of the opinion that:
(i) a substantial injustice has been caused or may be caused; and
(ii) the injustice cannot be remedied by any order of the Court; and
(b) the Court declares the meeting or proceeding (or that part of it) invalid.

(3B) If voting rights are exercised in contravention of subsection 259D(3) (company controlling entity that holds shares in it), the meeting or the resolution on which the voting rights were exercised will only be invalid on that ground if:

(a) the court is of the opinion that:
(i) a substantial injustice has been caused or may be caused; and
(ii) the injustice cannot be remedied by any order of the court; and
(b) the court declares the meeting or resolution invalid.

(4) Subject to the following provisions of this section but without limiting the generality of any other provision of this Act, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes:
(a) an order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Act or in relation to a corporation is not invalid by reason of any contravention of a provision of this Act or a provision of the constitution of a corporation;
(b) an order directing the rectification of any register kept by ASIC under this Act;
(c) an order relieving a person in whole or in part from any civil liability in respect of a contravention or failure of a kind referred to in paragraph (a);
(d) an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Act or in relation to a corporation (including an order extending a period where the period concerned ended before the application for the order was made) or abridging the period for doing such an act, matter or thing or instituting or taking such a proceeding;
and may make such consequential or ancillary orders as the Court thinks fit.
(5) An order may be made under paragraph (4)(a) or (c) notwithstanding that the contravention or failure referred to in the paragraph concerned resulted in the commission of an offence.

(6) The Court must not make an order under this section unless it is satisfied:

(a) in the case of an order referred to in paragraph (4)(a):
(i) that the act, matter or thing, or the proceeding, referred to in that paragraph is essentially of a procedural nature;
(ii) that the person or persons concerned in or party to the contravention or failure acted honestly; or
(iii) that it is just and equitable that the order be made;*and*
(b) in the case of an order referred to in paragraph (4)(c)-that the person subject to the civil liability concerned acted honestly; and
(c) in every case-that no substantial injustice has been or is likely to be caused to any person."

(emphasis added)

127. S 392 of the Singapore Companies Act provides as follows:"***Irregularities***

392.-(1) In this section, unless the contrary intention appears a reference to a procedural irregularity includes a reference to-
(a) the absence of a quorum at a meeting of a corporation, at a meeting of directors or creditors of a corporation or at a joint meeting of creditors and members of a corporation; and
(b) a defect, irregularity or deficiency of notice or time.
(2) A proceeding under this Act is not invalidated by reason of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid.
(3) A meeting held for the purposes of this Act, or a meeting notice of which is required to be given in accordance with the provisions of this Act, or any proceeding at such a meeting, is not invalidated by reason only of the accidental omission to give notice of the meeting or the non-receipt by any person of notice of the meeting, unless the Court, on the application of the person concerned, a person entitled to attend the meeting or the Registrar, declares proceedings at the meeting to be void.

(4) Subject to the following provisions of this section and without limiting the generality of any other provision of this Act, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes:

(a) an order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Act or in relation to a corporation is not invalid by reason of any contravention of, or failure to comply with, a provision of this Act or a provision of any of the constituent documents of a corporation;
(b) an order directing the rectification of any register kept by the Registrar under this Act;
(c) an order relieving a person in whole or in part from any civil liability in respect of a contravention or failure of a kind referred to in paragraph (a);
(d) an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Act or in relation to a corporation (including an order extending a period where the period concerned expired before the application for the order was made) or abridging the period for doing such an act, matter or thing or instituting or taking such a proceeding,
and may make such consequential or ancillary orders as the Court thinks fit.
(5) An order may be made under subsection (4)(a) or (b) notwithstanding that the contravention or failure referred to in the paragraph concerned resulted in the commission of an offence.

(6) The Court shall not make an order under this section unless it is satisfied-

(a) in the case of an order referred to in subsection (4)(a)-
(i) that the act, matter or thing, or the proceeding, referred to in that paragraph is essentially of a procedural nature;
(ii) that the person or persons concerned in or party to the contravention or failure acted honestly; or
(iii) that it is in the public interest that the order be made;
(b) in the case of an order referred to in subsection (4)(c), that the person subject to the civil liability concerned acted honestly; and
(c) in every case, that no substantial injustice has been or is likely to be caused to any person."
128. Although Article 157 of the 2006 Companies Law does not expressly contain the same test of substantial injustice as the Australian and Singapore statutes, the criterion of substantial injustice still remains as a useful touchstone to assist the Court in deciding whether it should invalidate a procedural irregularity.
129. I would therefore be prepared to hold that a defect of notice would not normally invalidate a meeting, unless substantial injustice has been caused by such deficiency.
130. Since the notice period of 21 days is essentially of a procedural nature, a shorter period of notice would be "*a defect, irregularity or deficiency of notice*" within the meaning of Article 157.
131. This is a case where the principle set out in *MacDougall v Gardiner* (1875) 1 ChD 13 would apply, i.e. the majority can regularize irregularities. The court in *MacDougall* stated that:"*if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes. . the majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly.*"
132. Although details of the Management Agreement were not given in all three notices and there were several other procedural irregularities, I will exercise my discretion to regularize the resolutions because at least 90% of the shareholders have indicated by way of a letter to the Court that their decision to adopt the New Articles would not have been affected by the nondisclosure.[10] All the shareholders who have given evidence have formally identified their letters and confirmed their contents as expressing their position. I have no reason to doubt the authenticity of the remaining letters as they have not been challenged. Apart from the Claimant, all (or nearly all) the other shareholders have signed a letter advising that, notwithstanding the procedural irregularities, they support all the resolutions reached at each of the three shareholders' meetings and they confirm their receipt of the Management Agreement and "*continue to believe that it is in the best interests of RECAP that it continue to be managed by DAM pursuant to that agreement*".
133. Accordingly, as the defective procedures in adopting the resolutions have been directly regularized by the exercise of my discretion, it is not necessary to deal with the Defendant's arguments in the alternative. Those arguments were that the Claimant's request for a declaration that the articles in effect at the commencement of these proceedings were the original Incorporation Articles alone must be rejected since the original Incorporation Articles had been indirectly amended by a series of unanimous shareholder agreements in the form of the SSA, the 29 December 2004 written resolution, the 5 April 2005 Closing Letter and the 3 May 2005 written resolution. I would observe that an *ad hoc* amendment of articles of association can only be effected in the following way. All the shareholders who have a right to attend and vote at a general meeting of a company can, by unanimous approval, amend the articles of association. As long as there is actual assent [*Re D'Jan of London Ltd* [1994] 1 BCLC 561 at 564], it would then be as binding as a resolution in general meeting would be. [*Re Duomatic Ltd* [1969] 1 All ER 161]. Further, there must be real assent, meaning that the shareholders must know the nature of what they are assenting to [paragraph 11[2], *Gore-Browne on Companies*, citing *EIC Services Ltd v Phipps* [2004] 2 BCLC 589 at paragraphs 120 to 147]. It does not matter whether unanimous approval is given by the shareholders in advance or after the event. It also does not matter whether it is characterised as an agreement, a ratification, a waiver or an estoppel, and whether members of the group give their consent in different ways at different times [*EIC Services Ltd v Phipps* [2003] EWHC 1507 (Ch)]. On the facts set out above, I do not wish to express an opinion as to whether these requirements have been met.
134. In view of my decision, it is also not necessary to deal with the Defendant's arguments in the alternative with regard to Article 65(2) of the 2006 Companies Law.

135. Articles 65(1) and (2) of the 2006 Companies Law provide as follows:

"*(1) Any General Meeting of the Company (other than an adjourned meeting) may be called by at least 21 days' notice in writing.*
(2) If a General Meeting is called by shorter notice than that specified in Paragraph (1), it is deemed to have been duly called if it is so agreed by a majority in number of the Shareholders having a right to attend and vote at the General Meeting, being a majority together holding not less than 95 per cent of the share capital represented by the Shares giving a right to attend and vote at the General Meeting."
136. However, my tentative view (without detailed research) is that a consent to short notice for purposes of Article 65(2) of the 2006 Companies Law can only be given at or before the convening of the meeting in question and not after the meeting has taken place [*Re Pearce, Duff & Co. Ltd* [1960] 3 All ER 222, [1960] 1 WLR 1014].

Whether the Management Agreement should be declared invalid

137. A number of arguments were addressed with regard to this declaration. The Claimant contends that the 5 April 2005 Meeting was irregularly convened and was ineffective either to empower RECAP or its directors to enter into the Management Agreement by the adoption of the New Articles or to ratify the Management Agreement. These arguments will be addressed later in the section entitled 'Ancillary Observations'.

The Claimant's arguments on locus standi

138. The Claimant argues that it has *locus standi* (i.e. individual standing to bring an action in the court) on the basis of the following arguments.

(a) The Claimant contends that the present action is neither a derivative action nor a minority shareholders' claim under Article 134 of the 2004 Companies Law nor a personal claim against promoters. The Claimant also contends that, whether or not it can bring a derivative action is not for decision in the present case, since the present action is not a derivative action. The Claimant recognizes that such a derivative claim or a statutory claim by minority shareholders would have to be fully pleaded in a properly constituted action and both parties would be obliged to give full and proper information and disclosure. Its purpose of bringing the present action is to seek a declaration that will shape those future proceedings.
(b) The Claimant argues that Messrs Gargash and Sulaiman, being the promoters of RECAP, owed fiduciary duties to RECAP and its future shareholders (including the Claimant) who were to provide the initial capital for the Company. On that basis, the Claimant in effect argues that it has *locus standi* as a shareholder to maintain a claim against the Defendant as opposed to the Company.
(c) The Claimant contends that Messrs Gargash and Sulaiman acted *ultra vires* and in breach of their duties as directors in the entry into the Management Agreement.
(d) The Claimant argues, in any event, that the entry into the Management Agreement was outside the capacity of the Company and therefore incapable of ratification.
139. The first step is to consider whether the Claimant has *locus standi* to seek a declaration that the Management Agreement between the Manager and the Defendant company is invalid. Accordingly, the Claimant's arguments above will be considered in greater detail in my ancillary observations below (see paragraphs 174 to 232).

The Defendant's arguments on locus standi

140. The Defendant argues that the Claimant has no *locus standi* as a shareholder to challenge the entry by the Defendant into the Management Agreement unless it can bring itself within one of the exceptions to the rule in *Foss v Harbottle*. The Defendant argues that the Claimant is unable to bring itself within one of the exceptions for the following reasons.

(a) The entry into the Management Agreement is not an *ultra vires* act.
(b) The entry into the Management Agreement is not illegal.
(c) There is no allegation that the entry into the Management Agreement was a fraud on the minority.
(d) There is no allegation that the Defendant is prevented from remedying any fraud or taking any proceedings because of the protection given to the fraudulent directors or shareholders by virtue of their majority. Such control is a pre-requisite for a derivative action. Furthermore, the evidence demonstrates that Mr Gargash and Mr Sulaiman do not hold a majority of the shares so as to give themselves such protection.
(e) The shareholders of the Defendant do not support the action by the Defendant to nullify the Management Agreement. In fact, it is the unchallenged testimony of the shareholders that they "*continue to believe that it is in the best interests of [the Defendant] that it continue to be managed by Daman pursuant to the [Management Agreement]*" see paragraph 44. In his testimony, Mr Bessem acknowledged that he does not doubt the honesty of any of the shareholders.
141. In support of its argument, the Defendant cites *Pavlides v Jensen* [1956] 1 Ch 565 ('*Pavlides*'), *Smith v Croft* (No. 2) [1987] 3 All ER 909, *Erlanger v New Sombrero Phosphate Co.* (1878) 3 App Cas 1218, *Burland v Earle*, *Barrett v Duckett* [1995] 1 BCLC 243, *Nurcombe v Nurcombe* [1984] BCLC 557.

Locus standi

142. The starting point when considering *locus standi* is the rule in *Foss v Harbottle* (1843) 2 Hare 461, i.e. the proper plaintiff rule. As the 2006 Companies Law does not enunciate a similar principle, the English common law rule in *Foss v Harbottle* is persuasive authority in the DIFC. Further, none of the other possible laws set out in Article 8(2)(a) to (d) of the Law on the Application of Civil and Commercial Laws in the DIFC (DIFC Law No. 3 of 2004) is applicable, so the laws of England and Wales under Article 8(2)(e) will apply in situations of default.
143. The rule in *Foss v Harbottle* essentially states that the company is *prima facie* the proper plaintiff in actions concerning its affairs. In other words, the shareholders holding a majority of the issued voting shares, within the limits of their power to ratify, have the sole right to determine whether or not a dispute shall be brought before the courts (paragraph 18[2], *Gore-Browne on Companies Volume I)*. This rule was extended to cover internal irregularities, on the basis that, if the wrong complained of was something that the members could cure, it would be fruitless to litigate over it ('the internal management rule') (paragraph 18[2], *Gore-Browne on Companies Volume I)*.

144. In *Prudential Assurance Co Ltd v Newman Industries Ltd (No. 2)* [1982] Ch 204, the English Court of Appeal described the judgement of Jenkins LJ in *Edwards v Halliwell* [1950] 2 All ER 1064 (CA) as the 'classic definition of the [*Foss v Harbottle*] rule' (and its exceptions) and summarised the relevant propositions of Jenkins LJ as follows.

(i) The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is *prima facie* the corporation.
(ii) Where the alleged wrong is a transaction which might be made binding on the corporation and all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter because, if the majority confirms the transaction, there is no valid reason why the company should not sue.
(iii) There is no room for the operation of the rule if the alleged wrong is *ultra vires* the corporation, because the majority of members cannot confirm the transaction.
(iv) There is also no room for the operation of the rule if the transaction complained of could be validly done or sanctioned only by a special resolution or the like, because a simple majority cannot confirm a transaction which requires the concurrence of a greater majority.

(v) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue.
145. I now consider the cases of*Pavlides v Jensen*[1956] 1 Ch 565,*Smith v Croft*(No. 2) [1987] 3 All ER 909,*Burland v Earle*,*Barrett v Duckett*[1995] 1 BCLC 243,*Nurcombe v Nurcombe*[1984] BCLC 557 cited by the Defendant in its Final Closing Submissions.
146. In*Pavlides v Jensen*[1956] 2 All ER 518, the plaintiff claimed on behalf of himself and all other shareholders of T.A.C. Ltd. (except the defendant directors) against the defendant directors and T.A.C. Ltd. for a declaration that the directors were guilty of a breach of duty, but did not allege that the sale was*ultra vires*, or that the directors had acted fraudulently. It was held that the action was not maintainable by the plaintiff because, since the sale of the mine was within the powers of T.A.C. Ltd. and no acts of a fraudulent character had been alleged by the plaintiff, the sale could be approved or confirmed by the majority of shareholders.
147. The Defendant relies on this case for the proposition that, in the absence of*locus standi,*it is impossible for a minority shareholder to maintain an action to challenge the Management Agreement.
148. In*Smith v Croft*(No. 2) [1987] 3 All ER 909, the plaintiffs representing 14.44% of the company commenced a minority shareholders' action against shareholders representing 62.5 % of the voting rights, alleging that (a) the executive directors of the company had paid themselves excessive remuneration, (b) the associated companies had received payments which were not made to benefit the company but designed to benefit the executive directors and were a dishonest breach of the directors' fiduciary duties and constituted a fraud on the minority shareholders, (c) the company's moneys were used to enable the associated companies to purchase the company's shares in breach of s 42 of the Companies Act 1981, and (d) payments made to the executive directors by way of reimbursement for expenses allegedly incurred on behalf of the company were in substance gifts and therefore*ultra vires*the company and made in fraudulent breach of the directors' fiduciary duties. The defendants sought an order under either Order 18 Rule 9 of the English Rules of Supreme Court, or under the inherent jurisdiction of the court, that the plaintiffs' action be struck out as not being one which the plaintiffs were entitled to bring.

149. The court held that, to have standing to bring a minority shareholder's action, it was necessary for a shareholder to establish a*prima facie*case that:

(i) the company was entitled to the relief claimed, and
(ii) the action fell within the boundaries of one of the exceptions to the rule in*Foss v Harbottle*.
150. The plaintiff had*prima facie*established that the company was entitled to the relief claimed because a transaction in breach of s 42 (the financial assistance provision in the English Companies Act 1985 which prohibited a company from assisting in the purchase of its own shares) was both*ultra vires*and illegal and as such unratifiable. However, the plaintiff had failed to establish a*prima facie*case in respect of the other payments made to the directors and associated companies as it was not shown that any of these transactions was either*ultra vires*or in excess of authority and therefore in breach of duty.
151. With respect to the first limb, the court in*Smith v Croft*did observe that "*there may well be a much stronger case for requiring a prospective plaintiff to have the onus of establishing that this case falls within the exceptions to the rule in Foss v Harbottle (1843) 2 Hare 461, . than there is for putting the same onus on him to show that the company would be likely to succeed if it brought the action. On the latter, it might well be appropriate . [to put] the onus on the defendants to show the case is effectively unarguable.*"
152. As for the second limb of the test, the court held that:"*the whole doctrine whereby a minority shareholder is permitted to assert claims on behalf of the company, is rooted in a procedural expedient, and adopted to prevent a wrong going without redress. Where what is sought is compensation for the company for loss caused by ultra vires transactions the wrong, in my judgment, is a wrong to the company which has the substantive right to redress. Where the minority shareholder is seeking to prevent an ultra vires transaction or otherwise seeking to enforce his personal substantive rights, the wrong which needs redress is the minority shareholder's wrong.*"
153. The court in*Smith v Croft*also held that there was no reason in principle why shareholders who were independent of the wrongdoers should not abandon or compromise a right of action arising out of a past*ultra vires*transaction (at pp 388f-h, 3391b-e of*Smith v Croft*).
154. The court in*Smith v Croft*further held that, in a minority shareholder's action to recover compensation for*ultra vires*transactions or to recover money in respect of acts which constituted a fraud on the minority, it would have regard to the views of the majority of the independent shareholders since, in determining whether the rule in*Foss v Harbottle*applied to prevent a minority shareholder seeking relief on behalf of the company, the ultimate question was whether the plaintiff was being prevented improperly from bringing the proceedings. If the plaintiff was prevented from prosecuting an action by an appropriate independent organ of the company, he was not being improperly prevented (at pp 410d-403g).
155. Shareholders would fail to satisfy this test of independence if their votes were cast with a view to supporting the defendants rather than for the benefit of the company or there was a substantial risk that this would occur and, while the court should not substitute its opinion for that of the shareholders, it should determine whether the decision-making process would be likely to be vitiated by being directed towards an improper purpose (at pp 404d-i).
156. In*Smith v Croft*, as it was proper for the court to take into consideration the views of a majority within the minority shareholders, even for an*ultra vires*transaction then, given that the action was opposed by a 20% shareholder which was both independent and held a majority of the minority shares on the grounds that it was not in the interests of the company, the action was dismissed.
157. The Defendant relies on*Smith v Croft*for the proposition that the Company must be prevented from remedying the fraud or taking any proceedings because of the protection given to the fraudulent shareholders or directors by virtue of their majority in order to fall within the exception to*Foss v Harbottle*. It argues that this Court should take into account the fact that 95% of the shareholders believe that it is in the best interests of the Defendant that it continued to be managed by DAM pursuant to the Management Agreement. and are ready to ratify it. However, the Defendant does not concede that the entry into the Management Agreement was an*ultra vires*act. This is in contrast to the transaction in*Smith v Croft,*which was*ultra vires*and therefore came within the exception in*Foss v Harbottle*.
158. The Defendant asserts that this case is a matter of a disgruntled 5% minority shareholder pitting itself against the wishes of 95% of the company. It relies on*Burland v Earle*[1902] AC 83, where it was held that the court would not interfère with the internal management of companies acting within their powers. Even if the shareholders were allowed to bring an action in their own names (in a case where the persons against whom the relief was sought themselves held and controlled the majority of the shares in the company, and would not permit an action to be brought in the name of the company), this was only a procedural concession "*in order to give a remedy for a wrong which would otherwise*

escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders or are capable of being confirmed by the majority." (at page 93)

159.*Burland v Earle*made it clear that "*the cases in which the minority can maintain such an action are therefore confined to those in which the acts . are of a fraudulent character, or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate.*"

160. In the present case, no fraud on the part of the majority is alleged.[11]Even if there has been a wrong done to the Defendant in entering into the Management Agreement by persons in control of the Defendant, the intention of the majority of the shareholders to approve the entry into the Management Agreement is clear, and the act of entering into the Management Agreement is within the powers of the Defendant[12]. Accordingly, the Claimant as a 5% minority is not entitled to sue.

161. In*Barrett v Duckett*[1995] 1 BCLC 243, Court of Appeal (Civil Division), where a 50% shareholder (B) commenced an action against another 50% shareholder (D) (her former son-in law) owing to the underlying divorce, it was held that "*a shareholder would be allowed to bring a derivative action on behalf of a company where the action was brought bona fide for the benefit of the company for wrongs to the company for which no other remedy is available and not for an ulterior purpose. Conversely, if the action was brought for an ulterior purpose or if another adequate remedy was available, the court would not allow the derivative action to proceed. On the facts, the opportunity to put the company into liquidation provided an alternative remedy to the derivative action. In addition, B was not pursuing the action bona fide in the interests of the company but was pursuing it for personal reasons associated with the divorce of her daughter from D. Accordingly, the derivative action was struck out.*" The court in that case set out a clear summary of the applicable principles, which are applicable to the present case."*The general principles governing actions in respect of wrongs done to a company or irregularities in the conduct of its affairs are not in dispute:*

1. The proper plaintiff is prima facie the company.
2. Where the wrong or irregularity might be made binding on the company by a simple majority of its members, no individual shareholder is allowed to maintain an action in respect of that matter.
3. There are however recognised exceptions, one of which is where the wrongdoer has control which is or would be exercised to prevent a proper action being brought against the wrongdoer: in such a case the shareholder may bring a derivative action (his rights being derived from the company) on behalf of the company.
4. When a challenge is made to the right claimed by a shareholder to bring a derivative action on behalf of the company, it is the duty of the court to decide as a preliminary issue the question whether or not the plaintiff should be allowed to sue in that capacity.
5. In taking that decision it is not enough for the court to say that there is no plain and obvious case for striking out; it is for the shareholder to establish to the satisfaction of the court that he should be allowed to sue on behalf of the company.
6. The shareholder will be allowed to sue on behalf of the company if he is bringing the action bona fide for the benefit of the company for wrongs to the company for which no other remedy is available. Conversely if the action is brought for an ulterior purpose or if another adequate remedy is available, the court will not allow the derivative action to proceed."

162. On the facts of this case, the Claimant has a clear collateral motive in commencing the action. This is evidenced by the fact that the main director of the Claimant has brought a separate suit in respect of the same subject matter against the same Defendant. In fact, the Claimant very clearly states that its purpose of bringing the present proceedings is to seek declarations that will shape those other proceedings. This perhaps accounts for the apparently academic First Declaration that it is seeking. However, the Defendant does not challenge the*locus standi*of the Claimant to seek the First Declaration but only its standing to claim the Second Declaration.

163. The cases of*Smith v Croft, Burland v Earle*and*Barrett v Duckett*demonstrate clearly that the entire rationale of allowing a shareholder to redress a wrong done to the company by persons in control is because there would otherwise be no other avenue of redress. This rationale does not apply when there is no fraud by the majority in ratifying the wrong done within the powers of the company, when the minority shareholder is suing due to an ulterior purpose or when the majority of shareholders, independently of the wrongdoer in control, have nevertheless indicated their intention to forgive the wrong done to the company.

164. In this case, the rule in*Foss v Harbottle*is clearly applicable, and the Defendant, RECAP, would be the proper plaintiff in any claim against DAM to set aside the Management Agreement. I now turn to consider the Claimant's argument seeking to establish itself within the exceptions to this rule.

The Claimant's argument that the entry into the Management Agreement was outside the capacity of the Company and therefore incapable of ratification.

165. One of the exceptions to the rule in*Foss v Harbottle*is that the act of the company is*ultra vires*. However, section 22 of the 2004 Companies Law in effect at the time (and also section 24 of the 2006 Companies Law) states:"***Capacity of Company***

(1) A Company has the capacity, rights and privileges of a natural person.
(2) The capacity of a Company is not limited by anything in its articles or by any act of its Shareholders or Members."

166. Accordingly, there is no scope for operation of the*ultra vires*doctrine in invalidating acts of the Company.

167. Since the entry into the Management Agreement was not*ultra vires,*the Claimant's argument that the Management Agreement was incapable of ratification on the basis that it was*ultra vires*fails.

Conclusion

168.*Smith v Croft (No. 2), Nurcombe v Nurcombe*and*Barrett v Duckett*all recognize that a minority shareholder's action is a procedural device. The Defendant aptly cited the words of Lawton LJ in*Nurcombe v Nurcombe*[1984] BCLC 557 at 562, [1985] 1 WLR 370 at 376:"*It is pertinent to remember, however, that a minority shareholder's action in form is nothing more than a procedural device for enabling the court to do justice to a company controlled by miscreant directors or shareholders. Since the procedural device has evolved so that justice can be done for the benefit of the company, whoever comes forward to start the proceedings must be doing so for the benefit of the company and not for some other purpose. It follows that the court has to satisfy itself that the person coming forward*

is a proper person to do so."
169. Quite apart from the collateral purpose of the Claimant, I am satisfied that the Claimant does not have standing to sue for the alleged wrong to the Defendant.
170. The Claimant has not shown that it has fallen within any of the exceptions to the rule in *Foss v Harbottle.* The Claimant's personal rights also are not affected by the alleged wrong, i.e. the entry into the Management Agreement. Accordingly, the Company should be the proper plaintiff to bring this action.
171. I am satisfied that this is a case where any wrong done to the company by the Manager or any rights arising out of the Management Agreement is a wrong that the Company may in this case, by the action of 90% of its shareholders, choose not to pursue (see *Burland v Earle,* discussed in paragraph 159 above).
172. It has not been established or even seriously argued that the entry into the Management Agreement is of a fraudulent character, although the Claimant did allege that there has been a breach of fiduciary duties owed by Messrs Gargash and Sulaiman as directors or promoters. Further, the cases cited by the Claimant (*Erlanger v New Sombrero Phosphate Co., Lagunas Nitrate Company v Lagunas Syndicate* [1899] 2 Ch 392, *Aequitas v AEFC* [2001] NSWSC 14) are all cases where the action to set aside agreements allegedly entered into by the Company in breach of its directors' fiduciary duties were instituted in the name of the Company against the counterparty to the agreements sought to be impeached.
173. Accordingly, the rule in *Foss v Harbottle* applies, and the Claimant has no *locus standi* to seek a declaration that the Management Agreement is invalid.
174. Furthermore, this is not a derivative claim against the Manager, DAM, nor an application for leave to bring such a claim. Leave of court to bring a derivative claim has not been sought under Rule 19.9 of the CPR. It would be improper to grant a declaration that the Management Agreement was invalid when the Manager, as the other party to the Agreement, has not been given an opportunity to answer the allegations made against it.
175. The action is also misconceived, when the claim seeks to allege a wrong against RECAP in the action when the Defendant is RECAP itself, and there is no claim for leave to bring a derivative action.

Ancillary Observations

176. The Claimant argues that the entry into the Management Agreement was invalid for the following reasons.

(a) The Defendant did not have capacity to enter into the Management Agreement and the shareholders cannot ratify the entry into the Management Agreement because it is *ultra vires* (This argument has already been dealt with in paragraph 165 above).
(b) The entry into the Management Agreement was in breach of fiduciary duties owed by Mr Gargash and Mr Sulaiman, either in their capacity as promoters or as directors. The Claimant argues that Messrs Gargash and Sulaiman had obligations as promoters to make full disclosure of their interests in the Company, and the terms of the Management Agreement. The Claimant alleges that Messrs Gargash and Sulaiman breached their fiduciary duty as promoters as the PPM gave inadequate notice to the future allotees of shares of the terms of the Management Agreement. The Claimant alleges that notice of entry into the Management Agreement should have been given to the prospective allotees of shares at the material time so that they could have the opportunity of making an appropriate response. This is because, at the time of entry by RECAP into the Management Agreement with DAM, Messrs Gargash and Sulaiman were the only two shareholders and directors of RECAP, as well as directors of DAM. This issue is dealt with together with the discussion of the directors' duty to disclose in paragraphs 215 to 222 below.
(c) The breaches by the Defendant and/or the Directors were incapable of ratification because they had the unlawful object of circumventing DIFC company legislation and/or DIFC and/or UAE provisions governing the status of foreign companies.
(d) The purported ratification of the Management Agreement on 29 December 2004 was ineffective because the directors did not comply with their duty of disclosure under Article 47 of the 2004 Companies Law or (at the very least) it has not been established whether the version of the Management Agreement which was the subject of the resolution on 29 December 2004 is the operative version.
(e) The entry into the Management Agreement was not ratified at any subsequent meeting.
(f) The Claimant is not estopped from challenging the entry into the Management Agreement.

177. In the light of the Court's finding that the Claimant does not have *locus standi* to seek a declaration that the Management Agreement is invalid, it is unnecessary to address the Claimant's arguments on why the Management Agreement is invalid. It is also not necessary to consider whether the Claimant had notice of the Management Agreement.
178. However, I will express my views on the arguments described in paragraphs 176(b) to 176(f) above, in order to assist the Parties and the Court of Appeal should my primary findings be found on appeal to be in error.

Observations on the Claimant's argument on abdication of director's powers and breach of fiduciary duty as directors

179. The Claimant's argument on this was divided into three sub-arguments, i.e. that:

(a) The purported entry into the Management Agreement was in violation of the Incorporation Articles.
(b) The Claimant's second sub-argument, related to its first, is that Clause 3.1 of the Management Agreement was an abdication of the directors' duties in violation of the Incorporation Articles.
(c) The Claimant's third sub-argument relies on the South African case of *Barlows Manufacturing v R N Barrie (Pty) Ltd* (1990) (4) SA 608 ('*Barlows*') for the proposition that neither the directors nor the Company can delegate their powers.

The Claimant's first sub-argument[13] that the purported entry into the Management Agreement was in violation of the Incorporation Articles.

180. The Claimant argues that clause 3.1 of the Management Agreement which gave the Manager the "*full power . and right to exercise the functions, duties, powers and discretions exercisable by the Board of Directors.[subject to the retained authority of the board of directors under Clause 3.3 for certain specific matters]*" was an abdication of the directors' duties in violation of the Articles, especially when "*the Board of Directors shall not have the right or authority to act for and on behalf of the Company, or to take part or in any way interfere in the conduct or management of the Company or to vote on matters related to the Company, except as specifically provided*

otherwise in Article 3.3 [retained authority] and Article 11.3 [limited right to terminate Management Agreement if the Manager has committed any act of gross negligence, fraud or wilful misconduct (which shall include a fundamental breach of the Management Agreement) which materially and negatively affects the financial condition of the Company or the successful conduct of the Buildings by Daman Project]." The Management Agreement was an attempt to circumvent the provisions of the 2004 Companies Law (Articles 33 to 53), in particular those that provided that the business and affairs of a Company shall be managed by not less than two directors who may not be bodies corporate and those providing that any director or other officer shall act honestly, in good faith and in the best interests of the Company.

181. The relevant provisions of the Incorporation Articles state as follows:"***POWERS OF DIRECTORS***

51. Subject to the Law and these articles the business of the Company shall be managed by the directors. No subsequent amendment to these articles shall invalidate any act of the director or the directors.
52. The directors may appoint a person to be the agent of the Company
DELEGATION OF DIRECTORS' POWERS
53. The board of directors may delegate any of its powers to a managing director, executive director or a committee of directors."
182. The position under the English common law is that the power to delegate - even a power expressly contained in the company's articles - does not enable the directors to abdicate their functions in favour of some other person as 'manager': the directors must retain the power of overall control (*Gore-Browne on Companies*, paragraph 15[15]). The modern position on the power to delegate has been summarised by Jonathan Parker J in*Re Barings plc (No. 3)*[1999] 1 BCLC 433 (at page 489) as follows:"*Whilst directors are entitled (subject to the articles of association of the company to delegate particular functions to those below them in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation does not absolve a director from the duty to supervise the discharge of the delegated functions . No rule of universal application can be formulated as to the duty . The extent of the duty, and the question whether it has been discharged, must depend on the facts of each particular case, including the director's role in the management of the company.*"
183. As this is a question which may affect the rights of DAM, which is not a party to these proceedings, I will reserve the decision of the Court on the question to another occasion.

The Claimant's second and third sub-arguments[14] on abdication of directors' duties and non-delegability of directors' powers

184. The Claimant's second sub-argument, related to its first, is that Clause 3.1 of the Management Agreement was an abdication of the directors' duties in violation of the Incorporation Articles. The Claimant's third sub-argument relies on the*Barlows'*case for the proposition that neither the directors nor the Company can delegate their powers. As the third sub-argument is merely an extension of the second sub-argument, I will deal with both sub-arguments together.

184.1. Article 3.1 of the Management Agreement does take away much of the Board's functions, which was exactly the concern of the*Barlows*case. The Claimant contends that this provision prohibits RECAP's Board of Directors from acting on behalf of the Company or taking part in the management or voting on any matters except those set out in Articles 3.3 [*'Retained authority of the Board of Directors'*] or 11.4 ['*Payment of any Amounts upon Termination'*].

184.2. However, with regard to the Second Declaration that the Claimant is seeking, such delegation is insufficient to invalidate the Management Agreement in the face of the clear words of the Incorporation Articles and Article 25 of the 2006 Companies Law. Article 25 provides:

"*25. Form of contractsA person acting under the express or implied authority of a Company may, subject to the articles, make, vary or discharge a contract or sign an instrument on behalf of the Company in the same manner as if the contract were made, varied or discharged or the instrument signed by a natural person.*"
184.3. I have already found above that entry into the Management Agreement is not*ultra vires*the company. Accordingly, the Management Agreement must stand (subject to the ordinary vitiating factors of any contract). A contract is not invalid simply because there has been a breach of fiduciary duty or excess of authority in entering into the Management Agreement (see*Gore Browne on Companies*, paragraph 18[2]). If the entry into the agreement is within the powers of the company and no fraud is alleged, the agreement can be ratified by the shareholders, even if it was entered into in breach of duty or in excess of authority (*Burland v Earle*[1902] AC 83,*Pavlides v Jensen*[1965] Ch 565; and*Grant v UK Switchback Railways*(1888) 40 ChD 135). In any event, the proper plaintiff in attacking the validity of such a contract must be the company itself, as the contracting party, to bring an action upon the Management Agreement (see paragraph 170 above).
184.4. If the directors have exceeded their powers of delegation, that is a breach of duty or excess of authority for which they will be personally accountable to the company. However, it will be insufficient to render their acts invalid. It may be worthwhile to consider the rule in*Turquand's*case (*Royal British Bank v Turquand*(1865) 6 E&B 327, Exch Ch.), a well-established principle in the English common law, but since neither party specifically raised this doctrine in its pleadings or arguments, I do not think it would be useful for me to go into an unguided discussion of the possible application of this principle in the present case.
185.*Barlows*did not actually hold that the management agreement in question was invalid. It is also distinguishable on the facts from the present case.

186.*Barlows*concerned a rule nisi calling upon the first respondent company to show cause why the appointment by the applicants of one S as manager of the first respondent should not be confirmed by the company. In the interim, the respondent was directed to permit S to manage the business of the first respondent. S had been appointed pursuant to an agreement between the applicant and the first respondent. This agreement entrusted to the applicants the power given to the directors by the articles to appoint a manager. The court held that, since the agreement surrendered all effective control over the company's business affairs to the appointed manager and that such managers would be for all practical purposes irremovable by the first respondent's directors, the first respondent company was entitled not to confirm such an agreement entered into by their directors since they were in conflict with the fundamental principles regulating the fiduciary relationship between a director and his company.

186.1. The court held that the directors had no power irrevocably to appoint someone to appoint a manager on behalf of the company. They only had power to appoint a manager directly. In that case, the court found that owing to the excess of powers on the part of the directors in

surrendering effective control, the respondent had shown cause why the order for specific performance for S to manage the company should be discharged. Since the company had refused to confirm the applicant's appointment of S, presumably the shareholders disapproved of the directors' excess of power. In the context of that case, for the courts to force specific performance would have meant that the company would be forcibly and irrevocably managed by a third party against its wishes.
186.2.*Barlows*is thus a case where the claimants in that case sought specific performance (to confirm their candidate as manager of the defendants) in a situation where the company had refused to confirm the manager appointed by a third party because its directors had exceeded their powers in irrevocably delegating their power to appoint managers to that third party. The result of that case is consistent with the general rule that specific performance is not normally available in contract and the decision in*Barlows*is heavily dependent on its context. The court was not called upon to decide whether the management agreement in that case was invalid and the validity of the agreement entered into in excess of director's powers was not discussed at all. In contrast, the validity of the Management Agreement is one of the main issues as the Claimant is seeking a declaration that the Management Agreement is invalid. The relief sought and the factual context are thus vastly different from*Barlows*.
186.3. While the present claim fails because the proper plaintiff to claim relief for breach of fiduciary duty by a director is (subject to certain exceptions which do not apply here) the company rather than individual shareholders, I cannot dismiss the possibility that at some point in the future RECAP may, under different directors or shareholders, challenge the validity of the Management Agreement in direct proceedings against DAM or even institute proceedings against the Directors for entering into the Management Agreement. Neither DAM nor the Directors (Messrs Gargash and Sulaiman) are parties to this action and it would not be right for me to express any opinion on the merits of such claims unless and until such litigation materializes.

Conclusion on the Claimant's arguments on fiduciary duties of promoters

187. The Claimant's arguments on the fiduciary duties of promoters are irrelevant because in this case the Defendant is the Company, not the promoters. Additionally, the Claimant is not a party to the Management Agreement. Any problems with the validity of the Management Agreement would at best constitute a wrong committed against the Company, as to which I express no concluded view.

The inadequate notice given to prospective shareholders of the terms of the Management Agreement

188. The Claimant alleges that the notice and the power to ratify or confirm the entry into the Management Agreement should have been given to the then prospective allotees of shares. This is because, at the time of entry by RECAP into the Management Agreement with DAM, there were only two shareholders, Mr Gargash and Mr Sulaiman, who were also the only directors of RECAP as well as directors of DAM.
189. However, it is unnecessary to consider whether the directors had exceeded their authority or breached Articles 47(1) and 47(3) of the 2004 Companies Law, as neither of these arguments, even if successful, would cause the entry into the Management Agreement to be*ultra vires,*and thus give the Claimant standing to bring the claim.
190. It is not impossible that the shareholders of RECAP may change in the future and the new shareholders may then procure RECAP to take DAM to court to challenge the validity of the Management Agreement. Alternatively, The Claimant may seek leave to bring a derivative action against Messrs Gargash and Sulaiman. I should not pre-judge the merits of any such actions before they occur, and will express no opinion on the merits of any such hypothetical actions.

The Claimant's argument that the breaches by the Defendant and/or the Directors were incapable of ratification because they had the unlawful object of circumventing DIFC company legislation and/or DIFC and/or UAE provisions governing the status of foreign companies.

191. The Claimant argues that there has been a breach of various sections of the 2004 Companies Law, in particular Articles 44 to 53, which provided that the business and affairs of a Company should be managed by not less than two directors who should not be bodies corporate and further provided that any director or other officer should act honestly, in good faith and in the best interests of the Company. However, my view is that any breach of the 2004 Companies Law would also not render the Management Agreement invalid unless such agreements are expressly prohibited by the Law. There is insufficient nexus between a statutory provision that requires a company to be managed by at least two directors and the entry of a Management Agreement which delegates most of the directors' management powers. (See*Curragh Investments Ltd v Cook*, below)
192. During the course of the trial, it emerged that DAM (the Manager) possessed no employees, no assets and no Dubai Trade Licence. Nor was it a Recognised Foreign Company in the DIFC within the meaning of Article 91 of the 2004 Companies Law (Article 115 of the 2006 Companies Law). The Trade Licence, staff and physical assets were provided for DAM by another company in the Daman Group called Daman Securities. This was confirmed by Mr Gargash in his oral evidence.
193. At the request of the Court, both parties made additional written submissions on the issue of illegality which were filed on 30 April 2007. The Defendant argued that DAM did not need to register itself with the DIFC Registry of Companies as it was not "carrying on business" within the DIFC at the relevant time or, alternatively, the registration requirement did not apply to DAM because it had already received explicit recognition by the Dubai Financial Services Authority in an agreement to purchase land within the DIFC.

194. The focus of my analysis will be on the following arguments of the Claimant:

194.1 The activities to be undertaken by DAM under the Management Agreement required an independent Dubai Trade Licence under Articles 314 and 315 of the UAE Federal Commercial Companies Law No. 8 of 1984 (as amended) and/or Section 5.1 of the UAE Central Bank Board of Directors Resolution no. 164/8/94.
194.2 If DAM's activities were to be undertaken within the DIFC they were prohibited by Article 91 of the 2004 Companies Law, which provides that "*[a] Foreign Company shall not carry on business in the DIFC unless . it is registered as a Recognised Company*".
195. Accordingly, the Claimant contends that the Management Agreement was for an illegal object, namely unlicensed activities either in Dubai or in the DIFC. The Claimant argues that such a contract cannot be ratified, and the Management Agreement should be declared invalid.
196. Five points have to be observed with respect to the Claimant's argument on illegality.

Point 1: A shareholder does not have*locus standi*to raise the issue of illegality of a contract entered into by a company

197. First, a shareholder does not have*locus standi*to raise the issue of illegality of a contract entered into by a company owing to the rule

in *Foss v Harbottle*. The illegality (i.e. the non-registration of the Management Company, DAM pursuant to the 2004 Companies Law) that the Claimant relies upon does not fall within the relevant '*ultra vires* and illegality' exception or any of the other exceptions to the rule in *Foss v Harbottle*. Under the common law, not all statutory obligations imposed on the company or its directors are enforceable by derivative action: *Devlin v Slough Estates* [1982] BCLC 479

198. Also, a shareholder may not have standing to sue where all that is alleged is that the company engaged in conduct that amounts to a technical breach of statute as opposed to a an illegal act that is so plainly illegal that the directors have acted in abuse of their powers: *Gore-Browne on Companies* Volume I, paragraph 18-[3], *Australian Agricultural v Oatmont*. (1992) ACSR 255, CA (NT).

199. In *Devlin v Slough Estates* [1982] BCLC 479, a shareholder sought a declaration that the accounts of the company should refer to the company's contingent liability for damages (in an action commenced against the company and one of its subsidiaries). This was a statutory requirement pursuant to the Companies Act 1967 to state the general nature of the contingent liabilities of the company and the aggregate amount or the estimated amount of those liabilities. In effect, the shareholder sought to argue that the articles of association of the company imposed a duty on the directors to prepare and to lay before the company in general meeting accounts and a balance sheet which were in accordance with the provisions of the statute. If the article imposed a duty to the company and if the statutory requirement with regard to the accounts was something which the company in general meeting could never ratify, then the shareholder could bring a derivative action on behalf of all the shareholders to obtain a declaration as to the true way in which the matter in question should have been dealt with in the accounts. The court held that a shareholder did not have standing to complain of the manner in which a company's accounts were prepared, as this type of dispute involved matters of business judgement with which the courts would not interfere in the absence of allegations of bad faith. It also held that the shareholder did not have an individual right to insist that the accounts prepared by the director or on the instructions of the directors should be in accordance with the provisions of the statute. It pointed out that the duty of the directors under the company's articles to prepare the accounts and to lay before the company in general meeting was a duty to the company rather than a duty to the individual shareholders.

200. The court's observation in *Devlin v Slough Estates* supports the proposition that a shareholder cannot bring a derivative action simply to enforce a statutory obligation imposed upon a company:".*it would be strange if the court could be approached by any shareholder, possibly in a multiplicity of proceedings relating to the same company in the same year, asking the court to settle the company's accounts in accordance with the statutes.*"

201. Although *Gore-Browne* at paragraph 18[3] states that, where an act is contrary to company law, a shareholder may have standing to sue, this would still depend on what aspect of company law the company has breached. In the present case, an administrative provision of the DIFC Companies Law has allegedly not been complied with. It is not the purpose of such a provision to invalidate transactions entered into with a foreign company. *Devlin v Slough Estates* demonstrates that it cannot be the case that a shareholder has standing to sue for every breach of a regulatory provision.

202. The Claimant would also not be able to bring a personal action as it was not privy to the Management Agreement between DAM and RECAP. Even if the contract was illegal owing to DAM's failure to register, it would be the Company, not the shareholder, who would be able to raise the unenforceability of the contract.

Point 2: Illegality cannot be taken into account unless fully pleaded in such a manner that the court is confident that all the relevant evidence is before it.

203. The burden is on the Claimant to prove illegality. The Claimant has not shown that the Management Agreement was illegal simply because one of the parties was a non-registered foreign company: paragraph 16-198, *Chitty on Contracts*, 29th Edition, 2004, Sweet & Maxwell ('*Chitty*')

204. In addition, *Chitty* states:".*where the contract is not ex facie illegal, evidence of extraneous circumstances tending to show that it has an illegal object should not be admitted unless the circumstances relied on are pleaded; thirdly, where unpleaded facts, which, taken by themselves, show an illegal object, have been put in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose),* ***the court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it****.[to show that a contract had an illegal objective]*" (citing *Pickering and another v McConville* [2003] All ER (D) 417 (Mar) (Court of Appeal). See also *North Western Salt v Electrolytic Alkali* [1914] AC 461 (UKHL) [1914-1915] All ER Rep 752.) [emphasis added].

205. Accordingly, it is only where the court can, with complete confidence, eliminate any possible answer by the party alleged to have committed the illegality, that an unpleaded case of illegality should be allowed to succeed (*Birkett v Acorn Business Machines Ltd* [1999] 2 All ER (Comm) 429).

206. In the present case, the illegality issue was not specifically raised until after the close of evidence. The non-registration of the Manager was only a surrounding circumstance which had not been directly raised until the last round of submissions after the close of evidence. Neither the Defendant nor the DAM had the opportunity of adducing evidence to prove otherwise. The court may not have all the relevant evidence before it, especially when DAM is not a party to the proceedings (and it is DAM's non-registration that allegedly gives rise to the illegality). Without evidence of the surrounding circumstances (i.e. of non-registration), it cannot be said that the contract on the face of it is illegal. Its object, the construction of buildings, is neither illegal nor against public policy. Accordingly, it is improper to adjudicate upon the fact of potential illegality in this case.

Point 3: Non-registration under Article 91 of the 2004 Companies Law does not render the Management Agreement illegal or void.

207. It is clear that the non-registration of the DAM under the 2004 Companies Law is not an illegality that renders its contracts invalid. (*Curragh Investments Ltd v Cook* [1984] 3 All ER 658, [1974] 1 WLR 1559, 28 P&CR 401; *Maronis Holdings v Nippon Credit Australia* (1990) 2 ACSR 138 at 142, *Top Ten Entertainment Pte Ltd v Lucky Red Ltd* [2004] 2 SLR 199). Accordingly, the Claimant's argument is irrelevant to the declaration it is seeking.

208. There is insufficient nexus between the requirement of registration and the contract for the Management Agreement to be tainted with any illegality. In *Curragh Investments Ltd v Cook*, the Purchaser argued that since the vendor, an overseas company, did not register its business under section 407 of the UK Companies Act, the covenants for title in land contract impaired by illegality. The court rejected the argument, stating that, for a contract allegedly made in breach of statutory requirement to be struck with illegality, it had to be shown that there was a sufficient nexus between the statutory requirements and the contract itself:"*for [the Court to find that the contract is stricken with illegality], there must be a sufficient nexus between the statutory requirement and the contract. If the statute prohibits the making of contracts of the type in*

question, or provides that one of the parties must satisfy certain requirements (e g by obtaining a licence or registering some particulars) before making any contract of the type in question, then the statutory prohibition or requirement may well be sufficiently linked to the contract for questions to arise of the illegality of any contract made in breach of the statutory requirement. But it seems to me a far cry from that to the breach of statutory requirements which are not linked sufficiently or at all to the contract in question. There are today countless statutory requirements of one kind or another, yet I cannot believe that an individual or a company who is in breach of any of these requirements (for example, under the Factories Acts) is thereby disabled from making a legal contract for the sale of land or validly entering into covenants for title. To take an example that was mentioned in argument, I do not think that it could seriously be contended that every contract made by an English company, whether for the sale of land or otherwise, is illegal if, when it is made, the company is liable to prosecution and fine for failing to comply with some provision of the Companies Act 1948, for example, for not filing its annual returns in due time. Such a doctrine, for which I can see no justification, would result in chaos."

209. In *Top Ten Entertainment Pte Ltd v Lucky Red Investments Ltd* [2004] 2 SLR 199, one of the issues in the case was whether Lucky Red, a foreign company, was carrying on business in Singapore without complying with the registration requirements of s 368 Companies Act (Cap. 50, 1994 Rev Ed.) which is equivalent to Article 91of the 2004 Companies Law. The court held that, even if Lucky Red ought to have been registered in Singapore, non-registration alone would not have made its dealings with Top Ten unenforceable. The sanction for its non-compliance would only have been a fine and a financial penalty for non-registration.

210. Similarly, in the Australian case of *Maronis Holdings v Nippon Credit Australia* 2 A.C.S.R. 138 (Supreme Court of New South Wales), where the plaintiff who carried on business in New South Wales was a foreign corporation not registered under the provisions of Div 5 Pt XIII of the Companies (NSW) Code, the Supreme Court of New South Wales held that "*Where a statute imposes a penalty upon the making or performance of a contract, it is a question of construction whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed.*" Having regard to the purpose of the statute, the court in *Maronis* found that:"*The registration [of foreign companies], is aimed at facilitating the flow of commerce and attends to the consequences of commercial disputes by making provision for the service of documents on agents. It would do nothing for the implementation of what I consider to be the legislative purpose to invalidate the transaction here in question.*"

211. Accordingly, the court found that the contract entered into by the non-registered foreign company was not invalidated by reason of the non-registration.

212. In addition, the Defendant also points out in its Additional Written Submissions that other common law jurisdictions such as New York, Delaware, New Zealand and India have adhered to the principle that the failure of a foreign company to register with the authorities of the jurisdiction will not invalidate the contracts entered into by that foreign company.

213. The purpose of registration under the 2004 Companies Law is similar to that of the equivalent statutes of other jurisdictions: i.e. for purposes of accepting service and general accountability (see Article 92 of the 2004 Companies Law). Contravention of Article 91 (now Article 115 of the 2006 Companies Law) is a general contravention as defined by Article 106 of the 2004 Companies Law, for which the Board of the DIFC Authority may prescribe procedures to impose administrative fines (Article 108(1), 2004 Companies Law). Accordingly, it does not serve any legislative purpose to invalidate the Management Agreement solely on the grounds of failure of registration.

Point 4: The UAE Federal Commercial Companies Law does not apply in the DIFC

214. The Claimant's allegation that DAM required an independent Dubai Trade Licence pursuant to Articles 314 and 315 of the UAE Commercial Companies Law No. 8 of 1984 to undertake its activities can be refuted by Article 3(2) of the Federal Law No. (8) of 2004 'Concerning Financial Free Zones' (Federal Law No. (8) of 2004), which excludes the application of the Federal civil and commercial laws to Financial Free Zones such as the DIFC. Article 3(2) of the Federal Law No. (8) of 2004 states that:"*Further, these [Financial Free] zones and Financial Activities are subject to all provisions of Federal Law with the exception of the Federal civil and commercial laws.*"

Point 5: Management Agreement not rendered ineffective owing to alleged breach of Article 47 of Companies Law

215. The purported ratification of the Management Agreement on 29 December 2004 was allegedly ineffective because the directors did not comply with their duty of disclosure under Article 47 of the 2004 Companies Law and/or (at the very least) it has not been established whether the version of the Management Agreement, which is the subject of the resolution on 29 December 2004, is the operative version.

216. The Claimant argues that neither Mr. Gargash nor Mr. Sulaiman did in fact disclose **the nature and extent** of their interests in the Management Agreement with DAM. Articles 47(1) and 47(3) of the 2004 Companies Law provided:

> *(1) A director of a Company who has, directly or indirectly, an interest in a transaction entered into or proposed to be entered into by the Company or by a subsidiary of the Company which to a material extent conflicts or may conflict with the interests of the Company and of which he is aware, shall disclose to the Company* ***the nature and extent of his interest.***
>
> .
>
> (3) *A notice in writing given to the Company by a director that he is to be regarded as interested in a transaction with a specified person is sufficient disclosure of his interest in any such transaction entered into after the notice is given.*"

[emphasis added]

216.1 The Claimant also argues that the 29 December 2004 resolution only entitled Mr Gargash and Mr Sulaiman to vote "provided they have disclosed to the Company the nature and extent of such interest." The Claimant argues that neither had disclosed the nature and extent of their interest in the Management Agreement in DAM and accordingly were not entitled to vote on the purported ratification of the Management Agreement.

216.2 The Defendant, however, contends that the notice dated 1 October 2004 complied with the terms of Article 47(3) of the 2004 Companies Law. The Defendant therefore argues that the directors (Messrs Gargash and Sulaiman) satisfied their obligation to give disclosure of their interest in any transaction with RECAP (including the Management Agreement).

217. The question is whether, in the circumstances relied on by the Claimant (i.e. Mr. Gargash and Mr. Sulaiman were the only directors and the very next day investors were to be allotted their shares on the basis of a misleading PPM) the Court should act as follows.

(a) The Court should hold that notice is ineffective if it is given to the persons who themselves are bound to give the notice. It is no answer to say that, since the directors and shareholders are the same people, the disclosure is academic. Disclosure to an independent board is essential for the protection of the shareholders and creditors of the Company.
(b) The Court should construe "the Company" in Article 47(1) to include future allottees of shares.

218. The Claimant also argues that DEP has the right to apply to the Court for an order setting aside the transaction concerned since Articles 47(4) to (6) of the 2004 Companies Law provide:

"*(4) Subject to Article 47(5) and (6), where a director fails to disclose an interest of his under this Article the Company or a member of the Company or the Registrar may apply to the Court for an order setting aside the transaction concerned and directing that the director account to the Company for any profit, gain or benefit realised, and the Court may so order or make such other order as it thinks fit.*

(5) A transaction is not voidable, and a director is not accountable, under Article 47(4) where, notwithstanding a failure to comply with this Article:
(a) the transaction is confirmed by Resolution; and
(b) the nature and extent of the director's interest in the transaction were disclosed in reasonable detail in the notice calling the meeting at which the Resolution is passed.

(6) Without prejudice to its power to order that a director account for any profit, gain or benefit realised, the Court shall not set aside a transaction unless it is satisfied that:
(a) the interests of third parties who have acted in good faith thereunder would be unfairly prejudiced; and
(b) the transaction was not reasonable and fair in the interests of the Company at the time it was entered into."

219. The Claimant's case is that the Court should exercise its discretion to set aside the Management Agreement because it was not reasonable and fair in the interests of the Company at the time it was entered into on the following grounds.

(a) As at 29 December 2004 no prospective shareholder was given the opportunity to review the agreement.
(b) It is unclear what were the terms of the Management Agreement at that time.
220. However, the evidence is clear and undisputed that at least one prospective shareholder (Dubai Investment Alliance) had been given the opportunity to review the Management Agreement and even negotiate its terms. Further, the 29 December 2004 shareholders' resolution passed by Mr Gargash and Mr Sulaiman (then the only shareholders) had confirmed the entry into the Management Agreement.
221. In any event, the real complainant on the issue of adequate disclosure is the Defendant. In my view, RECAP had sufficient notice of the nature and extent of the interests of Messrs Gargash and Sulaiman pursuant to Article 47(3) of the 2004 Companies Law (which qualifies Article 47(1)). Even though the Management Agreement was not shown to the eventual shareholders (except to Mr Shroff's Company, Dubai Investment Alliance Limited, this was a matter which was more relevant to the validity of the notices convening the various shareholders' meetings to adopt the New Articles and the Current Articles, a question which I have discussed earlier.
222. In the circumstances, Messrs Gargash and Sulaiman had complied with Article 47(3) accordingly; there is no need to decide if Article 47(5) was complied with.
223. On the evidence, I am also not satisfied that the conditions for setting aside a transaction in Article 47(6) have been fulfilled. There is no evidence, apart from the Claimant's dissatisfaction, that the interests of third parties acting in good faith have been unfairly prejudiced and that the transaction was not reasonable and fair in the interests of RECAP at the time it was entered into. (The shareholders' letters to the Court certainly evidence their views on the matter) Further, no fraud on the part of the directors in entering into the Management Agreement has been suggested.
224. Accordingly, it is my view that, since Mr Sulaiman and Mr Gargash were the only shareholders and directors of RECAP on 29 December 2004, the ratification of the Management Agreement on 29 December was effective. I leave open the question whether Mr Sulaiman and Mr Gargash had breached any fiduciary duties as promoters to RECAP or prospective shareholders.

225. Mr Sulaiman and Mr Gargash gave evidence that the Management Agreement had been executed on 9 October 2004, but later amended in December 2004 before its ratification on 29 December 2004. Mr Raju Shroff, who had negotiated certain changes to the Management Agreement, gave evidence that the Management Agreement was finalised shortly before, and definitely by April 2005. The Claimants argued that the date of execution of the amended Management Agreement was not clear and that Mr Raju Shroff's evidence should be believed over that of Mr Sulaiman and Mr Gargash because Mr Schroff had no reason to tie himself to any particular date.

225.1 Although Mr Shroff had said that the Management Agreement was finalised shortly before April 2005, he could not remember when exactly it was signed. He gave evidence that he had started the due diligence process prior to his company's subscription as early as September or October 2004. He was unable to recall when the negotiations concluded and the parties signed off on the negotiated investment package between RECAP and his company.
225.2 In an email dated 10 October 2004, Mr Sulaiman had instructed Mr Buderi to give Allen & Overy (solicitors for a shareholder, Regal Trading) a target date for the completion of the Management Agreement. This indicated that the Management Agreement had not yet been executed on 9 October 2004. Had it been executed, it would have been shown to Allen & Overy. A subsequent email by Mr Sulaiman to Mr Buderi on 24 October 2004 (not copied to Mr Bessem) states that Allen & Overy had been shown the Management Agreement. I therefore conclude that the original Management Agreement was probably executed in the period between 10 October and 24 October 2004.
225.3 Mr Shroff's company, Dubai Alliance Investment Limited, signed the Shareholders' Agreement on 18 December 2004 and instructed its bank to transfer funds to Daman Securities on 22 December 2004. Both Mr Gargash's and Mr Sulaiman's evidence was that the Management Agreement should have been amended around that time or shortly thereafter to honour the deal concluded with Mr Shroff.
225.4 Although the Claimant argued that there was an "overwhelming likelihood" that the Management Agreement supplied to the shareholders was a version supplied after April 2005 and probably as recently as December 2006 or January 2007, it adduced no evidence to show when the Management Agreement was likely to have been finally concluded.
225.5 The Claimant argues that the New Articles cannot be understood without sight of whatever version of the Management Agreement was being referenced.
225.6 After the 30 January 2007 hearing, Mr Buderi supplied a 'tracked changed' copy of the Management Agreement. On that copy, the date of

expected entry of the Sale and Purchase Agreement between the DIFC and RECAP had been changed to December 2004 from the original date of September 2004. This seems to indicate that the changes to the Management Agreement were made before the Sale and Purchase Agreement between DIFC and RECAP had been formally entered into, and possibly before the end of December 2004.
225.7. The New Articles define the Management Agreement as the "*management agreement between Daman [RECAP] and [DAM] dated 9 October 2004 as the same may be amended from time to time by agreement between the Company and Manager*".
225.8. Accordingly, it is likely that the amended Management Agreement was concluded around the end of December 2004. Owing to the close relationship between the Manager and RECAP, it appears that Mr Sulaiman and Mr Gargash had simply seen fit to amend the 9 October 2004 copy after negotiations with Mr Shroff without changing the date. As the amendments were made to accommodate Dubai Investment Alliance, it was likely that the amended Management Agreement would have been executed to satisfy Dubai Investment Alliance at or soon after the time of their investment.
225.9 Consequently, the Claimant has not proved its argument that the resolution of 29 December 2004 could not have ratified the operative version of the Management Agreement.
225.10.Since the amended Management Agreement was approved by the unanimous shareholders' resolution of 29 December 2004[15], the failure to disclose the Management Agreement to subsequent shareholders would not affect its validity. In any event, even if the amended Management Agreement was concluded after December 2004, the amendments made to the Management Agreement were favourable to the Company, and the Claimant's arguments would not be strengthened by the fact of any amendments made after 2004 even if true.

Assuming that the 29 December 2004 shareholders' resolution did not ratify the Management Agreement, was the entry into the Management Agreement ratified at any subsequent shareholders' meeting?

226.

(a) The Defendant's position is that, even if the Management Agreement had been entered into on behalf of the Defendant in excess of authority or breach of duty, the resolutions passed by the shareholders on 5 April 2005, 22 June 2006 and 17 September 2006 amounted to a ratification of the Management Agreement.

(b) However, the Claimant argues that:

(i) It seems that only one shareholder had actually seen the Management Agreement by those dates;
(ii) No notice of any resolution seeking to ratify the Management Agreement or Amended Management Agreement was ever given;
(iii) There is no record of the ratification of the Management Agreement or amended Management Agreement being discussed at any of those meetings; and
(iv) None of those resolutions even obliquely refer to ratification of the Management Agreement or amended Management Agreement.
227. The evidence does not conclusively show whether the Management Agreement has been expressly ratified at any subsequent shareholders' meeting. However, by the 27 June 2006 Meeting, where 95% of the shareholders had passed a special resolution to 'confirm and ratify' the vote at the 5 April 2005 Meeting to adopt the New Articles[16], the references to the Management Agreement in the New Articles and the present dispute would have come to the attention of the shareholders, and they could have enquired further had they been so inclined. In my view, the shareholders had informally approved the Management Agreement and had evidenced that informal approval in the form of shareholders' letters to this Court. This argument therefore does not advance the Claimant's position that the Management Agreement should be declared invalid.

The Defendant's argument that DEP is estopped from challenging the entry into the Management Agreement.

228. The Defendant argues that the Claimant is estopped from seeking to bring a derivative action to avoid the Management Agreement because there can be no doubt that the Claimant was given full disclosure in relation to the Management Agreement prior to the subscription for its shares and decided to subscribe for its shares on this basis.
229. I note that the Claimant is not seeking to bring a derivative action in this case. However, I will make some observations with respect to this line of argument.
230. The Claimant argues that Mr Bessem (representing DEP) did not have notice that the Management Agreement had been concluded when he had, by his own account, entered into the SSA in February or March 2005.
231. I believe that Mr Bessem probably did have notice of entry into the Management Agreement. As the Defendant rightly pointed out, Mr Bessem was copied on the email dated 10 October 2004 where Mr Sulaiman had instructed Mr Buderi to give Allen & Overy a target date for the completion of the Management Agreement. He had received a draft Project Development Agreement ('PDA') at the end of October 2004, stating that the Management Agreement had been signed on 9 October 2004. In his oral evidence, he agreed that, had he read the draft PDA, he would have been aware that the Management Agreement was signed on 9 October 2004. At the very least, he was aware that Mr Sulaiman was preparing to produce the Management Agreement to another investor. There was a suggestion by the Defendant to adjourn my decision on the Article 157 issue so that the shareholders could convene a meeting to express their views. But in view of the shareholders' evidence and letters, this would be academic, and I therefore do not consider that there is any need to adjourn my decision for such a meeting.

232. The final question is whether, had Mr Bessem expressly requested sight of the Management Agreement in February or March 2005, it would have been permitted.

232.1 Although the PPM stated that the Management Agreement would be available for inspection, Mr Bessem maintains that he was not told that it was available for inspection after it had actually been signed.
232.2 Mr Sulaiman had indicated in his evidence that RECAP had a policy where the Management Agreement was made available to any prospective shareholder prior to their subscription. After the subscription period, requests for the Management Agreement would have been considered on a case by case basis.
232.3 Mr Shroff, on behalf of Dubai Alliance Investment, had asked for a copy of the Management Agreement and had been provided with it by the latest, in early December 2004. Given that Mr Bessem had not asked for a copy of the Management Agreement prior to his subscription and that parties had a close working relationship at that time, my view is that the Management Agreement would have been provided to Mr Bessem in February or March 2005.

232.4 In any event, the argument of estoppel is irrelevant in light of my decision on *locus standi*.

Final conclusion

233. In conclusion, I find that the first special resolution passed at the 5 April 2005 Meeting was invalid owing to the lack of a formal vote, insufficient notice as well as other procedural irregularities. The 27 June 2006 Meeting and 10 September 2006 Meetings were also called on insufficient notice. However, as an overwhelming 90% of the existing shareholders have confirmed their support of the substantive contents of those resolutions, I will exercise my discretion to validate all three resolutions under Article 157 of the 2006 Companies Law. The First Declaration is therefore denied.
234. The short answer to the Claimant's prayer for a declaration that the Management Agreement between the Defendant and the Manager, DAM, is invalid is that the Claimant has no standing as a shareholder to bring such a claim. Even if there has been a breach of fiduciary duties, illegality or excess of authority, the Defendant RECAP is the proper plaintiff to pursue such a claim. The Second Declaration is therefore also denied

Orders

235. In the circumstances I make the following orders.

(a) The Claimant's claim for a declaration in terms of Paragraph 15(a) of its Amended Brief Details of Claim is dismissed.
(b) The Claimant's claim for a declaration in terms of Paragraph 15 (b) of its Amended Brief Details of Claim is dismissed.
(c) The Defendant's application for orders pursuant to Article 157 of the DIFC Companies Law (Amended and Restated) DIFC Law No 3 of 2006 in terms of paragraphs 29, 30 and 31 of the 4th Witness Statement of Charles L O Buderi dated 24 January 2007 is granted.
236. I will hear Counsel on the question of costs.

(Signed)

MICHAEL HWANG

Judge

Date of issue: 25 July 2007

(*The original judgment has been signed by the Honourable Justice Michael Hwang*)

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[1] Although not described as such, this was clearly intended to be the first Annual General Meeting of shareholders to be held pursuant to Article 55 of the 2004 DIFC Companies Law.

[2] This was originally disputed by Mr Bessem but the oral evidence at trial showed that Mr Bessem did receive the new Articles (see paragraph 98 below).

[3] Although neither the alleged maker of the recording, Mr William Broekhaven, nor the transcriber of the transcript, was called to give evidence, the Respondents did not dispute the authenticity or accuracy of the recording or the transcript.

[4] At the material time, the CPR applied to claims in this Court by virtue of Article 6 of The Law of the Judicial Authority at Dubai International Financial Centre (Law No. 12 of 2004).

[5] The 2006 Companies Law came into force on 30 April 2006 repealing and substituting the 2004 Companies Law and is the applicable statute for all three meetings as it is the only statute under which such an application for validation can be made, even in respect of meetings held before it came into force since there is no saving provision for matters occurring before 30 April 2006. In any event, there is no material difference between s 157 of the 2006 Companies Law and the equivalent section in the 2004 Companies Law (Article 133).

[6] The Claimant points out that the New Articles were not supplied (at the earliest) until the 5 April 2005 Meeting itself. Section 11 of the blue spiral-bound folder was also entitled "*Ratification of the Memorandum and Articles of Association*". The Claimant also argues that the shareholders did not have the Management Agreement, which was necessary in order to understand the New Articles. The Claimant contends that "[r]eference to documents that may be inspected elsewhere is not adequate notice".

[7] This is not really disputed by Mr Bessem. His evidence was that he had no objection to the terms of the new Articles 67 and 68 and signed the resolution on that basis.

[8] *Kaye v Croydon Tramways Company* [1898] 1 Ch 358 (CA), per Lindley MR

[9] Section 51 of the Companies Act 1862, the precursor of a special resolution under the pre-1948 English legislation, provided that a special resolution is required by a majority of not less than three-fourths of such members entitled to vote as might be present in person or by proxy at any general meeting, and the resolution was then to be confirmed by a majority of such members as might be present in person or by proxy at a subsequent general meeting. It also provided that, "in computing the majority under this section, when a poll is demanded, reference shall be had to the number of votes to which each member is entitled by the regulations of the company".

[10] or if Mr Mikati did in fact submit a letter, then 95%.

[11] The Claimant has alleged fraud only by way of example: the Claimant argues that Article 5.2 of the Management Agreement permits the

Manager to take its own fees from the Company' bank accounts. Under Article 9.1 of the Management Agreement, the Manager's liability for gross negligence, fraud and wilful misconduct is limited to the amount of any outstanding and uncollected Management Fees, and damages are purported to be excluded. On that basis, the Claimant argues that the Manager would be free to defraud the Company without financial consequence as the Manager would have taken away any uncollected fees in the Company's bank accounts.

[12]See paragraphs 167 to 169 below for an elaboration of this finding.

[13]See paragraph 179(a)

[14]See paragraph 179(b) and (c)

[15]At that time, Mr Gargash and Mr Sulaiman were the only shareholders. See paragraph 75(b).

[16]See paragraph 35