Michaelmas Term
[2015] UKSC 71
On appeal from: [2014] EWCA Civ 640

JUDGMENT

Eclairs Group Ltd (Appellant) v JKX Oil & Gas plc (Respondent)

Glengary Overseas Ltd (Appellant) *v* JKX Oil & Gas plc (Respondent)

before

Lord Neuberger, President
Lord Mance
Lord Clarke
Lord Sumption
Lord Hodge

JUDGMENT GIVEN ON

2 December 2015

Heard on 18 and 19 May 2015

Appellant (Eclairs Group Ltd)
David Mabb QC
Nigel Dougherty
(Instructed by Freshfields Bruckhaus Deringer LLP)

Respondent (JKX Oil & Gas plc)
Michael Swainston QC
Tony Singla
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Appellant (Glengary Overseas Ltd)
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LORD SUMPTION: (with whom Lord Hodge agrees)

Introduction

1. This appeal is about an alleged "corporate raid". According to the judgment of Mann J, at para 224, this expression is a "loose, convenient and pejorative shorthand" which can be applied to a variety of situations, but in this case means an attempt to exploit a minority shareholding in a company to obtain effective management or voting control without paying what other shareholders would regard as a proper price. I shall use the expression in that sense in spite of its pejorative overtones, but only because it is convenient.

2. One of the tools available to a public company seeking to resist the covert acquisition of control by raiders is a statutory disclosure notice calling for information about persons interested in its shares. There are statutory provisions empowering the court to restrict the exercise of rights attaching to shares if those interested in them fail to comply with a disclosure notice. But it is common for the articles of a public company to empower the board to impose such restrictions. The questions at issue on this appeal affect companies which have adopted powers of this kind in their articles. They are, in bald summary, what are the proper purposes for which the board may restrict the exercise of rights attaching to shares, and in what circumstances can the restrictions be challenged on the ground that they were imposed for a collateral purpose?

3. JKX Oil & Gas Plc is an English company listed on the London Stock Exchange. It is the parent company of a group whose business consists in the development and exploitation of oil and gas reserves, primarily in Russia and the Ukraine. For reasons which are disputed, and for present purposes irrelevant, the company has not prospered of late. Its difficulties have been reflected in its share price which has fallen to historically low levels. In 2013, the directors of JKX perceived that it had become the target of a raid by two companies, Eclairs and Glengary, both incorporated in the British Virgin Islands. Eclairs is a company controlled by trusts associated with Mr Igor Kolomoisky and Mr Gennadiy Bogolyubov. Mr Kolomoisky is a prominent Ukrainian businessman and politician and Mr Bogolyubov is his business associate. Eclairs beneficially owns some 47m shares amounting to 27.55% of the issued share capital of JKX. Glengary is a company controlled by Mr Alexander Zhukov in which his right-hand man Mr Ratskevych also has a small holding. The company beneficially owns 19m shares amounting to 11.45% of the issued share capital of JKX. The judge found that Mr Kolomoisky and Mr Bogolyubov had a reputation as corporate raiders. Rather less

is known about Mr Zhukov, but the directors of JKX believed him to have had business dealings with Mr Kolomisky in the past.

4. Between 2010 and 2012, JKX was trying to raise capital. It encountered some difficulty in raising it from banks and other financial institutions, partly because of the risks associated with investment in the Ukraine, and partly because Mr Kolomoisky's substantial stake in the company proved to be a deterrent. A number of proposals were made for raising capital by the issue and allotment of new shares, but these failed because Mr Kolomoisky opposed them. They would have required shareholders' special resolutions, and Eclairs' holding constituted a blocking minority. On 7 March 2013, Eclairs wrote to JKX calling upon it to convene an extraordinary general meeting to consider ordinary resolutions for the removal of the Chief Executive Dr Davies and the Commercial Director Mr Dixon from the board, and the appointment of three new directors. Enquiries suggested that this move had been concerted between Mr Kolomoisky and Mr Zhukov, and that the proposed new directors were associates of theirs. Newspapers in the Ukraine reported that Mr Kolomoisky was trying to take control of JKX's principal Ukrainian subsidiary.

5. The company received Eclairs' request on 15 March 2013. Its response was to issue five disclosure notices between 20 and 26 March. On the Eclairs side, they were addressed to Eclairs and Mr Bogolyubov, and on the Glengary side to Glengarry, Mr Zhukov and Mr Ratskevych. On 13 May 2013, further disclosure notices were issued to the same addressees as the March notices plus, on the Eclairs side, Mr Kolomoisky. The notices requested information about the number of shares held, their beneficial ownership and any agreements or arrangements between the various persons interested in them. The responses, which were received promptly, admitted the existence of interests in JKX shares, but denied that the addressees were party to any agreement or arrangement among themselves.

6. On 23 April 2013, the company convened an AGM for 5 June 2013. The business included the re-election of Dr Davies, the approval of the directors' remuneration report and three resolutions empowering the board to allot shares for cash, to disapply statutory pre-emption rights upon the allotment of shares, and to make market purchases of the company's shares. On 23 May 2013, Eclairs published an advertisement in the *Financial Times* and an open letter to shareholders. In these documents, shareholders were invited to oppose the above five proposed resolutions. Since the resolutions to authorise market purchases and to disapply pre-emption rights required a special resolution, this meant that as matters stood they were certain to fail. The other resolutions required only an ordinary resolution but would be difficult to get through in the face of opposition from two blocks together controlling 39% of the company.

7. The responses to the second batch of disclosure notices were received on 27 and 28 May 2013. On 30 May, a board meeting was held. One director (Mr Miller) was absent, but had given instructions to the chairman as to how he wished to vote, and two others (Dr Davies and Mr Dixon) recused themselves and took no part in the proceedings. The remaining directors considered that the responses to the notices were inadequate because they believed that there were agreements or arrangements between the addressees which they had not disclosed. They resolved to issue restriction notices under powers conferred on the board by the company's articles on the 47m shares in which Eclairs was interested and the 19m shares in which Glengary was interested. The effect of the restriction notices was to suspend the right to vote at general meetings attaching to these shares and to restrict the right of transfer.

8. On 4 June 2013, the day before the AGM, Eclairs and Glengary began separate proceedings in the Chancery Division challenging the restriction notices. A number of grounds were advanced, most of which were rejected by Mann J and have now fallen away. The one ground which subsists and is now before this court is that the board acted for a collateral, and therefore improper, purpose. It was contended that the only proper purpose for which the power could be exercised was to extract the information, and that the real purpose of the board had been to ensure that the resolutions at the forthcoming AGM would be passed. In the event, the company gave undertakings to David Richards J on the day that the proceedings were commenced, the effect of which was to allow the votes attaching to the 47m and 19m shares to be cast on the resolutions without prejudice to their validity.

Disclosure notices

9. The power to issue a statutory disclosure notice originates in section 27 of the Companies Act 1976. That provision was subsequently replaced by section 74 of the Companies Act 1981, and then by section 212 of the Act of 1985. It is now contained in section 793 of the Companies Act 2006. Section 793 empowers a public company to issue a disclosure notice to any person whom it knows or reasonably believes to be interested in its shares. The notice may require that person to disclose (among other things) whether or not it is interested in shares, the nature of that interest if there is one, and whether any persons interested are party to any agreement for the acquisition of interests in shares or the exercise of any rights conferred by the holding of shares. Sections 820-825 of the 2006 Act contain very broadly framed provisions for determining when a person is to be regarded as interested in shares for these purposes. It extends to any legal or equitable interest, or any right to exercise or control the exercise of any right attaching to shares, or any such right or interest vested in a company under a person's control or in specified categories of close relative, or any control or influence arising from an agreement for the acquisition of shares.

10. Under the statute, the failure of a person interested in shares to comply with a disclosure notice may result in the restriction of the rights conferred by those shares. Section 794(1) provides:

> "794 Notice requiring information: order imposing restrictions on shares
>
> Where -
>
> > (a) a notice under section 793 (notice requiring information about interests in company's shares) is served by a company on a person who is or was interested in shares in the company, and
> >
> > (b) that person fails to give the company the information required by the notice within the time specified in it, the company may apply to the court for an order directing that the shares in question be subject to restrictions.
>
> For the effect of such an order see section 797."

Section 797 identifies the restrictions as being that any transfer of the shares is void, no voting rights are exercisable, no further shares may be issued in right of the shares or pursuant to an offer made to their holder, and except in a liquidation no payment of capital or income may be made on the shares.

11. In the case of JKX, corresponding powers were conferred on the board by article 42, which empowered the board to issue a "restriction notice" whenever a statutory disclosure notice had been issued under section 793 and had not been complied with. It provided (so far as relevant):

> "(2) Notwithstanding anything in these articles to the contrary, if
>
> > (a) a disclosure notice has been served on a member or any other person appearing to be interested in the specified shares, and

(b) the Company has not received (in accordance with the terms of such disclosure notice) the information required therein in respect of any of the specified shares within 14 days after the service of such disclosure notice,

then the board may (subject to para 7 below) determine that the member holding the specified shares shall, upon the issue of a restriction notice referring to those specified shares in respect of which information has not been received, be subject to the restrictions referred to in such restriction notice, and upon the issue of such restriction notice such member shall be so subject. As soon as practicable after the issue of a restriction notice the Company shall serve a copy of the notice on the member holding the specified shares.

(3) The restrictions which the board may determine shall apply to restricted shares pursuant to this article shall be one or more, as determined by the board, of the following:

(a) that the member holding the restricted shares shall not be entitled, in respect of the restricted shares, to attend or be counted in the quorum or vote either personally or by proxy at any general meeting or at any separate meeting of the holders of any class of shares or upon any poll or to exercise any other right or privilege in relation to any general meeting or any meeting of the holders of any class of shares,

(b) that no transfer of the restricted shares shall be effective or shall be registered by the Company,

(c) that no dividend (or other moneys payable) shall be paid in respect of the restricted shares and that, in circumstances where an offer of the right to elect to receive shares instead of cash in respect of any dividend is or has been made, any election made thereunder in respect of such specified shares shall not be effective.

(4) The board may determine that one or more of the restrictions imposed on restricted shares shall cease to apply at

> any time. If the Company receives in accordance with the terms of the relevant disclosure notice the information required therein in respect of the restricted shares all restrictions imposed on the restricted shares shall cease to apply seven days after receipt of the information. …"

12. Article 42 differs in a number of respects from sections 794-800 of the Companies Act 2006, notably in vesting the power to impose restrictions on the board instead of the court. It also contains a definition section which specifies the circumstances in which the board is entitled to treat a response to the notice as non-compliant. Article 42(1)(j) provides:

> "(j) for the purposes of paragraphs (2)(b) and (4) of this article the Company shall not be treated as having received the information required by the disclosure notice in accordance with the terms of such disclosure notice in circumstances where the board knows or has reasonable cause to believe that the information provided is false or materially incorrect."

13. These were the powers which the board of JKX purported to exercise at their meeting on 30 May 2013 and which are now challenged.

The proper purpose rule

14. Part 10, Chapter 2 of the Companies Act 2006 codified for the first time the general duties of directors. The proper purpose rule is stated in section 171(b) of the 2006 Act, which provides that a director of a company must "only exercise powers for the purposes for which they are conferred". The rule thus stated substantially corresponds to the equitable rule which had for many years been applied to the exercise of discretionary powers by trustees. "It is a principle in this court", Sir James Wigram V-C had observed in *Balls v Strutt* (1841) 1 Hare 146, "that a trustee shall not be permitted to use the powers which the trust may confer upon him at law, except for the legitimate purposes of the trust." Like other general duties laid down in the Companies Act 2006, this one was declared to be "based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director": section 170(3). Section 170(4) accordingly provides that the general duties are to be "interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding rules and equitable principles in interpreting and applying the general duties".

15. The proper purpose rule has its origin in the equitable doctrine which is known, rather inappropriately, as the doctrine of "fraud on a power". For a number of purposes, the early Court of Chancery attached the consequences of fraud to acts which were honest and unexceptionable at common law but unconscionable according to equitable principles. In particular, it set aside dispositions under powers conferred by trust deeds if, although within the language conferring the power, they were outside the purpose for which it was conferred. So far as the reported cases show the doctrine dates back to *Lane v Page* (1754) Amb 233 and *Aleyn v Belchier* (1758) 1 Eden 132, 138, but it was clearly already familiar to equity lawyers by the time that those cases were decided. In *Aleyn's Case*, Lord Northington could say in the emphatic way of 18th century judges that "no point was better established". In *Duke of Portland v Topham* (1864) 11 HLC 32, 54 Lord Westbury LC stated the rule in these terms:

> "that the donee, the appointor under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power."

The principle has nothing to do with fraud. As Lord Parker of Waddington observed in delivering the advice of the Privy Council in *Vatcher v Paull* [1915] AC 372, 378, it

> "does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power."

The important point for present purposes is that the proper purpose rule is not concerned with excess of power by doing an act which is beyond the scope of the instrument creating it as a matter of construction or implication. It is concerned with abuse of power, by doing acts which are within its scope but done for an improper reason. It follows that the test is necessarily subjective. "Where the question is one of abuse of powers," said Viscount Finlay in *Hindle v John Cotton Ltd* (1919) 56 Sc LR 625, 630, "the state of mind of those who acted, and the motive on which they acted, are all important".

16. A company director differs from an express trustee in having no title to the company's assets. But he is unquestionably a fiduciary and has always been treated as a trustee for the company of his powers. Their exercise is limited to the purpose for which they were conferred. One of the commonest applications of the principle in company law is to prevent the use of the directors' powers for the purpose of influencing the outcome of a general meeting. This is not only an abuse of a power for a collateral purpose. It also offends the constitutional distribution of powers between the different organs of the company, because it involves the use of the board's powers to control or influence a decision which the company's constitution assigns to the general body of shareholders. Thus in *Fraser v Whalley* (1864) 2 H & M 10, the directors of a statutory railway company were restrained from exercising a power to issue shares for the purpose of defeating a shareholders' resolution for their removal. In *Cannon v Trask* (1875) LR 20 Eq 669, which concerned the directors' powers to fix a time for the general meeting, Sir James Bacon VC held that it was improper to fix a general meeting at a time when hostile shareholders were known to be unable to attend. In *Anglo-Universal Bank v Baragnon* (1881) 45 LT 362, Sir George Jessel MR held that if it had been proved that the power to make calls was being exercised for the purpose of disqualifying hostile shareholders at a general meeting, that would be an improper exercise of the directors' powers. In *Hogg v Cramphorn Ltd* [1967] 1 Ch 254, Buckley J held that the directors' powers to issue shares could not properly be exercised for the purpose of defeating an unwelcome takeover bid, even if the board was genuinely convinced, as the current management of a company commonly is, that the continuance of its own stewardship was in the company's interest. The company's interest was an additional and not an alternative test for the propriety of a board resolution.

17. In all of these cases, either there was no dispute about the directors' purpose or else the only purpose which could plausibly be ascribed to them was an improper one. But what if there are multiple purposes, all influential in different degrees but some proper and others not? An analogy with public law might suggest that a decision which has been materially influenced by a legally irrelevant consideration should generally be set aside, even if legally relevant considerations were more significant: *R(FDA) v Secretary of State for Work and Pensions* [2013] 1 WLR 444, at paras 67-69 (per Lord Neuberger of Abbotsbury MR). In some contexts, such as rescission for deceit or breach of the rules relating to self-dealing, equity is at least as exacting. But the proper purpose rule, at any rate as applied in company law, has developed in a different direction. Save perhaps in cases where the decision was influenced by dishonest considerations or by the personal interest of the decision-maker, the directors' decision will be set aside only if the primary or dominant purpose for which it was made was improper. To some extent this is a pragmatic response to the range of a director's functions and the conflicts which are sometimes inseparable from his position. The main reason, however, is a principled concern of courts of equity not just to uphold the integrity of the decision-making process, but to limit its intervention in the conduct of a company's affairs to cases in which an

injustice has resulted from the directors' having taken irrelevant considerations into account.

18. In his seminal judgment in the High Court of Australia in *Mills v Mills* (1938) 60 CLR 150, 185-186, Dixon J pointed out the difficulties associated with too rigorous an application of the public law test to the decisions of directors:

> "… it may be thought that a question arises whether there must be an entire exclusion of all reasons, motives or aims on the part of the directors, and all of them, which are not relevant to the purpose of a particular power. When the law makes the object, view or purpose of a man, or of a body of men, the test of the validity of their acts, it necessarily opens up the possibility of an almost infinite analysis of the fears and desires, proximate and remote, which, in truth, form the compound motives usually animating human conduct. But logically possible as such an analysis may seem, it would be impracticable to adopt it as a means of determining the validity of the resolutions arrived at by a body of directors, resolutions which otherwise are ostensibly within their powers. The application of the general equitable principle to the acts of directors managing the affairs of a company cannot be as nice as it is in the case of a trustee exercising a special power of appointment. It must, as it seems to me, take the substantial object the accomplishment of which formed the real ground of the board's action. If this is within the scope of the power, then the power has been validly exercised."

19. Once one accepts the need to compare the relative significance of different considerations which influenced the directors, the question inevitably arises what is the "primary" or "dominant" purpose, and how is it to be identified. One possibility is that it is the "weightiest" purpose, ie the one about which the directors felt most strongly. The other is that it is the purpose which caused the decision to be made as it was. Of course, the two things are connected. The ordinary inference is that the "weightiest" purpose (in this sense) will also have been causative, and that minor purposes will not have been. In most cases the two tests will in practice lead to the same result. But that will not always be so and, as will be seen, it is not necessarily the case here.

20. The first test seems to me to be difficult to justify, for reasons of both practicality and principle. The practical difficulty was pointed out by Dixon J in the passage which I have quoted. It would involve a forensic enquiry into the relative intensity of the directors' feelings about the various considerations that influenced

them. A director may have been influenced by a number of factors, but if they all point in the same direction he will have had no reason at the time to arrange them in order of importance. The attempt to do so later in the course of the dispute is likely to be both artificial and defensive. Moreover, a realistic appreciation of the directors' position will show that it is liable to lead to the wrong answer. Directors of companies cannot be expected to maintain an unworldly ignorance of the consequences of their acts or a lofty indifference to their implications. A director may be perfectly conscious of the collateral advantages of the course of action that he proposes, while appreciating that they are not legitimate reasons for adopting it. He may even enthusiastically welcome them. It does not follow without more that the pursuit of those advantages was his purpose in supporting the decision. All of these problems are aggravated where there are several directors, each with his own point of view.

21. The fundamental point, however, is one of principle. The statutory duty of the directors is to exercise their powers "only" for the purposes for which they are conferred. That duty is broken if they allow themselves to be influence by *any* improper purpose. If equity nevertheless allows the decision to stand in some cases, it is not because it condones a minor improper purpose where it would condemn a major one. It is because the law distinguishes between some consequences of a breach of duty and others. The only rational basis for such a distinction is that some improprieties may not have resulted in an injustice to the interests which equity seeks to protect. Here, we are necessarily in the realm of causation. The question is which considerations led the directors to act as they did. In *Hindle v John Cotton Ltd* (1919) 56 Sc LR 625, 631, Lord Shaw referred to the "moving cause" of the decision, a phrase taken up by Latham CJ in *Mills v Mills*, *supra*, at p 165. But this cryptic formula does not help much in a case where the board was concurrently moved by multiple causes, some proper and some improper. One has to focus on the improper purpose and ask whether the decision would have been made if the directors had not been moved by it. If the answer is that without the improper purpose(s) the decision impugned would never have been made, then it would be irrational to allow it to stand simply because the directors had other, proper considerations in mind as well, to which perhaps they attached greater importance. This was the point made by Dixon J in the passage immediately following the one which I have cited from his judgment in *Mills v Mills*

> "But if, except for some ulterior and illegitimate object, the power would not have been exercised, that which has been attempted as an ostensible exercise of the power will be void, notwithstanding that the directors may incidentally bring about a result which is within the purpose of the power and which they consider desirable."

Correspondingly, if there were proper reasons for exercising the power and it would still have been exercised for those reasons even in the absence of improper ones, it is difficult to see why justice should require the decision to be set aside.

22. Dixon J's formulation has proved influential in the courts of Australia. As the majority (Mason, Deane and Dawson JJ) pointed out in the High Court of Australia in *Whitehouse v Carlton House Pty* (1987) 162 CLR 285, 294:

> "As a matter of logic and principle, the preferable view would seem to be that, regardless of whether the impermissible purpose was the dominant one or but one of a number of significantly contributing causes, the allotment will be invalidated if the impermissible purpose was causative in the sense that, but for its presence, 'the power would not have been exercised'."

I thing that this is right. It is consistent with the rationale of the proper purpose rule. It also corresponds to the view which courts of equity have always taken about the exercise of powers of appointment by trustees: see *Birley v Birley* (1858) 25 Beav 299, 307 (Sir John Romilly MR), *Pryor v Pryor* (1864) 2 De G J & S 205, 210 (Knight Bruce LJ), *Re Turner's Settled Estates* (1884) 28 Ch D 205, 217, 219, *Roadchef (Employee Benefits Trustees) Ltd v Hill* [2014] EWHC 109 (Ch), para 130, and generally Thomas on Powers, 2nd ed (2012), paras 9.85-9.89.

23. The leading modern case is *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, a decision of the Privy Council on appeal from New South Wales, which proceeded on the basis that the law was the same in England and in New South Wales. It was another case of a board decision to issue and allot new shares against the background of a takeover bid, although rather unusually it was the directors who wanted the bid to succeed over the opposition of two existing shareholders who together held a majority of the shares. Delivering the advice of the Privy Council, Lord Wilberforce observed at p 834:

> "The directors, in deciding to issue shares, forming part of Millers' unissued capital, to Howard Smith acted under clause 8 of the company's articles of association. This provides, subject to certain qualifications which have not been invoked, that the shares shall be under the control of the directors, who may allot or otherwise dispose of the same to such persons on such terms and conditions and either at a premium or otherwise and at such time as the directors may think fit. Thus, and this is not disputed, the issue was clearly intra vires the directors. But,

> intra vires though the issue may have been, the directors' power under this article is a fiduciary power: and it remains the case that an exercise of such a power though formally valid, may be attacked on the ground that it was not exercised for the purpose for which it was granted."

24. The main interest of the decision for present purposes lies in the fact that it was a case of multiple concurrent purposes. The company was genuinely in need of fresh capital, and the directors had received legal advice that this was the only ground on which they could properly authorise an issue of shares. The number of shares to be issued and the amount of the subscription had been carefully calculated to match the company's capital requirements. After a trial lasting 28 days in which the four directors supporting the share issue gave evidence, Street J had found that the company's need for capital, although urgent, was not yet critical and that its normal practice had been to meet its capital requirements by borrowing rather than issuing shares. For this reason he rejected the evidence of the four directors that their sole purpose was to meet the company's shortage of capital and found that their primary purpose was in fact to dilute the shareholdings of those who opposed the bid. Lord Wilberforce adopted the primary purpose test which had been applied by the judge (p 832B-C) and affirmed his decision (p 832F-H):

> "when a dispute arises whether directors of a company made a particular decision for one purpose or for another, or whether, there being more than one purpose, one or another purpose was the substantial or primary purpose, the court, in their Lordships' opinion, is entitled to look at the situation objectively in order to estimate how critical or pressing, or substantial or, per contra, insubstantial an alleged requirement may have been. If it finds that a particular requirement, though real, was not urgent, or critical, at the relevant time, it may have reason to doubt, or discount, the assertions of individuals that they acted solely in order to deal with it, particularly when the action they took was unusual or even extreme."

Lord Wilberforce did not express the point in terms of causation, but it is I think clear that by the "substantial or primary purpose", he meant the purpose which accounted for the board's decision. He approved the judge's adoption of Dixon J's test (pp 831-832), and went on to adopt an analysis of the facts based on that test. Although the directors were influenced by the company's need for capital, the decisive factor in *Howard Smith Ltd v Ampol Petroleum Ltd* was that but for their desire to convert the majority shareholders into a minority, the directors would not have sought to raise capital by means of a share issue, nor at that point of time.

The judgment of Mann J

25. In Mann J's view, the only purpose for which the power to impose restrictions was conferred by article 42 was to "provide a sanction or an incentive to remedy the default" (para 206). In a meticulous judgment he went on to make the following findings of fact, at paras 168-79 and 183-200:

> (1) He expressed no view of his own on the merits of the dispute between the company and Messrs Kolomoisky and Bogolyubov and their associates. But he found that the board had reasonable cause to believe (whether or not it was right) that they were parties to an agreement or arrangement relating to shares in JKX with a view to carrying out a raid on the company. The board believed that the objective of the raiders was to depress the value of the shares so as to enable them to buy other shares more cheaply and eventually to take control of the company's Ukrainian subsidiary. They regarded the removal of Dr Davies and Mr Dixon and their replacement by inexperienced associates of the raiders as part of that plan. They therefore had reasonable cause to believe that the answers to the disclosure notices had been false.
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> (2) Of the seven directors who took part in the decision, six gave evidence and were cross-examined. The seventh was not cross-examined in relation to purpose for want of time, and no point was taken on that. Of the six, one was found to have had the primary purpose of extracting the information from the addressees of the disclosure notices. Another took a "balanced" view which attached substantially the same importance to extracting the information and preventing the raiders from voting against the resolutions at the AGM. The judge summarised the motives of the other four as follows (para. 189):
>
> > "While they may (and in all probability actually did) appreciate that the restrictions would have to be lifted if the information was provided, they did not regard the ability to impose restrictions as being one designed to protect the company pending the provision of information; they regarded it as one which they could use, and did actually use, to get an advantage (the opportunity to pass the resolutions) for its own sake, not linked to the extraction of information. Putting the matter another way, they did not regard the opportunity to get special resolutions passed which would otherwise not be passed (and the increased chance of getting the ordinary ones passed too) as an incidental benefit of imposing restrictions as an incentive to provide information; they elevated it in their minds, and in their purposes, to something with its own independent merit as

a way of doing down the 'raiders' for the benefit of the shareholders."

(3) The judge concluded (para. 200):

"The differences between relevant states of mind can be quite subtle in this situation, but I find that the evidence demonstrates that the following purposes, beliefs and states of mind existed among the voting directors:

(a) They all knew that the purpose of the notices was to get information.

(b) They all appreciated that the effect of restrictions would be (unless the information was provided before the AGM) that Eclairs/Glengary would be prevented from voting, with the effect that all the resolutions would be likely to be passed, or that there was a very enhanced prospect of that happening.

(c) They all saw that as operating for the benefit of the company as a whole, and as hindering the cause of the 'raiders'.

(d) The majority of the voting directors (Mrs Dubin, Mr Moore, Mr Miller and Lord Oxford) saw that as a sort of standalone proper and useful objective, and achieving it was a substantial purpose of voting for the restrictions, separate from the need to have information. Those directors did not have in mind the protection of the company pending the provision of the information; they had in mind protecting the company full stop. The restrictions were thus a useful weapon to be used against the 'raiders'. The disenfranchisement of the 'raiders' at the AGM was not just an incidental effect of the imposition of restrictions; it was the positively desired effect, seen as beneficial to the company in the long term.

(e) The bona fides of those directors, and the genuineness of their desire to benefit the company as a whole, was not challenged, and in my view cannot be challenged."

(4) It followed that the primary purpose of the board in issuing the restriction notices was to influence or determine the fate of the resolutions before the AGM. The directors

> "took the opportunity of using the power to alter the potential votes at the forthcoming AGM in order to maximise the chances of the resolutions being passed in a manner which they thought was in the best interests of the Company" (para 227)."

Since this was beyond the purpose for which the power to impose restrictions was conferred, he set aside the restriction notices and the board resolutions authorising them with effect from the time that they were made.

26. In the course of final speeches, the judge raised with the parties the question whether the board would have reached the same decision even if they had not taken account of the impact of the restriction notices on the resolutions at the AGM. "On the basis of what I heard, and the shape of the case before me" he said, he thought it "likely, and to be frank virtually inevitable" that the board would have reached the same conclusion and imposed the same restrictions even if they had confined themselves to the proper purpose of inducing the addressees of the disclosure notices to comply with them and imposing sanctions for their failure to do so to date. He "provisionally" concluded that on this alternative factual hypothesis the court would have had a discretion whether to set aside the board resolution and restriction notices, which it might have exercised in favour of the company. The alternative factual hypothesis had not, however, been pleaded or addressed by the relevant witnesses and had formed no part of the company's case. For this reason the judge, having raised the point, refused to allow the company to take it at that late stage. He put the position as follows (para 232):

> "… on the evidence that I have heard, I find it very hard indeed to believe that the directors would have come to any different conclusion. I deal with this in a short section below in which I consider the facts. However, in circumstances in which the directors have not made such a case in their own evidence in chief (or in the pleadings of the company), it would, in the end, be a step too far to allow them to say my purpose was X, but if I had been told that that was an improper purpose and I had to consider a legitimate purpose Y, I would have arrived at the same decision. If that were to be their case then it should have been positively advanced at some stage during the hearing. Although on the evidence I heard I find it difficult to see that the directors would have come to a different decision, none the

> less I can see that the claimants might have wished to have advanced their case differently, perhaps devoting more attention to the earlier events leading up to the service of the notices and what happened, and what the thinking was, between then and the board meeting."

The "short section below" was paras 235-237. In these paragraphs, the judge summarised what he would have found if he had allowed the company to advance the alternative factual hypothesis and had been obliged to deal with it on the basis of the existing evidence. He appears to have done this in case there was an appeal against his refusal to allow the point to be taken. In the event, however, there was no appeal on that point.

The judgments of the Court of appeal

27. The appeals were heard by Longmore and Briggs LJJ and Sir Robin Jacob. There was no challenge to the judge's findings of fact. The appeal revolved entirely around their legal significance. By a majority, the court allowed the appeal.

28. The majority (Longmore LJ and Sir Robin Jacob) considered that the proper purpose doctrine had "no significant place in the operation of article 42 or Part 22 of the 2006 Act" (para 138). They appear to have reached this conclusion for three overlapping reasons. The first was that restrictions arising from a shareholder's failure to comply with a disclosure notice did not reflect a "unilateral" exercise of power by the board. By this they meant that the shareholder could avoid the restrictions by complying with the disclosure notice. "Why should the law protect him when all he had to do was tell the truth?" (para 136). Their second reason was that the restrictions on the voting and other rights attaching to the shares was the very thing that article 42 was designed to permit if the directors reasonably considered that the disclosure notices had not been complied with. So once the board had reached that conclusion, there was no further limitation on their power to issue a restriction notice. The majority's third reason was that no limitation on the proper purpose of a restriction notice was expressed, either in Part 22 of the 2006 Act or in article 42 of JKX's articles. In their view there was no room for the implication of such a purpose, because in the nature of things the statutory disclosure procedure was most likely to be operated at a time of controversy in the company's affairs. They thought, at para 141, that the draftsman was unlikely to have intended a detailed enquiry into the minds of directors "in what may often be a rapidly changing scene"; and, at para 142, that in a battle for control against predators who were "up to something subversive but secret" the directors would naturally want to see them disenfranchised. In their view, the result of applying the proper purpose rule would be to emasculate the statutory scheme and the corresponding provisions of article 42. Underlying much of this reasoning was the view expressed in their peroration,

that any other view "would only be an encouragement to deceitful conduct and not something which English company law should countenance" (para 143).

29. In a formidable dissent, Briggs LJ set out the rationale for the proper purpose test and the authorities for its application to the exercise of discretionary powers by companies. He accepted the view of Mann J that the purpose of article 42 was to encourage or coerce the provision of information which had been requested under section 793, with the rider that it was also to prevent the accrual of any unfair advantage to any person as a result of the failure to comply with such a request. Even with that limited expansion, on the judge's findings of fact the directors' decision to impose restrictions under article 42 was improper, and there were no satisfactory reasons why the rule should not be applied to the draconian powers conferred by article 42 of JKX's articles. He added (para 122):

> "Furthermore, I consider it important that the court should uphold the proper purpose principle in relation to the exercise of fiduciary powers by directors, all the more so where the power is capable of affecting, or interfering with, the constitutional balance between shareholders and directors, and between particular groups of shareholders. The temptation on directors, anxious to protect their company from what they regard as the adverse consequences of a course of action proposed by shareholders, to interfere in that way, whether by the issue of shares to their supporters, or by disenfranchisement of their opponents' shares, may be very hard to resist, unless the consequences of improprieties of that kind are clearly laid down and adhered to by the court."

The proper purpose of article 42

30. The submission of Mr Swainston QC, who appeared for the company, was that where the purpose of a power was not expressed by the instrument creating it, there was no limitation on its exercise save such as could be implied on the principles which would justify the implication of a term. In particular, the implication would have to be necessary to its efficacy. In my view, this submission misunderstands the way in which purpose comes into questions of this kind. It is true that a company's articles are part of the contract of association, to which successive shareholders accede on becoming members of the company. I do not doubt that a term limiting the exercise of powers conferred on the directors to their proper purpose may sometimes be implied on the ordinary principles of the law of contract governing the implication of terms. But that is not the basis of the proper purpose rule. The rule is not a term of the contract and does not necessarily depend on any limitation on the scope of the power as a matter of construction. The proper purpose rule is a

principle by which equity controls the exercise of a fiduciary's powers in respects which are not, or not necessarily, determined by the instrument. Ascertaining the purpose of a power where the instrument is silent depends on an inference from the mischief of the provision conferring it, which is itself deduced from its express terms, from an analysis of their effect, and from the court's understanding of the business context.

31. The purpose of a power conferred by a company's articles is rarely expressed in the instrument itself. It was not expressed in the instrument in any of the leading cases about the application of the proper purpose rule to the powers of directors which I have summarised. But it is usually obvious from its context and effect why a power has been conferred, and so it is with article 42. Article 42(2) authorises the issue of a restriction notice only in the event that a disclosure notice has been issued under section 793 of the 2006 Act and the company has received either no response or a response which it knows or has reasonable cause to believe is false or materially incorrect. Under article 42(4) in the event that the information is supplied after the restrictions have been imposed (ie that a response has been received which the directors have no reasonable cause to regard as wrong), they are automatically lifted seven days thereafter. Any dividends or other payments in respect of the shares which were withheld while the restrictions were in force will then become payable under article 42(6). As Millett J observed in *In re Ricardo Group Plc* [1989] BCLC 566, 572 about the corresponding power of the court to impose restrictions under what was then section 216 and Part XV of the Companies Act 1985, these restrictions "are granted as a sanction to compel the provision of information to which the company is entitled. It follows, in my judgment, that once the information is supplied, any further justification for the continuance of the sanction disappears". The inescapable inference is that the power to restrict the rights attaching to shares is wholly ancillary to the statutory power to call for information under section 793.

32. It follows that I accept the view of Mann J that the purpose of article 42 is to provide a "sanction or incentive" to remedy a failure to comply with the disclosure notice. But I would not limit it to inducing the defaulter to comply, any more than I believe Mann J to have done in this case or Millett J in *In re Ricardo Group*. Otherwise the board would be disabled from imposing restrictions in a case where the defiant obduracy of the defaulter made it obvious that the restrictions would not produce compliance. I would therefore identify the purpose in slightly different terms. In my view article 42 has three closely related purposes. The first is to induce the shareholder to comply with a disclosure notice. This is the purpose which Millett J and Mann J regarded the restrictions as serving, and it is the least that they can have been intended to achieve. Secondly, the article is intended to protect the company and its shareholders against having to make decisions about their respective interests in ignorance of relevant information. As Hoffmann J observed in *In re TR Technology Investment Trust Plc* [1988] BCLC 256, 276, "the company, through its existing board, is given the unqualified right to insist that contests for the

hearts and minds of shareholders are conducted with cards on the table." Thirdly, the restrictions have a punitive purpose. They are imposed as sanctions on account of the failure or refusal of the addressee of a disclosure notice to provide the information for as long as it persists, on the footing that a person interested in shares who has not complied with obligations attaching to that status should not be entitled to the benefits attaching to the shares. That is the natural inference from the range and character of restrictions envisaged in article 42(3), which affect not only the right to participate in the company's affairs by voting at general meetings, but the right to receive dividends. These three purposes are all directly related to the non-provision of information requisitioned by a disclosure notice. None of them extends to influencing the outcome of resolutions at a general meeting. That may well be a consequence of a restriction notice. But it is no part of its proper purpose. It is not itself a legitimate weapon of defence against a corporate raider, which the board is at liberty to take up independently of its interest in getting the information.

33. Basing himself on the observation of Hoffmann J in *In re TR Technology Investment Trust Plc*, Mr Swainston argued that the purpose of a restriction notice was related to the non-provision of the information in a broader sense. The argument was that for as long as the addressee of a disclosure notice failed to put his "cards on the table", the directors were justified in treating the restrictions as a free-standing technique for frustrating the raiders' plans. In my view this extends the purpose of a restriction notice beyond its proper limits. It treats failure to comply with a disclosure notice as no more than a "gateway" or condition precedent to the directors' right to impose and maintain the restrictions for any purpose which they bona fide conceived to be in the interests of the company, including securing their preferred outcome at the AGM. But as the judge put it, at para 206, the "non-provision of information is not to be taken as a justification for opening up a new front against the predator with the benefit of a new weapon." Otherwise, directors would be entitled to impose restrictions in a case where they attached no importance to the information requisitioned in the disclosure notice. However difficult it may be to draw in practice, there is in principle a clear line between protecting the company and its shareholders against the consequences of non-provision of the information, and seeking to manipulate the fate of particular shareholders' resolutions or to alter the balance of forces at the company's general meetings. The latter are no part of the purpose of article 42. They are matters for the shareholders, not for the board.

34. We were pressed with a number of arguments about the purpose of article 42 based on an analogy with Part 22 of the Companies Act 2006. I did not find these arguments helpful. The two schemes are both directed at an assumed failure to comply with a statutory disclosure notice, and have a number of other points in common. But they differ in a number of respects, some of them significant. Arguments based on language which is to be found in the statute but not in the articles are unlikely to throw any light on the purpose of the latter.

Does the proper purpose rule apply?

35. At this stage, two preliminary observations are called for.

36. The first is that the imposition of restrictions under article 42 is a serious interference with financial and constitutional rights which exist for the benefit of the shareholder and not the company. In the case of listed companies such as JKX a restriction notice is also an interference with the proper operation of the market in its shares, in which there is not only a private but a significant public interest. One would expect such a draconian power to be circumscribed by something more than the directors' duty to act in the company's interest as they may in good faith perceive it.

37. The second preliminary observation concerns the role of the proper purpose rule in the governance of companies. The rule that the fiduciary powers of directors may be exercised only for the purposes for which they were conferred is one of the main means by which equity enforces the proper conduct of directors. It is also fundamental to the constitutional distinction between the respective domains of the board and the shareholders. These considerations are particularly important when the company is in play between competing groups seeking to control or influence its affairs. The majority of the Court of Appeal were right to identify this as the background against which disclosure notices are commonly issued. But they drew the opposite conclusion from the one which I would draw. They seem to have thought it unrealistic, indeed undesirable, against that background to expect directors to distinguish between the proper purpose of enforcing the disclosure notice and the improper purpose of defeating the ambitions of one group of shareholders. I find this surprising. The decision to impose restrictions under article 42 requires the directors to recognise the difference between the purpose of a decision and its incidental consequence. That certainly calls for care on their part and possibly for legal advice. But there is nothing particularly special in this context about a decision to issue a restriction notice under a provision such as article 42. The directors' task is no more difficult than it was in the many cases like *Howard Smith Ltd v Ampol Petroleum Ltd* in which other fiduciary powers, such as the power to issue shares, have been held improperly exercised because in the face of pressures arising from a battle for control the directors succumbed to the temptation to use their powers to favour their allies. I would agree with the majority of the Court of Appeal that in that situation the board would naturally wish to have the predators disenfranchised. That is precisely why it is important to confine them to the more limited purpose for which their powers exist. Of all the situations in which directors may be called upon to exercise fiduciary powers with incidental implications for the balance of forces among shareholders, a battle for control of the company is probably the one in which the proper purpose rule has the most valuable part to play.

38. I therefore approach with some scepticism the suggestion that in this of all contexts the proper purpose rule has no application. Of the three reasons given by the majority of the Court of Appeal, I have already dealt with their second reason, which was essentially a slightly repackaged version of Mr Swainston's "gateway" argument, and with their third, which is that no limiting purpose can be implied in a case where the directors are likely to exercise their powers for the purpose of disenfranchising a predator. I reject both of them as contrary to principle. I would add that I am unimpressed by the suggestion that it is impractical to examine the state of mind of the directors in a rapidly changing situation such as a takeover bid or an attempted raid. The present proceedings were begun on the day before the AGM. The interests of both parties were sufficiently protected pending the decision by the orders made on the same day by David Richards J, and the dispute was heard by Mann J within seven weeks and decided within three months. In some cases, for example where a tight timetable is imposed under the City Code on Takeovers and Mergers, it may be necessary to accelerate the procedure even more drastically, but the judges of the Chancery Division are perfectly capable of responding to these exigencies as they arise.

39. That brings me to the majority's first and, I think, main reason, which was that the power to impose restrictions under article 42 was not a "unilateral" power. The addressees of the disclosure notices had only to answer the questions fully and truthfully to bring the restrictions to an end. I reject this also. The short and principled objection to it was given by Briggs LJ. The limitation of the power to its proper purpose derives from its fiduciary character. If its exercise would otherwise be an abuse, it cannot be an answer to say that the person against whom it is directed had only himself to blame. Moreover, the majority's proposition assumes that that person is the only one whose interests are adversely affected. But that is not right. Other shareholders who agreed with them would be deprived of their support. In *Anglo-Universal Bank v Baragnon*, *supra*, Sir George Jessel MR considered that the proper purpose rule would apply to a board decision to make calls on shareholders if the object was to prevent particular shareholders from voting at general meetings, although any shareholder could remove the disability by paying. There is no trace in this or any other authority of a distinction between unilateral and non-unilateral powers. Moreover, I reject the majority's premise. The problem cannot always be resolved by unilaterally complying with the disclosure notice. Under a provision in the form of article 42 there may be a deemed non-compliance with a disclosure notice even in a case where the answers are prompt, complete and accurate. This is because the directors may reasonably though erroneously conclude that the answers are defective. This is not a fanciful hypothesis. The "interest" in shares about which information may be sought under section 793 of the 2006 Act is very broadly defined. It will often be a highly debatable question whether it exists. An alleged omission to disclose a relevant agreement or arrangement between persons with a relevant interest may be just as debatable. An agreement sufficient to give rise to a concert party may be informal. An arrangement may be no more than a nod and a wink or a tacit understanding. Reasonableness in these circumstances is very much

in the eye of the decision-maker. It will depend on what other facts or inferences are available to him. With the best will in the world, things may look very different on the other side of the partition. The weapon which the majority's analysis puts into the hands of the board is a blunderbuss whose shot is liable to injure the just and the unjust alike.

40. That is part of the reason why I am unable to accept the majority's parting assertion, at para 143, that the application of the proper purpose rule would be an "encouragement to deceitful conduct" by predators with "subversive but secret" projects. There is, however, a more fundamental objection to it, which is that it is incoherent once the operation of the rule is properly understood. If the "deceit" consists simply in the secrecy, ie in the withholding or deemed withholding of the information, a decision to impose restrictions which is based simply on that fact will be entirely consistent with the proper purpose of the power. But secrecy is one thing, subversion another. If the real objection is to the subversion, it is nothing to do with the issue or enforcement of disclosure notices. Directors owe a duty of loyalty to the company, but shareholders owe no loyalty either to the company or its board. Within broad limits, derived for the most part from Part 30 of the Companies Act 2006 (Protection of Members against Unfair Prejudice) and the City Code on Takeovers and Mergers, they are entitled to exercise their rights in their own interest as they see it and to challenge the existing management for good reasons or bad.

The present case

41. What the judge's findings amount to is that although at the critical board meeting the majority genuinely wanted to receive the information which they had requisitioned, once they were satisfied that it had not been provided and turned to consider the issue of restriction notices, they were interested only in the effect that this would have on the outcome of the forthcoming general meeting. They "did not have in mind the protection of the company pending the provision of the information; they had in mind protecting the company full stop" (para 200(d)). In any case where concurrent purposes are being considered, they must have been actual purposes in the minds of the directors, not merely possible or hypothetical ones. If the only consideration which actually influenced the decision was an improper one, it is difficult to envisage any basis on which their decision could have been sustained.

42. I have drawn attention earlier in this judgment to the relevance of causation in this field. The judge posed the question (para 228) whether the notices could be "saved" on the footing that although the directors' purpose was improper, they would have acted in the same way if the improper considerations had been ignored and they had applied their minds to proper ones. Suppose that the directors had decided to issue the restriction notices as a sanction for the non-provision of the

information and to protect the company from the consequences of its non-disclosure pending its provision. Suppose that they also made the decision in order to secure the passing of the resolutions, but would have done the same thing even if that had never entered their minds. On that hypothesis, it would be difficult to regard the impact on the resolutions as a primary consideration. The want of the information would have been a sufficient justification of the restrictions and the resolutions would have been irrelevant, in fact no more than a welcome incidental consequence.

43. That, however, was not the company's case. As summarised by the judge (paras 181, 207-208), their case was that once the raiders had failed to provide the information, the power to make a restriction order could properly be exercised for the purpose of defeating their attempt to influence or control the company's affairs, provided that this was conceived in good faith to be in the company's interests. Indeed it could properly be exercised for the purpose of ensuring the passage of the resolutions at the general meeting in the face of their objections. There was no attempt to justify the decision on some narrower basis if these purposes were found to be improper. Forensic judgments of this kind are often required and they are not easy. This one was no doubt a realistic approach in the face of the facts. But for whatever reason, none of the parties focused on the possibility that the same decision might have been reached without reference to the desire to defeat the raiders, until the judge drew their attention to its possible relevance. By that time it was too late to explore the point with the witnesses. In his judgment (paras 235-237), the judge summarised the findings of fact which he would have made if he had allowed the company to rely on the alternative hypothesis that the directors had disregarded their desire to defeat the raiders. He thought that they would have applied their minds to the right point and made the same decision. But the judge did not allow the company to take the point and there has been no appeal against that refusal. Since his reason for refusing was that the claimants had not had a proper opportunity to challenge the alternative hypothesis in the course of the evidence, it seems to me that the judge's hypothetical alternative findings are not properly before this court.

44. I would allow the appeal and restore the decision of Mann J.

45. In the light of the observations of other members of the court, I should record that while we received no oral argument on the role of causation in identifying the relevant purpose(s) of a board decision, full and helpful written submissions on the point were delivered after the hearing, at the invitation of the court.

LORD CLARKE: (with whom Lord Neuberger agrees)

46. I initially intended simply to agree with Lord Sumption's judgment. Like Lord Mance (and Lord Neuberger), I agree with Lord Sumption that the appeal

should be allowed for the reasons given in his paras 27 to 43. I am inclined to agree with the other views expressed by Lord Sumption but there does seem to me to be force in Lord Mance's reservation that not all the points were the subject of full argument and consideration below. In these circumstances I would prefer to defer reaching a final conclusion on the other points identified by Lord Mance until they arise for decision and have been the subject of such argument.

LORD MANCE: (with whom Lord Neuberger agrees)

47. I gratefully adopt Lord Sumption's summary of the relevant facts in paras 1 to 13 and of the judgments of Mann J and the Court of Appeal in paras 25 to 29. I also agree with his reasons for allowing this appeal in paras 30 to 44.

48. I have read with interest the discussion of the proper purpose rule in paras 14 to 24. It accepts an analysis which was suggested in general terms by the judge at first instance, but which became immaterial in the light of his refusal to allow any point on causation to be raised. It was not in those circumstances advanced by any party during the oral hearing before the Supreme Court. The analysis was first revived by the Supreme Court in a draft judgment handed down, but then withdrawn before delivery in the light of the parties' representations.

49. Thereafter, both appellants confirmed that they had argued the case before the Supreme Court on the basis that, if the proper purpose rule applied, the restriction notices fell to be set aside, since the judge had found the notices to have been issued for the principal purpose of improving the prospects of passing at the forthcoming AGM two special resolutions to authorise market purchases and to disapply pre-emption rights as well as of passing three ordinary resolutions. Eclairs submitted that any issue as to whether a "but for" test should be applied should in these circumstances await a case where it arose squarely. Eclairs and Glengary each supplied a copy of its submissions to the judge at the trial in 2013, which had suggested a two-pronged alternative analysis, according to which the notices would be set aside if a court concluded either that (a) the principal purpose was to ensure the passing of the resolutions or (b) even if that was not the principal purpose, the notices would not have been issued but for the wish to ensure the passing of the resolutions. JKX on the other hand sought to use the Supreme Court's "new development in the law" as a springboard to argue that the appeals should not be allowed and/or that there should be a further hearing on the issue of causation.

50. I readily accept my part in agreeing to the original draft judgment. But I am now satisfied, having considered the authorities without the benefit of oral or written submissions other than those dating from 2013 submitted by Eclairs and Glengary,

that we should not express any firm or concluded views on points which do not arise for decision on this appeal. I will summarise my reasons.

51. First, it would be helpful to clarify the meaning of section 171(b) of the Companies Act 2006, providing that directors may use their powers "only" for the purposes for which they were conferred. On the face of it this is clear. All purposes in mind must be legitimate. But *Buckley on the Companies Act* (looseleaf ed) suggests that it itself involves a primary purpose test, commenting at 3[869]:

> "What if a power were used for mixed purposes, some good and some bad? According to the old law the exercise would be good if its primary purpose were proper. By virtue of CA 2006, section 170(4), this law should inform the construction of CA 2006, section 171(b). Thus, a director who has exercised powers for mixed purposes has still only exercised them primarily, if not exclusively, for the purposes for which they are conferred and this should be within CA 2006, section 171(b). CA 2006, section 171(b) can be construed (as it should be), in accordance with CA 2006, section 170(4) to mean that a director must exercise his powers primarily (or substantially) only for the purposes for which they are conferred."

52. Buckley cites for the "old law" *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821. Lord Sumption at paras 14 and 21 treats section 171(b) as requiring a director's power to be used "with an entire and single view to the real purpose and object of the power", assimilating a director's power in this respect with the exercise of discretionary powers by trustees. But Dixon J in the judgment in *Mills v Mills* (1938) 60 CLR 150, 185-186, which Lord Sumption commends at para 18, expressly noted that

> "The application of the general equitable principle to the acts of directors managing the affairs of a company cannot be as nice as it is in the case of a trustee exercising a special power of appointment. It must, as it seems to me, take the substantial object the accomplishment of which formed the real ground of the board's action. If this is within the scope of the power, then the power has been validly exercised."

I would therefore wish to have submissions on the scope of the duty under section 171(b).

53. Second, whatever the scope of the duty, I understand Lord Sumption's point that the granting of relief in the event of a breach of section 171(b) is a different matter. But here too I think it would both assist and be wise to hear submissions. I do not for my part think that the interpretation which Lord Sumption puts in para 24 on Lord Wilberforce's speech in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 is necessarily or clearly what Lord Wilberforce meant. Equally, the passage already quoted from Dixon J's judgment in *Mills v Mills* appears to me far from conclusive, while its later explanation in the High Court in *Whitehouse v Carlton House Pty* (1987) 162 CLR 285, 294 (quoted by Lord Sumption at para 22) is, at least arguably, consistent with "but for" causation being viewed either as the only test or as affording an extended basis for the grant of relief, even where the principal purpose was legitimate, as Eclairs and Glengary submitted to the judge. In these circumstances, although I have sympathy with Lord Sumption's view that "but for" causation offers a single, simple test, which it might be possible or even preferable to substitute for references to the principal or primary purpose, I am not persuaded that we can or should safely undertake what all parties consider would be "a new development" of company law, without having heard argument.

54. Third, Lord Sumption expresses the view in para 20 that identification of the principal or primary purpose for which directors exercised a power would "involve a forensic enquiry into the relative intensity of the directors' feelings about the various considerations that influenced them", in relation to which directors' evidence would be "likely to be both artificial and defensive". To the extent that that is a difficulty, I cannot see that it exists any the less in relation to a test based on "but for" causation. Human nature being what it is, that is just as likely to give rise to artificial and defensive attempts to justify what was done. If anything, I would have thought that the principal or primary purpose in mind would be likely to be easier to identify, since it is likely to be reflected in directors' exchanges before and/or at the time of the decisions under examination, than the answer to a question whether they would have acted as they did without taking into account their main expressed purpose. They will have been less likely to have directed express attention to this: that is, unless well advised by their lawyers, in which case further caution might be necessary about accepting their assertions at face value.

55. Fourth, if a "but for" test were to be adopted, attention should I think be given to the standard to which the directors, on whom the onus would presumably lie, would have to show that they would have reached the same decision, even if they had not had the illegitimate purpose in mind. Would probability be enough? Or would the test be whether their decision would inevitably have been the same? See eg by analogy the public law test, as stated by May LJ in *Smith v North East Derbyshire Primary Care Trust* [2006] 1 WLR 3315, and quoted by Lord Neuberger in *R (FDA) v Secretary of State for Work and Pensions* [2012] EWCA Civ 332; [2013] 1 WLR 444, para 68.