Claim Nos: CFI 016/2021
CFI 023/2021

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

IGPL GENERAL TRADING LLC

Claimant in CFI-016-2021 and CFI-023-2021

and

(1) HORTIN HOLDINGS LIMITED
(2) LODGE HILL LIMITED
(3) WESTDENE INVESTMENT LIMITED

Defendants in CFI-016-2021 and CFI-023-2021

(4) PAUL PRETLOVE (RECEIVER)

Defendant in CFI-016-2021

ORDERS WITH REASONS OF JUSTICE ROGER GILES

UPON reviewing the Defendants' Application No. CFI-023-2021/2 dated 30 March 2021 (the **"Application"**) for immediate judgment in favour of the Defendants

AND UPON reviewing the evidence filed in support of and in opposition to the Application

AND UPON hearing Counsel for the Claimant and Counsel for the Defendants at a hearing on 4 August 2021

IT IS HEREBY ORDERED THAT:

1. Order that there be immediate judgment in favour of the Defendants.

2. Dismiss the proceedings.

3. In proceedings CFI-016-2021, order that the orders made on 31 January 2021 (as thereafter extended) be discharged.

4. Suspend the operation of order 3 for 28 days.

5. Grant liberty to apply in relation to orders 3 and 4.

6. Order that, if the parties are unable to agree on costs within ten days, written submissions on costs not exceeding three pages be exchanged and filed within a further seven days.

Issued by:
Nour Hineidi
Registrar
Date of Issue: 22 August 2021
At: 10am

SCHEDULE OF REASONS

1. The Claimant seeks orders for specific performance of a contract to lease premises in London, said to be found in an agreement dated 16 January 2013 between the Defendants as lessors and the Claimant and others as lessees (the **"Tenancy Agreement"**). This is the Defendants' application for immediate judgment in their favour and dismissal of the claims. For the reasons which follow, the application should succeed.

Background

2. "The Bridge" in Queenstown Road, Battersea Park, London is a mixed-use residential and commercial development, comprising 103 separate premises, each the subject of a long-term lease. The Second Defendant is the registered proprietor of the freehold of "The Bridge". The First Defendant holds long-term leases of residential Flats 803 and 804, both for 125 years from 24 June 2000. The Third Defendant holds a long-term lease of residential Flat 802, for the same term, and a long-term lease of the commercial Suites 2 and 3 for 999 years from 24 June 2000. I will refer to the freehold and these leases as "the London Properties" (the **"London Properties"**). The London Properties are the Defendants' only substantial assets.

3. Each of the Defendants is a company incorporated in the British Virgin Islands (the **"BVI"**). From the Register of Members, the shares in the Defendants have been held successively by Waterman Nominees Ltd, a Manx nominee company; Mr Antonis Papp, a Cypriot nominee; and from

late 2016 Mr Mark Farmer. Mr Farmer signed a document confirming that he acted as nominee for Mr Mohammed Abdulla Juma Al-Sari and Mr Majid Abdulla Juma Al-Sari, and the application was conducted on the basis that at all material times prior to Mr Farmer's involvement, including in January 2013, they were the beneficial owners of the shares in equal shares. Without intending any disrespect, as did the parties in the hearing I will refer to these gentlemen as Mohammed and Majid.

4. Mohammed and Majid are sons of Mr Abdulla Juma Al-Sari, who was and is the patriarch of the Al-Sari family. Again without intending any disrespect, I will refer to him as Abdulla. Children of Mohammed and Majid are parties to the Tenancy Agreement as joint lessees.

5. In 2002 and 2007, Flats 802, 803 and 804 were progressively structurally amalgamated to create one flat. It has been used by members of the Al-Sari family, who are ordinarily resident in Sharjah, when visiting London.

6. On 27 February 2017, the Commercial Bank of Dubai (the **"Bank"**) obtained a judgment from the Sharjah Federal Appeal Court against Abdulla, Mohammed and Majid jointly and severally, together with others, for AED 433,831,116.81 plus interest and costs. The judgment was not paid, and the Bank took steps to enforce it.

7. Relevantly to this application, on 7 June 2018 the Bank obtained judgment against Mohammed and Majid in the Eastern Caribbean Supreme Court in the amount of USD 118,103,193.58 plus interest and costs, and then on 13 September 2018 a provisional charging order over the shares in the Defendants beneficially owned by Mohammed and Majid. On 19 February 2019 it obtained a final charging order over the shares and an order for sale. The order for sale included the appointment of Mr Paul Pretlove, a BVI licensed insolvency practitioner, as Receiver with power to realise the Defendants' assets and to sell the shares.

8. An appeal was mounted against the charging order, but was eventually dismissed. On 20 June 2019, solicitors acting for Mr Pretlove wrote to Majid advising him that the London Properties were to be realised by sale. On 27 June 2019, solicitors acting on behalf of Majid responded advising of the Tenancy Agreement. The existence of the Tenancy Agreement had previously been unknown to Mr Pretlove, and from his enquiries made thereafter there was no evidence of it in the Defendants' corporate records.

9. The Claimant brought these proceedings, seeking specific performance of the Tenancy Agreement, on 14 February 2021. The Defendants' Defence, filed on 30 March 2021, included that the Tenancy Agreement "is a false document, which was not created on the date that it purportedly bears, and a sham.", and that it had been made not with the intention of creating its purported legal consequences but for the purpose of frustrating enforcement of the Bank's judgment.

10. At some point, whether before or after the commencement of these proceedings is not clear, Mr Pretlove sold the shares in the Defendants. I was informed that the shares are now held by a special purpose vehicle of the Bank, which wishes to realise the London Properties.

The Tenancy Agreement

11. As pleaded in the Particulars of Claim, the Claimant seeks specific performance of the Tenancy Agreement being the agreement dated 19 January 2013. The Tenancy Agreement was supplemented by an agreement between the same parties dated 4 March 2013, expressed to be an addendum to the agreement dated 19 January 2019 (the **"Addendum"**). The Addendum is also pleaded in the Particulars of Claim, and it would appear that any orders for specific performance would extend to it; it must be considered together with the Tenancy Agreement. For present purposes, only brief description of the agreements is necessary.

12. The Tenancy Agreement is entitled "Assured Shorthold Tenancy Agreement". It is expressed to be made between "Landlords", being the three Defendants, and "Tenants", being the Claimant and six named natural persons (the **"Other Tenants"**). The Claimant is identified as a UAE incorporated company with its registered office in Sharjah. The Other Tenants are identified as UAE nationals resident in Sharjah with dates of birth variously in 2003, 2004, 2007 and 2009. Abdulla is named as the manager of the Claimant in its trading licence, and in the application the Claimant was described as a proxy for the Al-Sari family. The Other Tenants are children of Mohammed and Majid.

13. Under the heading "Background", a clause provides:

> "1. This is an agreement to create an Assured Shorthold Tenancy as defined in Section 19A of the Housing Act 1988 or any successor legislation as supplemented or amended from time to time and any other applicable and relevant laws and regulations."

14. The principal operative clause then provides:

> "1. The Landlords, each to the extent of their respective properties stated herein, agree to let to the Tenants, jointly, and the Tenants agreed to take a tenancy of the properties, known as and forming:
>
> (a) The following property owned by Lodge Hill: The Bridge, 334 Queenstown Road, London SW 11 8NP.
>
> (b) . [and so on for the other Defendants and their Flats or Suites]"

15. Subsequent clauses provide for "the term of the tenancy" to commence on 16 January 2013 and continue for 15 years, with an option for renewal "for similar terms thereafter on the same or similar terms" (purportedly therefore, potentially in perpetuity as to the freehold and for the entirety of the leasehold terms), and for a lump sum rent of £850,000 said to have been fully paid by payment of that sum by the Claimant on behalf of the Landlords in settlement of loans taken from a bank. The rent, and its deemed payment, is not apportioned between the Landlord companies or the Flats and Suites; it is not clear whether any further rent is payable if an option for renewal is exercised. The Tenants have the right to assign or submit without prior written consent of the Landlords. A clause provides that the agreement will be "construed in accordance with and governed by the laws of England", and that the parties submit to the exclusive jurisdiction of the DIFC Courts.

16. The document bears the same signatures, the signatory or the signatory's capacity not being identified, separately on behalf of each of the three Landlords and the seven Tenants. It was common ground in the application that the signatory was Abdulla.

17. The Addendum is again between "Landlords" and "Tenants", set out as the same companies and other tenants as in the earlier agreement. A recital states their desire to supplement the terms and conditions of the earlier agreement. A clause repeats that the rent of £850,000 had been fully paid. The operative clauses effectively place all expenses in relation to the London Properties to the account of the Landlords and all income to the account of the Tenants. A clause again provides for the laws of England and the jurisdiction of the DIFC Courts. The document again bears the same signatures, the signatory or the signatory's capacity not being identified (but the signatory being Abdulla), separately on behalf of each of the three Landlords and the seven Tenants.

18. For convenience, references hereafter to the Tenancy Agreement should be taken to include the Addendum unless indicated otherwise. The Claimant did not seek specific performance of the Tenancy Agreement in its entirety, but only as to the freehold and the residential Flats - that is, not as to the commercial Suites.

The Application for Immediate Judgment

19. The Application Notice was filed on 30 March 2021, at the same time as the Defence. Filed in support of it were two witness statements of Mr Carlo Fedrigoli of the Defendants' UAE lawyers, and witness statements of Mr Pretlove; Mr Andrew Willins, a BVI lawyer who had acted for Mr Pretlove in enforcement of the Bank's judgment in the BVI but also gave evidence of BVI company law; and Mr Karl Anders, an English lawyer who had advised Mr Pretlove concerning enforcement of the Bank's judgment in England but also gave evidence of English land law. Filed in opposition to it were two witness statements of Ms Sara Sheffield of the Claimant's UAE lawyers, and witness statements of Mr Nicholas Colquhoun-Denvers, who provided property management services in relation to "The Bridge", and Mr Haylom Gebremedhin, the housekeeper for the Al-Sari family at "The Bridge". No evidence was called from Abdulla, or from Mohammed or Majid.

20. The witness statements of Mr Fedrigoli and Ms Sheffield contained much in the way of submissions or their views on the parties' positions. That is not correct. Witness statements are for evidence, unless the witness's state of mind is a relevant matter not for the witness's thoughts, and it is for Counsel to present the submissions on behalf of the parties. At the commencement of the hearing I informed Mr Faisal Osman, appearing for the Defendants, and Mr Stephen Doherty, appearing for the Claimant, that I would determine the matter on the submissions of Counsel based on facts found in the witness statements, and would not pay regard to the witness statements so far as they were in the nature of submissions.

21. By RDC 24.1, immediate judgment against a claimant may be given if the Court considers that the claimant has no real prospect of succeeding on the claim, and there is no other compelling reason why the case should be disposed of at trial. The principles to be applied are well established, and were not in dispute: see *GFH Capital Limited v Haigh* [2014] DIFC CFI 020 ("Haigh") at [9] and the same principles adopted in a number of subsequent cases including in the Court of Appeal in *Saif Sulaiman Mohammed Al Mazrouei v Bankmed (SAL)* [2019] DIFC CA 011. Adapted to immediate judgment against a claimant, in summary the Court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success, meaning one that carries some degree of conviction and is not merely arguable as opposed to one that is entirely without substance; a mini-trial without disclosure and oral evidence should be avoided, and the Court should not attempt to resolve the conflicts of fact which are normally resolved by a trial process, although it may be clear that there is no real substance in factual assertions in which case immediate judgment may be given; and the Court must take into account not only the evidence before it in the application, but also the evidence that can reasonably be expected to be available at trial. Pertinent to the ground of sham shortly mentioned is proposition (7) from Haigh at [9], that "[a]llegations of fraud may pose particular problems in summary disposal, since they often depend, not simply on facts, but inferences which can properly be drawn from the relevant facts, the surrounding circumstances and a view of the state of mind of the participants".

22. The applicant for immediate judgment carries the legal burden of proof, although (again adapted to immediate judgment against a claimant) if the defendant discharges that burden by adducing evidence which establishes an entitlement to judgment, the claimant carries the burden of adducing evidence to show that it has a real prospect of succeeding in the claim or there is some other reason why the proceedings should go to trial: see *Barclays Bank Plc v Shetty* [2020] DIFC CFI 061 at [102].

23. Although other matters were raised in the Defence, the Defendants' case for immediate judgment was on two grounds. One was that, as pleaded in the Defence, the Tenancy Agreement was a sham. The other, a discrete and narrow ground, was that the Tenancy Agreement was not binding on the Defendants because the signatures by Abdulla purportedly on their behalves had been without their authority.

A Question of Parties?

24. The Tenancy Agreement was with the Claimant and the Other Tenants, and was expressed as an agreement to let to the Tenants jointly; but the Claimant alone is the party seeking specific performance. All but one of the Other Tenants is a minor. On receipt of the papers for the hearing of the application, I requested submissions from the parties on whether the Other Tenants should be parties to the action, and if so, in the case of the minors how that should be done.

25. Written submissions were provided. Both sides said, on the Defendants' side at least in relation to the application for immediate judgment, that the Other Tenants need not be joined. At the commencement of the hearing I stated that, that being so, and when the parties had prepared for the hearing before I raised the question, I proposed to take a practical course having regard to the overriding objective: I would not rule one way or the other on whether the Other Tenants should be parties, whether parties now or at any time, but would hear and decide the Application as the action was presently constituted. If and when necessary, the question could arise at another time.

The Ground Of Sham

26. Although the Defence included that the Tenancy Agreement was not created on the date it bears, Mr Osman said that for the purposes of immediate judgment he could not establish when it was created. He said that the case he put was that, whether it was created in 2013 or whether it was created later, its function was as a "rainy day agreement": one created to keep the Al-Sari family in perpetual occupation of the London Properties if it should happen that they lost control of the Defendants.

27. The language of a "rainy day agreement" came from *Midland Bank Plc v Wyatt* [1997] 1 BCLC 242 (*"Wyatt"*). In resisting a 1991 charging order over his interest in the former matrimonial home, Wyatt relied on a trust deed executed in 1987 giving his interest in the home to his wife and

daughters. It was held that the declaration of trust was void because a sham, in that it was not intended to be acted upon. In a detailed examination of the facts, it was found that it had not been acted on in any way (for example, Wyatt's daughter was not told of it and his dealings with third parties, including seeking to borrow on the security of the home, were on the basis of joint beneficial ownership with his wife). The Judge concluded (at 252-3):

> "I do not believe Mr Wyatt had any intention, when he executed the trust deed, of endowing his children with his interest in Honer House, which at the time was his only real asset. I consider the trust deed was executed by him, not to be acted upon but to be put in the safe for a rainy day. As Mr Wyatt states in his affidavit, it was to be used as a safeguard to protect his family from long-term commercial risk, should he set up his own company. As such, I consider the declaration of trust was not what it purported to be but a pretence, or as it is sometimes referred to, a `sham'. . It follows that even if the deed was entered into without any dishonest or fraudulent motive, but was entered into on the basis of mistaken advice, in my judgment such a transaction will still be void and therefore an unenforceable transaction if it was not intended to be acted upon but was entered into for some different or ulterior motive."

28. In oral submissions, a number of reasons were developed for concluding that the Tenancy Agreement was not a genuine commercial agreement, but (as it was put in the skeleton argument) "a device to put before a court or tribunal to frustrate a judgment creditor". One was that it had not been disclosed by Mohammed or Majid when they swore disclosure affidavits in 2014 in accordance with a freezing order made in proceedings in England, when (according to the Defendants) one would have expected disclosure. Others, in summary, were that according to the terms of the Tenancy Agreement the Al-Saris would be entitled to occupation of the Flats for as long as they wanted without having to pay any further rent, even if they lost control of the Defendants; that the stated rent of £850,000 was itself well below commercial rent and a figure plainly fixed only in order to discharge the outstanding mortgage over the London Properties; that the stated rent had in truth not been paid, because £400,000 had been repaid a week later (but the Addendum still asserted that the entire £850,000 had been paid); and that as at 2013 the Suites were leased by the Third Defendant, Westdene Investments Ltd (**"Westdene"**), to a third party until 2016 and so were not the Defendants' to lease to the Claimant and the Other Tenants at all.

29. These reasons overlapped with a non-exhaustive statement of "six indicia of a sham" in the skeleton argument, in some respects going further but again with the point that the Tenancy Agreement was uncommercial and for the ulterior purpose of ensuring that the Al-Saris retained occupation of the London Properties if they lost control of the Defendants.

30. It may be accepted that there is force in the matters on which the Defendants rely. However, I am not persuaded that a case for immediate judgment has been made out.

31. Uncommerciality itself does not put beyond countenance genuine intention that the Tenancy Agreement have effect, to ensure to the Al-Sari family continued enjoyment of the London Properties on the most favourable terms. *Wyatt* was decided with the benefit of Wyatt's evidence of the intended use of the trust deed only as a safeguard against a then foreseen possibility. If the Tenancy Agreement was created in 2013, there was no evidence that a judgment against Mohammed or Majid, or some other occasion for loss of control of the Defendants, was in prospect in 2013; and if it was created then for that rainy day, it might be thought that it would have been produced when the rains came with enforcement steps being first taken in the BVI. There is much that is curious about the Tenancy Agreement, and difficulty in excluding from the investigation of the character of the Tenancy Agreement its disclosure only upon immediate threat of enforcement in June 2019 and the allegation in the Defence that it was not created in 2013. If that is in play, it could be said that the Tenancy Agreement was not for a rainy day but was intended to operate at once and according to its terms, in order to frustrate enforcement of the Bank's judgment, whereupon other legal and factual considerations of sham or unenforceability would arise.

32. Uncommerciality may will be significant in a wider context of the additional matters in the six indicia and the allegation that the Tenancy Agreement was not created in 2013, but I do not think the character of the Tenancy Agreement, and the legal principles to be applied to its status and enforceability, can be satisfactorily determined without a more full factual examination at trial. Further, in determining whether the Tenancy Agreement is a sham questions akin to fraud arise, which ordinarily should not be resolved in an application such as this. So far as sham is concerned, this case in my view requires the factual examination at trial, and I am not satisfied that the Claimant has no real prospect of success in its reliance on the Tenancy Agreement as genuine.

The Ground of Authority

33. From the Register of Directors, the sole director of each of the Defendants was successively Ayre Management Ltd (**"Ayre"**), a company registered in the BVI; Mr Papp; and Acorn Management Ltd, a Panamanian company. As at January 2013, the sole director was Ayre. The directors of Ayre were Mr Richard Hird and Mr Andrew Howroyd.

34. The Claimant sought to enforce the Tenancy Agreement as an agreement made on the date it bears, and the authority of Abdulla as at 19 January 2013 (and 4 March 2013) is in question. It was common ground in the application that the director at that time, Ayre, had not given authority: it knew nothing of the Tenancy Agreement. The Defendants had thus satisfied their evidential burden of establishing their entitlement to judgment, and the Claimant had an evidential burden of reasonable prospects of success in showing authority in Abdulla.

35. The Claimant said that Abdulla had authority (a) in exercise of the powers of Mohammed and Majid as the beneficial shareholders in the Defendants, via a power of attorney granted to him by Mohammed and Majid; alternatively (b) in exercise of an implied actual authority of Mohammed and Majid, implied from acquiescence of Ayre in their direct or indirect management of the Defendants' affairs, again via the power of attorney.

36. It is convenient immediately to go to the power of attorney. Mohammed and Majid executed a power of attorney in favour of Abdulla, certified by the notary on 26 June 2008. Its genuineness was not questioned. It is in Arabic, and what follows is from the translation.

37. The document is described as a "General Power of Attorney". It is an appointment by Mohammed and Majid "in our personal capacity and in any capacity whatsoever". It appoints Abdulla "[t]o represent us and take our place", followed by descriptions of numerous powers and rights, including to enter into contracts, to lease, and to trade in and subscribe to "shares in all companies operating in the country". The extent of the

descriptions and their terms is wide. The last sentence includes, "This is an absolute general power of attorney granted to his word, opinion and action, without excluding any matter of such power of attorney, whether mentioned above or not.".

38. As will appear, the Claimant's argument for implied actual authority from the Defendants rested on Mohammed alone as agent. There were no submissions on whether the power of attorney was joint or several on the part of Mohammed and Majid, and I will assume that it was joint and several.

Beneficial shareholding

39. In the seminal case of Salomon v A Salomon & Co Ltd [1897] AC 22, Lord Davey observed (at 57) that "[a] company is bound in a matter intra vires by the unanimous agreement of its members". That principle has gained the name of the Duomatic principle, from In re Duomatic Ltd [1969] 2 Ch 365. The company's articles required that the remuneration of directors should be determined by the company in general meeting. The liquidator claimed to recover payments to Elvins and Hanly as directors' salaries, on the ground that they had not been voted by the company in general meeting. Company accounts showing the payments had been signed and approved by Elvins and another director, East. At the time Elvins and East were the only shareholders entitled to vote in general meeting. Buckley J held that the payments could not be disturbed, saying (at 373):

> "It seems to me that if it had occurred to Mr Elvins and Mr East, at the time when they were considering the accounts, to take the formal step of constituting themselves a general meeting of the company and passing a formal resolution approving the payment of directors' salaries, that it would have made the position of the directors who received the remuneration, Mr Elvins and Mr Hanly, secure, and nobody could thereafter have disputed their right to retain the remuneration. The fact that they did not take that formal step but that they nevertheless did apply their minds to the question of whether the drawings by Mr Elvins and Mr Hanly should be approved as being on account of remuneration payable to them as directors, seems to lead to the conclusion that I ought to regard their consent as being tantamount to a resolution of the general meeting of the company. In other words, I proceed on the basis that where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be."

40. More recently, in EIC Services Ltd V Phipps [2003] EWHC 1507 (Ch) at [122], Neuberger J said:

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

41. The principle is summarised in *Bowstead & Reynolds on Agency*, 22nd Ed, 2020, para 1-028:

> "Normally, directors and shareholders will have actual authority, as opposed to apparent authority, only when they make their decisions in accordance with the procedures established by the statute and constitution. However, both in relation to directors and shareholders the courts recognised early on that these groups could also bind their company informally, so long as it could be established that all directors, or all shareholders, as the case may be, assented unanimously to the decision being made on the company's behalf. In respect of shareholders, Lord Hoffman in the *Meridian case [Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 506] approved the formulation of the concept of informal unanimous assent as follows:
>
> `. The unanimous decision of all the shareholders in a solvent company about anything which the company under its memorandum of association has power to do shall be the decision of the company.'
>
> Assent must be proven, but may be tacit and need not be manifested in concert, and may occur before or after the events in question have taken place. Informal unanimous assent cannot, however, be used to do anything that could not be achieved by formal resolution."

42. From the witness statement of Mr Willins, the Duomatic principle applies to the Defendants as BVI companies; the Defendants did not submit otherwise. It is important, however, to see how the Claimant submitted that the principle applied in this case. At one point it was summed up that Abdulla had authority to do what Mohammed and Majid did and that Mohammed and Majid had authority to bind the company, but on examination the submission was otherwise. With reference to the Privy Council case of *Ciban Management Corpn v Citco (BVI) Ltd* [2021] AC 122 ("Ciban") (as it happens, an appeal from the Court of Appeal of the Eastern Caribbean Supreme Court), it was that the principle applied to enable unanimous shareholder assent to authorise an individual to act for a company by conferral of (relevantly) actual authority, and that there was assent of Mohammed and Majid, as a corporate decision binding on the Defendants, to the Defendants authorising Abdulla to enter into the Tenancy Agreement - which (according to the submission) he did pursuant to the power of attorney.

43. At the level of the summary mentioned above, more fully expressed as a submission that there was assent of Mohammed and Majid to the Defendants entering into the Tenancy Agreement as a corporate decision binding on the Defendants, the Defendants submitted in response that an essential element was missing. That element was described as execution of any decision Mohammed and Majid may have come to by their unanimous assent. The Defendants' submission was rested on a provision in the Defendants' articles stating that the business of the company shall be managed by the directors and on legislation for a process between directors and shareholders in some circumstances, and it was said that while the shareholders' unanimous assent could require the directors to enter into the Tenancy Agreement, it was necessary that the execution of the Tenancy Agreement be by the directors and the shareholders' assent could not overcome that requirement.

44. I do not think the article or legislation is a sound foundation for the submission, as they are concerned with division of decision-making functions and under the Duomatic principle the division of functions would be subject to decision of the shareholders in general meeting: Ciban is against the Defendants' reliance on the legislation. However, the thrust of the submission went further, and exposed that the question in this case is not simply a decision to enter into the Tenancy Agreement, but the actual entry into it by Abdulla's signatures purportedly on behalf of the

Defendants.

45. The point of the submission was that execution, the act of signing the Tenancy Agreement, was not a matter for the shareholders in general meeting: it was not something for them as shareholders. If a company's board resolves to enter into an agreement, that is internal to the company and the company is not bound to the agreement unless and until the agreement is duly executed on its behalf, or becomes binding on it by some other means. It is the same if the resolution to enter into the agreement is by the shareholders in general meeting, and it is necessarily the same if the shareholders' assent is not by due resolution in general meeting but informally under the Duomatic principle. The Duomatic principle commonly arises where what is in question is a decision, such as the approval of the payment of directors' salaries in Duomatic itself or of a transaction allegedly in breach of directors' duty as in *Multinational Gas and Petrochemical v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258. In this case there is more. It is not enough to say that, whether by inference of the assent of Mohammed and Majid or of assent of Abdulla on their behalves pursuant to the power of attorney, there was a decision of the Defendants to enter into the Tenancy Agreement. Abdulla's authority to sign it on behalf of the Defendants must still be found.

46. Conferring of authority to sign was in question in Ciban. The facts are complex, but can be simplified. Byington was the sole beneficial shareholder in Spectacular Holdings Inc (**"Spectacular"**). With his knowledge and approval, his business associate Costa instructed Spectacular's registered agent and its sole (legal) director to issue four powers of attorney for carrying out transactions on behalf of Spectacular. Unknown to Byington, Costa also instructed the issue of a fifth power of attorney, pursuant to which property held by Spectacular was sold and the proceeds were used by Costa. It was claimed that the agent and the director had been in breach of duties owed to Spectacular when they failed to ensure that Costa was authorised by Byington to instruct the issue of the fifth power of attorney.

47. The Board upheld the lower Courts' decisions that the agent and the director had not been in breach of duties owed to Spectacular, but also analysed the case through the Duomatic principle. By Byington's informal assent to Costa instructing the issue of the four powers of attorney, under that principle Spectacular had given Costa actual authority to instruct their issue. There was no such assent to Costa instructing the issue of the fifth power of attorney. However, their Lordships considered that Byington, by his conduct in representing to the agent and the director over some years that Costa had authority to give them instructions, had clothed Costa with ostensible authority to instruct the issue of the fifth power of attorney. Lord Burrows JSC said (at [38]):

> "The question therefore becomes whether one can apply the Duomatic principle of informal unanimous shareholder consent to ostensible authority. As a matter of principle, there seems no reason why not. If actual authority can be conferred informally by unanimous shareholder consent the same should apply to ostensible authority. So here Mr Byington's informal consent to the representation by conduct, that Mr Costa had authority to instruct TCCL (and Citco BVI) in relation to the fifth POA, binds Spectacular."

48. There was no submission of ostensible authority in the present case. The submission was that Mohammed and Majid as beneficial shareholders could appoint an agent with authority to bind the Defendants, in the same manner as Byington had clothed Costa with authority, and had done so by the appointment of Abdulla.

49. The Defendants' submissions included that the assent of Mohammed and Majid to such an appointment of Abdulla could not be found, because it was "demonstrably not known" by them that Abdulla was signing the Tenancy Agreement. The basis for this was that (as noted at [28] above) the Tenancy Agreement had not been disclosed by them in their 2014 affidavits in accordance with the English freezing order. I do not think that is a finding which can be made in this Application. But the Claimant's argument fails for a more fundamental reason. Let it be assumed that Mohammed and Majid informally resolved that the Defendants should enter into the Tenancy Agreement. Apart from the power of attorney, and in the absence of evidence from any of Mohammed, Majid and Abdulla, there is nothing to warrant finding that they informally resolved that it should be signed by Abdulla on behalf of the Defendants. The power of attorney is the essential link to that appointment of Abdulla, but it is a false link. It empowers Abdulla to act on behalf of Mohammed and Majid - not on behalf of the Defendants. Put another way, in the Claimant's reliance on the power of attorney as embodying Abdulla's authority, he signed the Tenancy Agreement *not on behalf of the Defendants, but on behalf of Mohammed and Majid*. To say that he signed *on behalf of Mohammed and Majid in their capacity as beneficial shareholders* does not work, because signing is not something for them in general meetings of the Defendants.

50. This is a fatal flaw in finding authority in Abdulla in the exercise of the powers of Mohammed and Majid as beneficial shareholders. The Claimant having conducted this application without evidence from Abdulla, Mohammed or Majid, there is no reason to give it the opportunity to improve its position, or sufficient reason to consider that further evidence which will improve its position can be expected to be available at trial. In my view, the Claimant has no real prospect of establishing authority in Abdulla to sign the Tenancy Agreement in this manner.

Implied Actual Authority

51. Citing *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 (*"Hely-Hutchinson"*), the Claimant submitted that actual authority in Abdulla to sign the Tenancy Agreement was to be implied from the acquiescence of the Defendants' directors in its affairs being managed by its beneficial shareholders Mohammed and Majid, directly or "by their appointed proxies".

52. In *Hely-Hutchinson* Richards, the Chairman, CEO and de facto managing director of Brayhead Ltd ("Brayhead"), signed on Brayhead notepaper two letters of guarantee and indemnity in favour of Hely-Hutchinson. When Hely-Hutchinson sued on the letters, Brayhead refused to pay on the ground that Richards had no authority to enter into the contracts of indemnity and guarantee. It was held that Brayhead was bound by the letters. Lord Denning MR, with whom Lords Pearson and Wilberforce relevantly agreed, said that Richards did not have express authority to enter into the contracts on behalf of Brayhead, nor did he have authority implied from his office as Chairman to enter into them without the board's sanction; but he did have authority (at 584):

> ". implied from the circumstance that the board by their conduct over many months had acquiesced in his acting as the chief executive and committing Brayhead Ltd to contracts without the necessity of sanction from the board."

53. For the acquiescence by Ayre, the director of the Defendants, the Claimant relied on the witness statement of Mr Colquhoun-Denvers. He provided property management services in relation to "The Bridge", through a succession of companies, as well as looking after the Al-Sari family's

assets and affairs in the United Kingdom in other respects. He described his activities, although without it being particularly clear when he was referring to 2013 and beforehand or after 2013, and the culmination was:

> "I am not aware of Ayre, or any of the other corporate directors of Hortin, Lodge Hill and Westdene, playing a significant role in their management: as far as I am aware, their role was limited to maintaining the requisite company documentation and ensuring that the offshore companies complied with any legal requirements in the BVI. As I have explained, all aspects of the day-to-day management of the Companies, however, was undertaken by me in London."

54. It is necessary, however, to appreciate the extent of Mr Colquhoun-Denvers' activities, and more particularly what he said about the actions of Mohammed, since the argument for the Claimant more accurately required that authority in Mohammed to sign the Tenancy Agreement should be implied, which he then exercised through Abdulla under the power of attorney.

55. The management activities described by Mr Colquhoun-Denvers were, in summary:

a) day to day staffing and maintenance at "The Bridge";

b) collecting service charges and rents;

c) preparing budgets and submitting annual accounts to the freeholder and lessees;

d) payment of invoices incurred by the Defendants, including for example utility bills for "The Bridge", insurance accounts and annual company registration fees;

e) obtaining legal advice on behalf of the Defendants; and

f) acting as liaison between Mohammed and the Coutts, the bank from which the Defendants obtained loans secured on the London Properties, although not managing or controlling their accounts.

56. The charges and costs in (b) and (d) so far as falling on the Defendants would generally be paid by the management entity and reimbursed by the Claimant or another Al-Sari entity, and it seems not be borne by the Defendants.

57. Mr Colquhoun-Denvers said that in performing these duties he took his instructions from Mohammed, whom he understood was authorised to act on behalf of the rest of the Al-Sari family. He described Mohammed as the family member who controlled the family's property interests in the United Kingdom. Mr Colquhoun-Denver's spoke less to Majid, as he was involved in the family's oil interests, and spoke with Abdulla infrequently and generally when paying his respects in Sharjah.

58. Mr Colquhoun-Denvers did, however, have involvement with Ayre. He said that he was occasionally involved in seeking the signatures of is directors, Messrs Hird and Howroyd, on documents for the Defendants. He would receive instructions from Sharjah, particularly from Mohammed, for example to have a document legalised or notarised, or to obtain a signature from the directors, and he would arrange for that to be done. He described that as the liaison with Coutts, loan documents for loans to Westdene passed through his hands in 2006 and 2011, the signatories on its behalf in 2006 being Messrs Hird and Howroyd and in 2011 being Mr Hird and Mohammed. According to Mr Colquhoun-Denvers, he sent the 2011 loan documentation to Mohammed requesting that he obtain a signature from one of "the `A' list" of the directors of Westdene, being Abdulla, Mohammed and Majid, whereupon he would send the documentation for signature by one of the "the `B' list" of directors meaning Messrs Hird and Howroyd. In fact, the documents were signed pursuant to a resolution of Westdene's directors authorising signature by Mr Hird and Mohammed. Also described was a document signed by Mr Hird and Mohammed on behalf of the First Defendant, Hortin Holdings Ltd, a request to Coutts in 2013 to repay money said to have been paid to it in error.

59. Mr Colquhoun- Denvers had no involvement in the Tenancy Agreement - although he does not specifically say so, it is clear he did not know of it until recently.

60. I assume in the Claimant's favour that, for the purpose of implying authority, the matters described above were as at and prior to 2013. Nothing in this evidence gives implied actual authority to Abdulla directly, or to Majid - in the light of the evidence and as earlier stated, the Claimant's argument more accurately required that authority in Mohammed be implied, which was exercised through his attorney Abdulla. But the evidence is wholly insufficient to establish implied actual authority in Mohammed to sign the Tenancy Agreement. It could be found that Mohammed was left to instruct Mr Colquhoun-Denvers in essentially management and administrative matters, and acquiescence of Ayre to that extent could be implied. It is an entirely different proposition that Ayre acquiesced in Mohammed committing the Defendants to major transactions of the scale of the Tenancy Agreement which, at least according to its terms purporting to allow perpetual renewals, was tantamount to disposition of the whole of the Defendants' undertakings. In fact, the evidence is against such acquiescence. Although without specificity, Mohammed would cause Mr Colquhoun-Denvers to obtain the directors' signatures on documents. More specifically, and as the examples given by Mr Colquhoun-Denvers, the 2006 and 2011 loan documents were not left by Ayre's acquiescence to signature by Mohammed, but were signed by the directors of Ayre or, where Mohammed was one signatory, by him and Mr Hird pursuant to a particular and duly resolved grant of authority. Even taken at its highest, Mr Colquhoun-Denvers' apparent belief in an "A" list and a "B" list of directors does not indicate that Mohammed or anyone on the "A" list was treated by Ayre as having sole authority, since signature by one of the Ayre directors was also required.

61. In my view, the Claimant has no real prospect of establishing implied actual authority in Abdulla to sign the Tenancy Agreement: there is no substance in the argument.

62. The Defendants submitted that there was a further failing in the argument, citing *MVV Environment Devonport Ltd v NTO Shipping GmbH & Co KG MS `Nortrader MV Nortrader* [2020] EWHC 1371 (Comm) at [41] for the proposition that implied actual authority can arise only in relation to someone who has been given some express authority to which the implied authority is appurtenant and submitting that neither Mohammed nor Abdulla had been given any relevant express authority. It is not immediately obvious why, if the facts so warrant, actual authority should not be implied in favour of a stranger, with the absence of some other express authority in the stranger being part of the factual matrix. Even

accepting the proposition, however, it raises questions of fact and degree in identifying any relevant express authority in Mohammed. I do not think this is a matter for resolution in an application for immediate judgment, and it is not necessary to take it further. Nor is it necessary to consider the Defendants' further submission that, if Mohammed (or Majid) had an implied actual authority, it could not be delegated to Abdulla.

63. I do not accept the Claimant's submission that the question of authority raises complex legal issues and requires factual investigation, making it unsuitable for decision in an application for immediate judgment. It was not in dispute that there was no express authority given to Abdulla. The Claimant had an evidentiary burden for a case with a real prospect of establishing authority. The relevant legal principles are well established, and on the evidence put forward by the Claimant no such case has been made out; There is no reason to think that other significant evidence, not presently available to the Claimant, might exist and could be available at trial. I do not think there is any other compelling reason why the case should go to trial. The proceedings should be recognised as without real prospects of success, and brought to an end.

The Result

64. It follows that the proceedings should be dismissed. On 31 January 2021 orders were made *ex parte* in proceedings CFI 016-2021, restraining the Defendants and Mr Pretlove until 3 February 2021 from action contrary to the Tenancy Agreement. The orders were subsequently extended by consent until further order. With the dismissal of the proceedings, those orders should be discharged, but I will suspend the operation of the order for discharge for 28 days so that the Claimant has the opportunity to consider its position. There will be liberty to both sides to apply in that respect.

65. At the hearing of the application, I was asked to give the parties the opportunity to make submissions as to costs. If the parties are unable to agree on costs within ten days of these reasons being issued, written submissions not exceeding three pages should be exchanged and filed within seven days thereafter, and I will determine the question of costs on the papers.

Orders

66. I make the following orders:

1. Order that there be immediate judgment in favour of the Defendants.

2. Dismiss the proceedings.

3. In proceedings CFI 016-2021, order that the orders made on 31 January 2021 as thereafter extended be discharged.

4. Suspend the operation of order 3 for 28 days.

5. Grant liberty to apply in relation to orders 3 and 4.

6. Order that, if the parties are unable to agree on costs within ten days, written submissions on costs not exceeding three pages be exchanged and filed within a further seven days.