Neutral Citation Number: [2023] EWHC 2538 (Ch)

Case No: CR-2022-002200

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF IKTOMI EVENTS LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Royal Courts of Justice
Rolls Building, EC4A 1NL

Date: 11/10/2023

Before :

INSOLVENCY AND COMPANIES COURT JUDGE BURTON

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Between :

1. JAMES WILLIAM HAGGART
2. IKTOMI EVENTS LIMITED **Claimants**

- and –

1. ELANZO ALASTAIR BURGESS
2. MARTINO LOIS BURGESS
3. BEVERLEY BURGESS
4. VINCENT BURGESS
5. CASSARA JACKSON
6. BRENT TAYLOR
7. REGISTRAR OF COMPANIES **Defendants**

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Patrick Dunn-Walsh (instructed by **Temple Bright LLP**) for the **Claimants**
Jian Jun Liew (instructed by **Humphreys & Co**) for the First to Sixth **Defendants**

Hearing dates: 17 to 19 May 2023

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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INSOLVENCY AND COMPANIES COURT JUDGE BURTON

Insolvency and Companies Court Judge Burton :

1. The Claimants seek:

   i) a declaration that the appointments of the First and Second Defendants as directors of Iktomi Events Limited (the "Company"), as registered on 14 August 2021, are invalid and ineffective;

   ii) a declaration that the First Claimant, Mr Haggart, is the Company's sole shareholder;

   iii) orders pursuant to sections 1096 and 790V of the Companies Act 2006 (the "Act") directing the Registrar of Companies to remove Forms AP01 notifying those directors' appointments and to remove various forms regarding the Company's shareholding; and

   iv) an order pursuant to section 125 of the Act for the Company's register of members to be rectified to remove the names of the First to Sixth Defendants as members.

Background

2. The First Claimant, Mr Haggart is a nightclub promoter based in Bristol. The First to Sixth Defendants (together the "Defendants") comprise members of the Burgess family who own several properties in Bristol including a building from which one of their companies, formerly known as Lakota Limited, ran a nightclub called Lakota (the "Nightclub"). Mr Haggart started organising events for the Nightclub from October 2013.

3. On 24 May 2018, a company called Iktomi Limited ("IL") was incorporated to be the main operating company for the Nightclub. Its sole shareholder on incorporation was Bentleigh Burgess.

4. In 2018, the Burgess family were keen to bring Mr Haggart into the business where he would head the Nightclub's events team. It was originally proposed that Lakota would lease the Nightclub to a company to be incorporated by Mr Haggart and Bentleigh Burgess.

5. That company was the Company, incorporated on 12 October 2018 with Mr Haggart as its sole director and shareholder. Both parties agree that his sole directorship and shareholding was not what was originally intended, but at least in their written evidence, they differ in their recollection as to who was responsible for setting up the Company and why it was created in this way.

6. The lease was not transferred to the Company and the Company lay dormant for a while. In November 2018 a new proposal emerged in the negotiations between Mr Haggart and members of the Burgess family such that he would gain an interest in the Nightclub business by being issued shares in IL. On 8 February 2019, Mr Haggart acquired a 20% shareholding in IL, with the remaining 80% being transferred by Bentleigh Burgess to Lakota Limited. On the same day, Mr Haggart and Lakota Limited entered into a shareholders agreement (the "SHA") in respect of IL. The SHA provides for IL to operate the Nightclub and ancillary event management. Mr

Haggart was allocated ordinary B shares which, according to IL's articles of association, entitled him to 50% of IL's net profits over £120,000.

7. In May 2019, Mr Haggart was concerned that ticket income from events at the Nightclub, which he considered should be paid to IL, was being paid to Lakota Events Limited, a company solely owned by Bentleigh Burgess. It was agreed that the Company, which had not yet started to trade, would be "re-purposed" to receive ticket income generated by the Nightclub.

8. Mr Haggart's evidence is that he understood the Company was to be a subsidiary of IL. Consequently, the net income, after paying promoters' fees, from tickets sold for events at the Nightclub (the "Event Income") was on various occasions paid by the Company to IL and often used to meet IL's costs and expenses. As the Company continued to operate in that way, he saw no pressing need for its shareholding to be officially resolved. Things changed, however, when it became apparent that he might be considered solely liable for the Company's apparent failure properly to account for VAT. In August 2020, he arranged for what he described as an "interim dividend" to be paid by the Company to IL's members, himself and Lakota Limited (the "Interim Dividend").

9. The Defendants' case is that they did not become aware that Mr Haggart was the Company's sole director and member until May 2019. The Second Defendant, Ms Burgess, states that there was some consideration at the time about the Burgess family immediately taking steps "to exercise control over" the Company but that they were reluctant to do so as they wanted first to understand the potential VAT liabilities of the Company.

10. Despite Mr Haggart being the Company's sole director and shareholder, according to Ms Burgess' evidence, it was agreed that Mr Haggart would consult Bentleigh Burgess or her before making any decisions in relation to the Company. She states that this practice was largely followed with one notable exception when, in October 2020, Mr Haggart unilaterally declared the Interim Dividend. Ms Burgess states that this created difficulties, as Lakota Limited was not a member of the Company and was not therefore entitled to receive a dividend payment. Whilst the issue was ultimately resolved with the advice of accountants, it prompted the Burgess family to revisit the issue of which party was to hold shares in the Company.

11. A series of meetings took place in 2020 and 2021 to discuss a restructuring of the Nightclub's business. Mr Haggart claims that it was proposed that Bentleigh Burgess and Ms Burgess would become directors of the Company and that on 21 October 2020, as part of those discussions, he provided Ms Burgess (who practices in Bristol as a solicitor) with the necessary codes so that once everything was agreed, she would be in a position to file the relevant notices with Companies House to reflect the restructuring.

12. However, the restructuring discussions continued for some time after that. It does not appear to be in dispute that the changes would not be made until the Company's late, year-end accounts for 2019 had been filed and a solution had been found for the uncertainty concerning the Company's VAT liability.

13. On 11 August 2021, Ms Burgess sent a message to Mr Haggart and Bentleigh Burgess saying:

> "The accounts have now all been filed. We need to sort out [the Company] – I am gong to sort this out so the shares are owned 80/20 and there are three directors. Is everyone ok with that – we also need to sort out the payment of the vat imminently?"

14. On 14 August 2021, before receiving a reply from Mr Haggart, Ms Burgess filed forms at Companies House notifying the appointment of herself and the First Defendant, Elanzo Burgess as directors of the Company, as well as the allotment of 999 new shares, of which 199 were allotted to Mr Haggart and the remainder to the First to Sixth Defendants (together, the "Filings").

15. The Defendants' case is that Mr Haggart knew that once the Company's accounts for 2019 had been lodged, these changes were going to be made. They contend that an agreement was reached over the course of meetings spanning a period of almost a year, for shares in the Company to be issued to members of the Burgess family. The agreement provided that the family would decide among themselves, which of its members would receive those shares, such that those family members would hold, 80% of the Company's shares, and Mr Haggart would hold the remaining 20%. It was also agreed that the Company would appoint two additional directors from the Burgess family, with it again being left to the family to decide the identity of the individuals concerned.

16. Mr Haggart's claim centres upon him never having agreed, and therefore as the Company's sole director, never having decided to make the changes notified by the Filings. In his evidence, he expresses concern that following the Filings, the First to Sixth Defendants attempted to retain the Event Income in the Company, without "passing it up" to IL where Mr Haggart's shareholder rights entitle him to 50% of the profits earned in excess of £120,000.

17. Relations between the parties have broken down, and I understand that it is now accepted that Mr Haggart will sell his shares pursuant to clause 12.1.1 of the SHA. However, the claim form seeks first to determine the ownership and control of the Company.

The Company's articles of association

18. The Company's articles of association (the "Articles") provide that the model articles set out in schedule 1 of the Companies (Model Articles) Regulations 2008 (the "Model Articles") shall apply, except in so far as they are modified or excluded by the Articles.

19. Model Article 5 provides that directors may delegate any of their powers to such person, by such means and to such an extent as they think fit. Model Article 7 provides that if the Company only has one director, and no provision of the Articles requires it to have more than one director, then the director may take decisions without regard to any of the provision of the Articles relating to decision-making.

20. Model Article 17(1) provides that any person who is willing to act as a director and is permitted by law to do so, may be appointed by ordinary resolution or by a decision of the directors.

21. Article 5 of the Articles, under the heading "Directors' Meetings" provides:

> "Any decision of the directors is taken in accordance with this article when all eligible directors indicate to each other by any means that they share a common view on a matter. Such a decision may take the form of a resolution in writing, where each eligible director has signed one or more copies of it, or to which each eligible director has otherwise indicated agreement in writing. ***Where there is only one director such a decision is taken when that director comes to a view on the matter.*** A decision may not be taken in accordance with this article if the eligible directors would not have formed a quorum at such a meeting." (*my emphasis)*

22. Article 5.2 provides that where there is only one director in office, the quorum for a meeting of the directors is one.

23. Article 3.2 provides that the directors of the Company are generally and unconditionally authorised, subject to the remaining provisions of Article 3 and to Article 4, to offer and allot shares.

Relevant law

24. Section 1096(1) of the Companies Act 2006 (the "Act") provides:

> "(1) The registrar shall remove from the register any material -
>
> (a) that derives from anything that the court has declared to be invalid or ineffective, or to have been done without the authority of the company, or
>
> (b) that a court declares to be factually inaccurate, or to be derived from something that is factually inaccurate, or forged, and that the court directs should be removed from the register.

25. Section 125 of the Act provides:

> "(1) If—
>
> (a) the name of any person is, without sufficient cause, entered in or omitted from a company's register of members, or
>
> (b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person aggrieved, or any member of the company, or the company, may apply to the court for rectification of the register."

26. To the extent necessary, the Defendants seek to rely on the principle set out in *Re Duomatic* [1969] 2 Ch 365, explained by Neuberger J in *EIC Services v Phipps* [2003] 1 WLR 2360 as follows:

> "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, the requirement can be avoided if all the 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 the members of the group give their consent in different ways at different times, does not matter."

27. The *Duomatic* principle can remedy procedural irregularities in relation to both the appointment of directors (see *Burnell v Trans-Tag Limited* [2021] EWHC 1457 (Ch)) and the issue of shares (see *Re Finch (UK) Plc* [2015] EWHC 2430 (Ch)).

28. The authors of Meetings and Resolutions: Law, Practice and Procedure helpfully summarise, at paragraph 16.11, the key principles affecting the court's willingness to apply the *Duomatic* principle:

> "(1) The relevant transaction or matter decided upon is intra vires the company, lawful and honest and for the benefit of the company. An unlawful transaction cannot be ratified or approved.
>
> (2) The decision was taken with the unanimous consent of the shareholders entitled to attend and vote on the matter had it been placed before a duly convened general meeting of the company …
>
> (3) The persons giving their consent must have been aware of sufficient details of the transaction that their consent can fairly be described as an informed consent ie the material details of the transaction must have been brought to the attention of the shareholders as a whole. Acquiescence by shareholders with knowledge of the matter is as good as actual consent. However, if it can be shown that some members were not sufficiently informed, in particular as to a possible infringement of their rights, or did not consent the decision will be ineffective. Neuberger J summarized the position in *EIC Services v Phipps* in the following terms that have been cited many times in subsequent cases:
>
> > 'Before the Duomatic principle can be satisfied the shareholders who are said to have assented or waived must have the appropriate of 'full' knowledge'. If shareholder is not even aware that his 'assent' is being

> sought to the matter, let alone that the obtaining of his consent is at least a significant factor in relation to the matter, he cannot, in my view, have the necessary 'full knowledge' to enable him to 'assent', quite apart from the fact that I do not think he can be said to 'assent' to the matter if he is merely told of it."

> (4) Assent may be given at different times or simultaneously, at the time of the transaction or subsequently, expressly or by implication, verbally or by conduct, but nothing short of unqualified agreement, objectively established, will suffice. There must be material from which an observer can discern or (in the case of acquiescence) infer assent.

> (5) Where a party whose consent is required has remained silent during the discussion of a proposed transaction it is relevant for the court to consider the factual context and whether the circumstances were such that shareholders would be expected to voice their objections. If the surrounding circumstances are such that it would be unconscionable for a party to remain silent at the time and only later raise his objections, assent may be inferred from that shareholder's silence. Accordingly, the conduct from which agreement may be inferred may include acquiescence in circumstances when the members know that their assent is being sought or where there is some reason why conscience demands that they object sooner rather than later."

29. In *Gestmin SGPS S.A. v Credit Suisse* [2013] EWCA 3560 (Comm) Leggatt J provided oft-cited guidance regarding the fallibility of memory. Starting at paragraph 15, he summarised the difficulties faced by a judge when assessing the weight to be given to oral evidence:

> "15. An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.

> 16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been 'refreshed' by reading documents. The documents considered often include statements of case and other argumentative

> material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.
>
> … 22. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

The issues

30. The issues for the court to determine are whether, prior to 14 August 2021, Mr Haggart made any decision within the meaning of the Articles, or an informal decision within the scope of the principle in *Re Duomatic* to appoint two directors from the Burgess family, leaving it to the family to decide which family member would be appointed and/or to allot shares in the Company to whichever of the Burgess family members they decided should receive them.

Witness evidence

Mr Haggart

31. I found Mr Haggart to be a reliable witness. Despite Mr Liew's attempts to undermine his credibility, I found his evidence to be consistent on all key issues. He admitted to not recalling the precise details surrounding the incorporation of the Company. He said that it was only from reviewing the documents in the course of these proceedings that he recalled that the Company was originally intended to be the vehicle through which he and Bentleigh Burgess would operate the Nightclub, and

that at that time, they had not concluded discussions regarding the proposed, final shareholding.

32. He knew, at the time, that it was being set up with one director and one shareholder but at that stage, considered neither detail to be important. No revenue was being paid to the Company, it had not, as intended, secured the lease and it was not trading. The initial structure could be altered later.

33. However, the discussions surrounding its original, intended purpose fell by the wayside and the Company remained dormant until "repurposed" to receive ticket monies. He stated that he and Bentleigh Burgess had various discussions in 2019 about the Company structure but in the midst of running a busy nightclub, there was no pressing need to sort it out. As far as he was concerned, it only became pressing when he realised that there was a risk of a substantial VAT liability in a company for which, as sole director and shareholder, he appeared to be solely responsible.

34. He explained that he did not understand much of the legal terminology regarding holding assets "on trust". He consistently said that he had always understood from his discussions with Ms Burgess and Bentleigh Burgess, that the Company was to be treated as a subsidiary of IL, "part of the group". This, he said, was the reason why large sums of money were transferred from the Company to IL.

35. It became apparent during cross-examination that in considering and describing various companies as subsidiaries of IL, Mr Haggart had not focused on the Company's shareholding and whether legally, the requisite majority was held by IL. I nevertheless accept his evidence that he considered that they were all part of "the group" of companies which together performed roles to contribute to IL's profits running the Nightclub. In my judgment, the credibility of him holding such an understanding is supported by the following:

i) the SHA which describes IL's business as operating the Nightclub "and any ancillary event management". It does not seem to me to be unreasonable for him to have concluded that this would include the net income from such events;

ii) the manner in which Ms Burgess describes the corporate structure in her emails and witness statement, for example:

a) on 4 June 2019, in an email to family members, Ms Burgess referred to her concern how they would account for certain sums "intra-group between the Company, IL and Lakota";

b) an email dated 12 August 2020 addressed to Mr Haggart in which Ms Burgess referred to the need to tidy up "all of the group companies";

iii) the level of control that the Burgess family purported to be entitled to exercise in relation to the Company's affairs, notwithstanding that legally, they were not among its directors nor its members;

iv) the fact that the Defendants have not sought to deny that large amounts of the Company's money were used to discharge IL's costs and expenses; and

v) contemporaneous documents prepared by Mr Haggart in January and June 2020 when he provided Burgess family members with a summary of the Nightclub's finances. He included, and lumped together in the table, a summary of the areas of the business making a profit or loss and, under the heading "Where is the money?" a list that includes details of several companies' bank balances, among them, IL and the Company. Other companies appearing in this part of the table include "Upper York Street Ltd" ("UYSL") and "Dark Room Promotions". They were shown, during cross-examination, not to be subsidiaries of IL at the time. However, far from undermining Mr Haggart's evidence, in my judgment, that appears to me to support his belief that he and the Burgess family members involved in the Nightclub, treated the companies involved in the Nightclub's business *as if* they were all part of the same corporate group and *as if* they were subsidiaries of IL regardless of whether, legally, that was the correct legal interpretation of the shareholdings;

vi) Ms Burgess's own witness statement that refers to a meeting on 16 March 2021 where she recalls that all present agreed that the Company "should be kept in its current position *in the company structure*" (my emphasis);

vii) Ms Burgess's third witness statement in which she describes IL as having 50% of the shares in each of the promotions companies (which include UYSL and Dark Room Promotions) but then states that they were:

> "intended to be materially under the control of [IL] from the outset and in due course upon receipt of further advice, around September 2020, they were restructured to become full subsidiaries of [IL]".

I am not aware of a company being anything other than a subsidiary of another company or not - of there being partial or full subsidiaries. Ms Burgess's own language did not accurately reflect the legal position regarding which company was a subsidiary of IL and which could legally be considered to be "group companies"; and

viii) it is not in dispute that one of the options considered for the proposed restructuring was for the Company to become a subsidiary of IL.

36. I find reliable, Mr Haggart's statement that he had understood that whatever restructuring solution was arrived upon to address the VAT treatment of Event Income, it would need still to be included in the calculations giving rise to IL's profit and thus fall within the scope of the profit-sharing arrangements in the SHA. He conceded that the solution need not necessarily have resulted in the money being paid directly to IL. He would be happy with other arrangements provided a separate agreement was reached, to the same financial effect for him. However, formally making the Company a subsidiary of IL reflected what he had always understood was intended to be the case and comprised his favoured solution.

37. Mr Haggart was referred to Ms Burgess's email dated 26 June 2021 stating:

> "We discussed Alex's proposal regarding the VAT and are all happy to go ahead with it.

> Please can you confirm this with Alex. We also want to be shareholders as discussed so that our 80% mirrors Lakota Ltd in shareholding with you owning 20%. I know that Alex said he was going to look at this as part of the restructure work but we want you to know that this is our current thinking. Bentleigh and I will come on as directors."

38. I accept Mr Haggart's evidence that he considered the email merely to inform him, as it states, of the family's "current thinking" and that the proposals at that stage were still fluid and potentially subject to further thought. I found credible his explanation that whilst he would not be prepared to agree to an 80:20 split of shares in the Company unless there were a separate agreement to replicate his profit-sharing arrangement, he did not consider the email required an immediate response. He explained that he did not consider the email to be expressing the proposed, final solution and that on 26 June 2021 he was "mentally distracted", in the midst of organising one of the country's first post-lockdown festivals attended by 15,000 people.

39. Mr Haggart stated that when, in October 2021, he signed the Company's accounts for the year ending October 2020, he merely skim-read them, focussing principally on the statement of assets and the figures given for profits and that he did not notice that both the covering letter and the company information sheet referred to "directors" (plural) and the purported appointment of the additional directors. He was concerned to check that the numbers looked right and again, October is a busy time of year for the Nightclub, with Halloween-related events. I found credible his statement that whilst he would focus on "the figures" he would not check every line of the annual accounts prepared by OR, much of which he assumed was a standard template.

40. In my judgment, Mr Haggart's statement that he was less concerned about the VAT issue once the 2019 accounts had been filed was not undermined. He conceded that, as Mr Liew put it, the Company was not "out of the woods" because further accounts still needed to be filed and the VAT needed to be paid, but he said, credibly in my judgment, that he became more relaxed about the issue once a final figure for the VAT that needed to be paid had been identified and the Burgess family had agreed that it would be paid.

41. Mr Haggart stated that he did not become aware of the matters recorded by the Filings purportedly having taken place until February 2022. In the absence of any contemporaneous documents expressly notifying him that Ms Burgess had notified Companies House of these purported changes, and bearing in mind the significant financial effect which the Company's new shareholding could have on Mr Haggart's share of IL's profits, I consider his evidence, that he was not aware before that date of the changes having purportedly been made before that date, to be reliable.

Ms Burgess

42. I consider Ms Burgess sought to give truthful evidence. However I do not consider her to be a reliable witness. In my judgment her evidence appeared to be potentially tainted by the lapse of time and almost certainly tainted by the involuntary tendency, noted by Leggatt J in *Gestmin*, for past recollections to be revised to make them more consistent with present beliefs.

43. Important elements of Ms Burgess's evidence focussed on what she thought Mr Haggart knew. However I have seen no evidence to support her asserted belief that Mr Haggart was aware or knew of the matters that she claims formed part of his understanding, and which his evidence directly contradicts.

44. The correspondence passing between Ms Burgess and Mr Haggart in and around March and April 2021 suggests that important discussions, to which Mr Haggart was not a party, were taking place between members of the Burgess family. This perhaps explains why Ms Burgess believes Mr Haggart to be far more aware of her understanding of the way the group was to be structured than he claims was the case. Having carefully reviewed the parties' witness statements against the contemporaneous correspondence, it seems to me, more likely than not that on occasion, when Ms Burgess and other family members knew or understood something to be the case, she assumed it was equally as clear to Mr Haggart, even though he may not have been party to the relevant conversation.

45. Ms Burgess's correspondence gives the impression that whenever she could devote time to the Nightclub business, she sought to introduce some element of control and reporting systems to make it easier for her to manage it remotely. The correspondence also strongly suggests to me that none of IL's directors, including its managing director, Mr Haggart, had a clear understanding of each of their roles and in particular, of the scope of his authority. It was only in March 2022, two years after Mr Haggart joined the group, that Ms Burgess stated that they would be "pulling together your MD contract which will be in line with our original shareholders' agreement". There is evidence that in its absence, the parameters of Mr Haggart's authority were repeatedly, and only retrospectively, identified or refined. One example concerned the appointment of managers, "Mike" and "Adam". The SHA required shareholder approval for the entering into of any contract of employment to appoint anyone at managerial level. Shareholder approval is defined in the SHA as the prior written agreement of 81% of IL's shareholders. IL's shareholders were Mr Haggart and Lakota Limited. Bentleigh Burgess was one of the directors of Lakota Limited. Mr Haggart's email to Ms Burgess dated 22 March 2021 states that with Bentleigh Burgess's agreement, Adam was appointed general manager of the Nightclub in May (presumably May 2020 – some 10 months earlier), since when Adam had "massively stepped up". Whilst there is no evidence of Bentleigh Burgess's agreement having been given in writing (as required by the SHA), Ms Burgess does not seek in her evidence to deny that Bentleigh Burgess orally agreed that Adam should be hired. Instead, and notwithstanding that Adam had apparently been "stepping up" in his performance of the role of general manager for some time, she replied to say that there was "some confusion" (she does not say among whom) about Adam's role as "we are all under the impression" that he was only appointed as manager of Lakota Gardens. Despite Mr Haggart stating that limiting Adam's role to Lakota Gardens would represent a "demotion", Ms Burgess informed Mr Haggart that she would be happy for Adam "to continue" as manager of Lakota Gardens, but that they now wanted to advertise a new role of general manager of the Nightclub.

46. Another example can be seen when, by email dated 25 April 2022, Ms Burgess informed Mr Haggart that "we" have not approved the choice of medical company nor any of Iktomi's staff being involved in the warehouse events. These do not appear to fall within the scope of decisions for which shareholder approval was

required. In the same email and despite all that Ms Burgess has said in her evidence of the importance of keeping Event Income separate from IL, instead of Event Income being paid to the Company, she required it to "go into" IL until the issued had been resolved – which I assume is a reference to the concerns that had arisen in respect of the Company's liability for VAT.

47. The contemporaneous documents include examples of Bentleigh Burgess taking significant sums of money out of the business without consulting Mr Haggart. There appeared, at the time, to have been no agreed procedure for business expenses and/or a common failure to comply with such procedure. On 14 January 2020, Mr Haggart chased Bentleigh Burgess for a list of costs incurred and paid out of the business. On the same date, he informed Ms Jackson, the Fifth Defendant, that even after deducting items that might have been business expenses, Bentleigh Burgess still appeared to have transferred £97,338.63 to his own account without explanation. Around the same time, he urged his fellow directors to adopt a clear expenses policy, explaining that too much of his time was being taken up trying to preserve the Nightclub's cash flow.

48. The lack of clarity surrounding Mr Haggart's and Ms Burgess's understanding of the scope of Mr Haggart's authority to make decisions not expressly reserved by the SHA to require shareholder consent can be seen when he asked his fellow directors whether they had "any preference" for the food to be offered – pizzas, tacos, burgers etc. This does not appear to be the type of decision reserved by the SHA for shareholder approval. However Ms Burgess's reply indicates that she assumed that rather than being asked to express a preference, they were being asked to make a decision:

> "We would need to see more information on the options before making any decision".

49. In my judgment it is also illustrated by Ms Burgess's email of 24th April 2021, two years after Mr Haggart joined the business, in which she described one of the purposes of the Saturday meetings she was proposing Mr Haggart should attend was:

> "so you understand how we are as individuals going to interact with the business. We are also happy to share with you reasonable information about our plans so you know how Iktomi fits into what we do".

50. Ms Burgess stated during cross-examination, with what appeared to be a degree of sarcasm, that Mr Haggart "doesn't recall a lot", which suggests to me that she doubts the veracity of his recollections, and further that she was "used to James sending contrary emails". However, having reviewed the documents in evidence in these proceedings, I can readily apprehend that whilst Ms Burgess may have thought Mr Haggart was aware of issues concerning the Nightclub, it was quite possible that he was not aware of them, nor of her, or the Burgess family's understanding of various matters. Meetings were not formally minuted and whilst Ms Burgess put in evidence her own handwritten notes and diagrams prepared during the course of meetings, they were not shared with Mr Haggart at the relevant time.

51. Ms Burgess was taken to Mr Haggart's email sent at 9.36pm on 25 March 2021 when he asked her:

> "Are you happy for me to instruct the accountants to change ownership from me to Iktomi as per our accounting meeting?"

52. She said that the email baffled her as it was contrary to what was discussed at the meeting. She responded at 10.34 pm saying:

> "I'm not sure that was agreed. Can we see the final accounts for Iktomi Events. Have they been done?"

53. Mr Dunn-Walsh suggested to Ms Burgess that surely she would have ensured that a final decision regarding something as important as the manner in which the business would be restructured would be recorded in writing, particularly when Mr Haggart's email of 25 March 2021 appeared to show that he had understood an entirely different course to be proposed. Ms Burgess replied that she had made her own note regarding what had been agreed and that she was consequently clear, from 16 March 2021 that they had agreed a way forward. This again fortifies my view that Ms Burgess expected Mr Haggart to share her knowledge and understanding of matters concerning the Nightclub when they were not always clearly shared with him or recorded in writing.

54. The answer given by Ms Burgess, that the parameters for the proposed restructuring had been agreed from 16 March 2021, was the first time that the Defendants provided a date from which they claim Mr Haggart had agreed to the changes recorded in the Filings. Ms Burgess's evidence, up to that point, had referred only to an agreement "taking place" across the course of meetings and discussions spanning a period of almost a year, between October 2020 and August 2021. When Mr Dunn-Walsh highlighted to Ms Burgess that none of her witness statements provided a specific date on which the agreement was allegedly reached, according to my notes, she replied:

> "No, there were several meetings and by 16 March we had all the family on board and would become directors and I would ascertain the VAT liability, get the accounts done and then take the steps agreed upon. I felt after the 16th March we were all on the same page."

55. Her emphasis was notably on having the family on board, not Mr Haggart and on her feeling that "we were all on the same page". Despite the conviction with which Ms Burgess asserted that this was the date on which the alleged agreement was reached, I have seen no other evidence to support that that was the case. It represents such a marked divergence from her evidence up to that point, that in my judgment, and as I did not discern a conscious intention on Ms Burgess's part to mislead the court, in my judgment it again reflects the malleability and vulnerability of memories to be altered in the course of litigation.

56. Ms Burgess took the opportunity, during the trial, to correct a statement in her evidence in chief that addressed an issue first raised, many months earlier, in Mr Haggart's evidence. I found credible, and accept the reasons she gave to explain why she had not realised the error. However the fact that she set out in her third witness statement a very clear explanation of the intended meaning behind the email, which

she now accepts was neither relevant nor accurate, suggests a tendency on Ms Burgess's part to self-persuasion.

57. On 11 August 2021, Ms Burgess sent a WhatsApp Message to Mr Haggart and Bentleigh Burgess which read:

> "The accounts have now been filed. We need to sort out iktomi events – I am going to sort this out so the shares are owned 80/20 and that there are three directors. Is everyone ok with that – we also need to sort out the payment of the vat imminently?"

58. I did not find credible the explanation she gave in cross-examination that when she asked whether "everyone" was OK with her proposal, in fact she was only asking for Bentleigh Burgess's confirmation because she had "done the VAT, done the accounts" and thought that she was doing what Mr Haggart had expressly been wanting the family to do. She said she was jubilant when she sent the WhatsApp message. Having sympathised with Mr Haggart's concern that he should not continue as the Company's sole shareholder and director, she felt that she had "delivered the project" and that they could now "get our relationship into a better place". I find it noteworthy that Ms Burgess did not say that she putting into effect her agreement with Mr Haggart, but rather, that she was doing what she *thought* Mr Haggart had expressly wanted the family to do. This appeared to be her understanding despite there being no agreed note recording the alleged agreement and despite the effect of the proposed 80/20 split – if, as she maintains it was to be 80% to Burgess family members instead of IL – would deprive Mr Haggart of the benefit of Event Income from the profit-sharing arrangement.

59. Even allowing for a generous degree of sub-conscious self-persuasion, I have seen no evidence to justify Ms Burgess signing a letter dated 22 February 2022 from Lakota to Mr Haggart's solicitors regarding the issues in dispute in these proceedings, stating that:

> "He was present at the board meeting of Iktomi Events Limited when these matters were approved by him. He was informed when the filings were made at Companies House."

There is no evidence of any such board meeting having taken place, no evidence of him approving the matters recorded by the Filings and no evidence, beyond the WhatsApp message, of him being informed at the time that they were made.

Elanzo Burgess

60. Elanzo Burgess gave no direct evidence concerning the agreement reached with Mr Haggart other than to confirm that he attended the meeting on 16 March 2021 when he recalled that everyone present, including Mr Haggart agreed to have new directors appointed to the Company as soon as possible. He then states that in late Spring or early summer 2021 the Burgess family agreed that he (Elanzo Burgess) would be appointed as a director and the Company's shares would be held 80:20 between either Lakota Limited or its members and Mr Haggart. He has no direct knowledge whether these matters were relayed to Mr Haggart.

Mrs Jackson

61. Mrs Jackson's evidence in chief states:

> "As promised and agreed since 2021, the long-awaited restructure of the Company took place [after the accounts were filed in August 2021]."

62. Whilst, during cross-examination, she said that her reference to an agreement meant the agreement to appoint additional directors to the Company and for its shareholding to reflect the 80:20 split which exists in IL, the detailed reference to the shareholding was, in my judgment, notably absent from her written evidence. I attach little weight to it.

Decision

63. The Company's Articles require Mr Haggart, as its sole director, to have "come to a view" regarding the matters set out in the Filings. I was taken to no authority on the meaning of the phrase "come to a view" but in my judgment, what is required is for the director to have moved beyond contemplating a future possibility. He must reach his own decision that the proposed course of action will be put into effect.

64. I have found reliable Mr Haggart's evidence that he always understood that, whether received via the Company or pursuant to any other arrangement, the Event Income was intended to form part of the income from which his profit share would be calculated. His email of 25 March 2021 unambiguously sets out his understanding that the Company was to become a subsidiary of IL. He confirmed in evidence that he would be open to agreeing to an alternative arrangement, provided a separate agreement was reached to preserve the Event Income being included in the profit-share arrangement. No party has sought to suggest that any such alternative agreement was reached. In the absence of such an alternative agreement, it would have made no commercial sense for Mr Haggart to agree to, or "come to a view" that the Company's shareholding should be restructured in a way that would exclude the Event Income from the profit-share calculation.-

65. Ms Burgess's "current thinking" email of 16 June 2021 and the WhatsApp Message to Bentleigh Burgess and Mr Haggart that expressly asks if "everyone is ok with that" contradict her evidence that by 31 March 2021, Mr Haggart had come to a view that involved him relinquishing the Event Income from his profit-share calculations and provided for two, at that time unspecified members of the Burgess family to be appointed as his fellow directors. Up to that point, almost all of his dealings had been only with Bentleigh Burgess and Ms Burgess.

66. However, even if I were to accept Ms Burgess's explanation of the meaning of the "current thinking" email and the WhatsApp message, the determinative issue in this case is not her understanding of what Mr Haggart had decided or agreed to, but whether he had in fact come to such a view.

67. For the reasons I have given, I prefer Mr Haggart's evidence that at the time the Filings were made, he had not formed a view that 80% of the Company shares would be held by individual members of the Burgess family. I accept his evidence that his

understanding was that the changes which he desired to be made to the Company's directorships would be made at the same time as the agreed restructuring. In my judgment, although he was in principle prepared and keen for Burgess family members to be appointed as directors of the Company, as the restructuring still remained, as far as he was concerned, up in the air, he had not reached a view that Ms Burgess and Elanzo Burgess be appointed directors on the date on which the Filings were made.

68. I have found credible Mr Haggart's evidence that he signed the Company's accounts, without noticing the statements that referred to the appointment of Ms Burgess and Elanzo Burgess as directors of the Company. Even though Mr Haggart did not reply to the WhatsApp Message, there is no documentary evidence that the changes purportedly effected by the Filings were expressly brought to his attention. His evidence that he did not become aware of the Filings until February 2022 was not undermined.

69. For the *Duomatic* principle to apply, Mr Haggart must have been aware of sufficient details regarding the proposed share allocation and directorships to have given his "informed consent" to those changes.

70. It follows from my findings on the evidence that as Mr Haggart had not come to a view of the matters in dispute before the Filings were made, and did not become aware of them until February 2022, he cannot fall within the category of parties who had the requisite knowledge to have enabled him, in the manner contemplated by the *Duomatic* principle, between August 2021 and January 2022 to have assented to a share allocation that was entirely contrary to his financial interests and to the appointment of directors, one of whom, he did not even appear to be aware was intended to join the business.

71. In conclusion, when the Filings were made, Mr Haggart, as the Company's sole director and shareholder, had not made a decision, nor entered into an agreement nor come to a view that the Company would allocate shares such that 80% of them would be held by the First to Sixth Defendants nor that, absent an agreed plan to restructure the Company's shareholding, the First and Second Defendants would be appointed directors of the Company

72. The Claimants are entitled to the declarations and relief sought in the form sought by the Claim form, as amended at the start of the trial.