Case No: A3/2014/1663

Neutral Citation Number: [2014] EWCA Civ 1239
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MANCHESTER DISTRICT REGISTRY
HHJ Raynor QC sitting as a judge of the High Court
Case No A30 MA 304

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: Friday 19th September 2014

Before :
LORD JUSTICE BRIGGS
LORD JUSTICE FLOYD
and
LADY JUSTICE MACUR
- -

Between :
(1) GRANT MICHAEL SUGARMAN
(2) SARAH NATALIE HORLEY
(3) GRANT GLEDHILL — **Appellants**
- and -
(1) CJS INVESTMENTS LLP — **Respondents**
(2) JASON ALEXANDER
(3) BRIAN GROVE
(4) ULLA MARGARETA MEHTA
(5) CHANDRAVADAN RICHARD MEHTA
(6) SUNIL GUNNAR MEHTA
- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Paul Chaisty QC (instructed by **Paul Ross & Co Solicitors**) for the **Appellants**
Mark Warwick QC and **Camilla Chorfi** (instructed by **DAC Beachcroft LLP**) for the **Respondents**

Hearing date: 16 September 2014
- -

Judgment

Lord Justice Floyd:

Introduction

1. This is an appeal by the claimants from the decision of HHJ Raynor QC (sitting as a judge of the High Court in Manchester on 12 May 2014). It raises a short point of construction of one of the articles of association of Lawrence House Management Company ("the Company"), which is the management company of a residential development called New Lawrence House, consisting of 104 flats, at Shawheath Close in Manchester. Between March 2009 and December 2010 the original developer, JCS Homes Ltd., granted 104 leases of 125 years each of flats in New Lawrence House. The leases are between JCS Homes Limited and the tenant, but the Company is a party to each lease. A large number of the leases (some 66) are now held by the first defendant CJS Investments LLP, 6 are held by a company owned by the second, fifth and sixth defendants and one each by the third and fourth defendants. The vast majority of the remainder (all except one) are held by individuals, including the three claimants. Each flat is held on the basis that a member owns one share in the company.

2. Meetings of the company were held on 7 April 2014 and 11 April 2014 concerned with the appointment of directors. The details of those meetings do not matter, but it is common ground that their outcome depends on whether each member can exercise one vote, regardless of the number of shares he holds, or whether he or she can exercise one vote for each share held. The appellants contended for one vote per member, whilst the respondents contended for one vote per share. The judge construed the articles as conferring one vote per share.

3. It is not difficult to see why the issue between the parties matters. If the 66 flats in fact owned by the first defendant entitle them to only one vote they can be routinely outvoted by the remaining flat owners, even though the first defendant holds the majority of the shares in the company.

4. Before coming to the relevant article, it is necessary to refer briefly to the common law and statutory position as it affects voting at company meetings. The common law position is summarised in the judgment of Jessell MR in *Re Horbury Bridge Co*. (1879) 1 Ch D 109, at page 115, as follows:

> "We first of all consider what may be termed the common law of the country as to voting at meetings. It is undoubted, and it was admitted by Sir Henry Jackson in his argument for the Respondents, that, according to such common law, votes at all meetings are taken by show of hands. Of course it may not always be a satisfactory mode – persons attending in large numbers may be small shareholders and persons attending in small numbers may be large shareholders, and therefore in companies provision is made for taking a poll, and when a poll is taken the votes are to be counted according to the number of shares…."

5. The ability of members to call for a poll is not now dependent on the articles but is enshrined in statute. Section 321(1) of the Companies Act 2006 recognises the right of the members of a company to demand a poll and renders void any provision of the company's articles insofar as it would have the effect of excluding the right to demand a poll at a general meeting on any question other than the election of the chairman or the adjournment of the meeting.

6. As to votes at the meeting, section 284 (1) to (4) of the Companies Act 2006 ("the Act") provides, and provided at the date of incorporation of the company, as follows:

> "(1) On a vote on a written resolution –
>
> (a) in the case of a company having a share capital every member has one vote in respect of each share or each £10 of stock held by him, and
>
> (b) in any other case, every member has one vote.
>
> (2) On a vote on a resolution on a show of hands at a meeting –
>
> (a) every member present in person has one vote, and
>
> (b) every proxy present who has been duly appointed by a member entitled to vote on the resolution has one vote.
>
> (3) On a vote on a resolution on a poll taken at a meeting –
>
> (a) in the case of a company having a share capital, every member has one vote in respect of each share or each £10 of stock held by him, and
>
> (b) in any other case, every member has one vote.
>
> (4) The provisions of this section have effect subject to any provisions of the company's articles."

7. Accordingly it is necessary to look to the Company's articles to determine whether those statutory provisions - one member one vote on a show of hands and one vote per share on a poll - have been modified.

8. Companies which do not wish to draft bespoke articles of association may simply adopt the regulations in Table A. In the present case the Company's articles provided by article 1 that the regulations contained in Table A should apply to the Company "*subject as hereinafter provided*".

9. Regulation 54 of Table A is expressly disapplied by article 13(b) of LHM's articles. But I should set it out, as the very fact that it is disapplied forms a component of the appellants' argument on construction:

> "Subject to any rights or restrictions attached to any shares, on a show of hands every member who (being an individual) is present in person or (being a corporation) is present by a duly

> authorised representative, not being himself a member entitled to vote, shall have one vote and on a poll every member shall have one vote for every share of which he is the holder."

10. Regulation 54 therefore reflects the terms of section 284(2) and (3) of the Act: one vote per member on a show of hands and one vote per share on a poll. As regulation 54 is disapplied, the critical question then is whether and if so to what extent the bespoke articles have modified the position laid down by statute.

11. The relevant article is article 13. It is headed "Votes of members" and reads:

> "(a) Subject as hereinafter provided, every Member present in person or by Proxy shall have one vote, provided that where a dwelling has no dwellingholder those members who are subscribers to the Memorandum of Association or who have been nominated Members under Article 4(a) shall have such number of additional votes each that when taken collectively form a three quarters majority of the votes cast.
>
> (b) Regulation 54 and 55 in Table A shall not apply to the Company...."

12. A number of points can be noted about this article. Firstly and most obviously it appears in the opening words (without intending to pre-judge the issue which arises) to provide that each member present or by proxy has one vote. I will refer to this part of the article as "the main voting provision". Secondly, unlike section 284 and regulation 54 of Table A, it does not make the distinction between votes taken by a show of hands and by a poll. Thirdly it contains a proviso to make special provision for the case where a dwelling has no dwellingholder, something which is tailor-made to this particular company and has no counterpart in Table A ("the proviso").

13. A "dwellingholder" is defined by the articles of association of the Company as:

> "… the lessee and/or transferee of a dwelling provided that where two or more persons are the lessees and/or transferees of a dwelling they shall for all purposes of these Articles be deemed to jointly constitute one Dwellingholder and the expression 'Dwellingholder' shall be read and construed accordingly."

14. Both sides recognised that the proviso is far from clear in its meaning and effect. It is, however, clear that it involves a special weighting provision which is to apply in certain circumstances. If taken literally, it would mean that the fact that one dwelling was temporarily bereft of a dwellingholder triggered the weighting provisions of the proviso. It is not necessary for us to reach a conclusion on the precise meaning and effect of the proviso, save to note, as both sides recognise, that at least this aspect of article 13(a) appears to have been inexpertly drafted.

The arguments on the appeal

15. Mr Chaisty QC, who appears for the appellants, contends that the language of at least the main voting provision of article 13(a) is crystal clear and means that, however the vote is cast, each member has one vote. He supports his argument by reference to the fact that regulation 54 of Table A, which expressly provided for a different method of counting on a show of hands and on a poll, is expressly disapplied. Article 13(a) must therefore necessarily require one vote per member on a show of hands or on a poll. He submits that this is not a case where the court has the option of choosing between possible constructions on the footing that one or the other accords more closely with commercial common sense. The court can only reject the plain meaning of the words used here if the result would be commercial absurdity, and no such absurdity arises here. He submits there is no valid process of interpretation which would arrive at the conclusion that a member has one vote per share.

16. As presented to us, the argument of Mr Warwick QC for the respondents is that when viewed against the relevant matrix which includes the position at common law, under statute and what one would normally expect to be the position in relation to a management company of a block of residential flats, the reader of the main voting provision in article 13(a) would reach the conclusion that it was dealing only with a vote by a show of hands. The right to a poll is enshrined in statute, and the taking of a poll is not dealt with by article 13(a). Accordingly section 284(3) applies on such a poll and each member has one vote per share. He points to the words "*present in person or by Proxy*" as "providing a clue" towards that conclusion and indicating that the draughtsman was only considering a show of hands. Overall he submitted that the provisions of section 284(3) had not been excluded with sufficient clarity.

17. Mr Warwick relies heavily on what he says are the uncommercial consequences of the appellant's construction: in particular the fact that the minority shareholders could vote for heavy expenditure of which they would bear only a small part compared with the majority, who would be powerless to prevent it. If necessary, he goes on to submit that the appellants' construction amounts to a commercial absurdity.

18. Mr Warwick developed his argument by reference to the following further points. The memorandum and articles of the Company make it clear that

    i) The Company is organised on the basis the income and property of the company may only be spent on promotion of the objects of the Company and there were to be no distributions by way of dividend or other means of the profits;

    ii) The Company was not intended to trade;

    iii) Save in the early stages before the leases were granted the owner of each dwelling was entitled to one share;

    iv) A dwellingholder is only entitled to transfer a share to another dwellingholder;

    v) The price for the transfer of any share was to be nominal unless the parties agreed otherwise.

19. Mr Warwick submitted in consequence that the sole purpose of allocating a share to a dwellingholder was to enable him to participate in management. There was nothing

in the memorandum and articles of the Company to tell you that if a dwellingholder acquired a subsequent dwelling he would not acquire an extra vote. He submitted that, other than article 13(a), the memorandum and articles constituted a trap, because the natural expectation of the reader of those documents was that the additional share would carry with it additional voting rights.

20. Mr Warwick drew attention to regulation 55 of Table A, which is also disapplied by article 13(b). Regulation 55 provides:

> "In the case of joint holders the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the other votes of the other joint holders; and seniority shall be determined by the order in which the names of the holders stand in the register of members."

Mr Warwick questioned why this fairly innocuous provision had been deleted when it was unnecessary to do so.

21. Mr Warwick also relied on two other provisions of Table A which were not disapplied, and which he said were an indication that one vote per share was contemplated. These were regulations 57 and 59:

> "57. No member shall vote at any general meeting or at any separate meeting of the holders of any class of shares in the company, either in person or by proxy, in respect of any share held by him unless all moneys presently payable by him in respect of that share have been paid....
>
> 59. On a poll votes may be given either personally or by proxy. A member may appoint more than one proxy to attend on the same occasion....."

22. Mr Warwick referred us to The RTM Companies (Model Articles) (England) Regulations 2009 which came into force on 13 November 2009 and which prescribe model articles for "right to manage" companies set up pursuant to the Commonhold and Leasehold Reform Act 2002. Clause 33 of the model articles provides in part:

> "(1) A resolution put to the vote of a general meeting must be decided on a show of hands unless a poll is demanded in accordance with the articles.
>
> (2) If there are no landlords under leases of the whole or any part of the Premises who are members of the company, then one vote shall be available to be cast in respect of each flat in the Premises…"

23. Finally, he also relied, he accepted less relevantly, on non-statutory recommendations for the governance of residents' associations.

Discussion

24. In *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900 at [14] Lord Clarke of Stone-cum-Ebony JSC reiterated the well established proposition:

> "that the aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant."

25. In the following paragraphs of his opinion, Lord Clarke considered the impact of business common sense on the process of construction. His conclusion, at [30], which was that:

> "where a term of a contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation which is most consistent with business common sense."

26. At [16] of his opinion in *Rainy Sky* Lord Clarke set out the approach of Sir Simon Tuckey in the Court of Appeal in that case:

> "There is no dispute about the principles of construction to be applied in order to answer this question. The court must first look at the words which the parties have used in the bond itself. The shipbuilding contract is of course the context and cause for the bond but is nevertheless a separate contract between different parties. If the language of the bond leads clearly to a conclusion that one or other of the constructions contended for is the correct one, the Court must give effect to it, however surprising or unreasonable the result might be. But if there are two possible constructions, the Court is entitled to reject the one which is unreasonable and, in a commercial context, the one which flouts business common sense. This follows from the House of Lords decisions in *Wickman Machine Tools Sales Limited v Schuler* AG [1974] AC 235, where at 251 Lord Reid said:
>
> > 'The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.'
>
> and *The Antaios* [1984] AC 191, where at 201 Lord Diplock said:
>
> > 'If detailed and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense it must yield to business common sense.'"

27. Sir Simon Tuckey's approach was approved by Lord Clarke at [20] to [22] of his opinion. At [23] Lord Clarke dealt with the case where the parties have used unambiguous language:

> "Where the parties have used unambiguous language, the court must apply it. This can be seen from the decision of the Court of Appeal in *Co-operative Wholesale Society Ltd v National Westminster Bank plc* [1995] 1 EGLR 97. The court was considering the true construction of rent review clauses in a number of different cases. The underlying result which the landlords sought in each case was the same. The court regarded it as a most improbable commercial result. Where the result, though improbable, flowed from the unambiguous language of the clause, the landlords succeeded, whereas where it did not, they failed. The court held that ordinary principles of construction applied to rent review clauses and applied the principles in *The Antaios (Antaios Compania Naviera SA v Salen Rederierna AB*) [1985] AC 191. After quoting the passage from the speech of Lord Diplock cited above, Hoffmann LJ said, at p 98:
>
> > "This robust declaration does not, however, mean that one can rewrite the language which the parties have used in order to make the contract conform to business common sense. But language is a very flexible instrument and, if it is capable of more than one construction, one chooses that which seems most likely to give effect to the commercial purpose of the agreement."'

28. It seems to me, therefore, that my first task is to enquire whether the language used in the main voting provision in article 13(a) is capable of bearing the meaning contended for by the respondents, or whether, as the appellants submit, it is clear and unambiguous. It is only if I consider that the language is capable of bearing both meanings, that I am entitled to prefer that which most accords with common sense. I am not entitled, under the guise of construing the contract, to rewrite it in order to arrive at a meaning which most accords with our view of business common sense.

29. In understanding how the reasonable person would understand the language used in article 13 it is of course legitimate to rely, as part of the background, on the fact that regulation 54 is disapplied. The appellants' argument asks the forensic question: "why would the draughtsman have troubled to disapply the ready-made provision in Table A merely to replace it with an article of exactly equivalent effect?" It is true that the effect of the respondents' argument is that the main voting provisions of regulation 54 continue to apply under the bespoke provisions, but article 13(a) has other differences from regulation 54, in particular the proviso. One therefore has a ready answer to the forensic question posed, namely that the draughtsman considered it simpler to draft his own provision including a proviso. There would, as Mr Chaisty points out, have been other means of achieving the same effect, for example by stating that regulation 54 applied, but subject to the proviso, but by that stage, to my mind, one is in the realms of unhelpful speculation. That said, the fact that the draughtsman

has made one very obvious change to regulation 54 does not mean that he has not made others.

30. The judge understood both the rival arguments to be based on the proposition that article 13(a) applied to both votes and shows of hands, and the respondents' argument to be that one could read in the words "per share" at an appropriate point in the text. Mr Warwick has, in his skeleton argument, referred us to the transcript of the argument before the judge, in which he made clear that this was not his argument[1]. He accepts that one vote per member is the rule for a show of hands. His argument is therefore not that one writes in the word "per share" into article 13(a), but that one writes in "on a show of hands" or "on a show of hands only". By this means the position on a poll is left to be regulated by section 284(3) of the Act.

31. One has to return, therefore, to examine what basis there is for suggesting that the language of article 13(a):

> "Subject as hereinafter provided every Member present in person or by Proxy shall have one vote…"

is capable of having the meaning for which Mr Warwick contends, namely that the provision only applies to a show of hands.

32. The words "*present in person or by Proxy*" do not, it seems to me, give any indication whatsoever that the draughtsman was only considering the case of a show of hands. Whether a vote is taken on a show of hands or on a poll, the voting is of those present in person or by proxy. If the reader were in any doubt, and I see no reason for supposing that he should be, he would observe that regulation 59 of Table A, which is preserved in the Company's articles, begins with the words: "*<u>On a poll</u> votes may be given either personally or by proxy.*.".

33. I was not impressed by any of the arguments advanced by Mr Warwick in support of his submission that the language of article 13 was rendered ambiguous by the other provisions of the memorandum and articles on which he relies. Reduced to its essentials the argument is that the only purpose of giving each dwellingholder a vote is to enable him to participate in the management of the company. However the appellants' construction of article 13(a) does not deny the right of a dwellingholder to participate in the management of the company. The voting provisions in article 13(a) mean that the acquisition by a dwellingholder of a *second or subsequent* flat does not give him any additional control of the management of the building. As Mr Chaisty points out, this does not defeat the purpose of giving each dwellingholder a share: the effect of the memorandum and articles is that whenever a dwelling is sold the new owner will acquire a share and with it the right to participate in the management of the building. Mr Warwick's argument relies on the existence of an expectation that the acquisition of multiple flats carries with it *additional* voting rights for that member. I see nothing in those provisions which would give rise to such an expectation.

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[1] His argument before the judge appears to have been, at least at one point, that Article 13(a) prescribed only the position about a poll. This would have required the writing-in of both "on a poll" and "per share". But no point was taken by Mr Chaisty about this, and I ignore it.

34. This is not a case where it can seriously be suggested that the reasonable person seeking to understand the words used in the main voting provision would react by saying "it cannot mean what it says". It is now common ground that it means exactly what it says insofar as it relates to a vote on a show of hands. So far as a poll is concerned, given that section 284(3) can, by section 284(4) be disapplied by a provision in the articles, there is nothing inherently implausible in it being disapplied in Article 13(a).

35. Regulation 57 of Table A, which disables a member from voting in respect of any share unless it is paid up, does not seem to me to raise any implication that the holder of more than one share will get more than one vote, particularly given the general purpose nature of the Table A articles. Regulation 59 is in my judgment also neutral: the fact that a member may appoint more than one proxy to attend on the same occasion does not imply that he will get more than one vote per share. The member may wish to appoint alternate proxies, or proxies for different resolutions or for different parts of the day. Likewise I am unable to derive any support from the fact that regulation 55 was deleted.

36. I also do not consider that the provisions of the RTM model articles of association assist in establishing a lack of clarity. Quite apart from the fact that they post-date the incorporation of the Company on 27 January 2009, and therefore cannot have formed part of the factual matrix, their deployment in support of the construction contended for by the respondents is clearly two-edged. The language used in the model articles is radically different to that used in article 13(a). The recommendations for residents' associations are also too late in origin to be admissible on an issue of construction and, as I think Mr Warwick was inclined to recognise, less relevant still.

37. It is true that the proviso which forms part of article 13(a) appears to have been drafted inexpertly. However, I accept Mr Chaisty's submission that the unhappy draughtsmanship of the proviso does not infect the whole of article 13(a). Whatever the effect of the proviso, it cannot have the effect that the language of the main voting provision requires to be modified. Moreover, it would be odd in the extreme if the proviso only applied to a vote on a show of hands. If Mr Warwick's submission were correct, the first part of the article (the main voting provision) is only concerned with voting by a show of hands, but the proviso must be taken as dealing with both. Otherwise, on a poll, section 284(3) would require one member one vote without application of the proviso. This cannot sensibly have been the intention. This suggests that both parts of article 13(a) apply irrespective of the method by which the vote is taken.

38. For all those reasons, I am of the view that the language of the voting provision in article 13(a) is clear and unambiguous and that I am bound to apply it. The language used is simply not flexible enough to admit of the respondents' construction of it. The language is in my judgment sufficiently clear to oust the provisions of section 284(3) of the Act.

39. I do not consider that this interpretation of article 13(a) can be described as one which is either detailed or syntactical (the terms used by Lord Diplock in *The Antaios* (above)), or that it "flouts common sense". The judge was prepared to hold in the alternative that, assuming the language to be clear, that it resulted in commercial absurdity and should be departed from. I do not agree with his conclusion. Whilst

one might express a preference for a mechanism which allowed greater control for those who owned more than one flat, a system based on one member one vote falls well short of commercial absurdity. As I have said, it is common ground that it applies on a show of hands. It ensures the right of every member to participate in the management of the flats, whilst at the same time securing that, on a change of ownership, a successor in title acquires that right. The owner of multiple flats would moreover not necessarily have the same direct interest in the affairs of the company as the owner of a single flat. Whilst it is true that the articles do not distinguish between resident and non-resident owners, a distinction between single and multiple owners is not an absurd or irrational one. Mr Warwick's response was that if the articles had wished to make that distinction they would have been drafted very differently. But that answer does not support the charge of commercial absurdity. The articles, on the appellants' construction do make that distinction, at least so far as the voting rights of members are concerned. It was for the respondents to make out a case of commercial absurdity and, in my judgment, they have not done so.

40. I would therefore allow the appeal, set aside the judge's declaration and grant a declaration to give effect to the appellants' construction.

Lady Justice Macur

41. For the reasons given by my Lord, Floyd LJ, I agree and would allow this appeal.

Lord Justice Briggs

42. I also agree that the appeal should be allowed, substantially for the reasons given by Floyd LJ with which Macur LJ agrees. But I have had rather more difficulty than they have in departing from the judge's view that, construed as requiring one member one vote even on a poll, Art 13(a) is a commercial absurdity, which therefore demands an interpretation other than the literal meaning of its relevant words, which I agree are free from ambiguity. Since we are departing from the judge on this point, and out of respect for Mr Warwick's careful submissions, I set out my own reasoning.

43. Notwithstanding Lord Clarke's dictum in the *Rainy Sky* case that the court must apply unambiguous language, I do not understand him to have disapproved, as an exception to that healthy principle, the earlier dicta in *The Antaios*, in the *ICS* case and perhaps best exemplified in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, to the effect that, sometimes, the apparently unambiguous meaning of the words used produces such a nonsensical result that it cannot be treated as expressing the meaning of the document. Nor do I understand my Lord and my Lady to have thought otherwise. Sometimes, as in the *ICS* case, this rare exception is described as a case where the parties must have used the wrong words or syntax, or where something must have gone wrong with the language; see *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101. Sometimes, as in *The Antaios*, (in a passage approved by Lord Clarke in the *Rainy Sky* case), the exception is described as recognising a requirement for the analysis of words to yield to business common sense, where it would otherwise flout it.

44. There can unfortunately be a fine dividing line between that which appears commercially unattractive and even unreasonable and that which appears nonsensical or absurd. It causes continuing difficulty in the application of English law to

problems of construction, not least because it is not unusual for apparently reasonable judicial minds to disagree on the question whether a particular contractual or other documentary provision has crossed it, as Lord Hoffmann ruefully observed in the *Chartbrook* case at paragraph 15.

45. In the present case the question is whether Art 13(a) expresses a sufficient contrary intention to displace the one vote per share rule on a poll laid down in S. 284(3) of the Act. There is plenty of scope for the view that the main purpose of Art 13 was to introduce the proviso (which takes up most of the text of Art 13(a)), and the proviso is itself so bizarre if given effect according to the plain meaning of its words that the parties cannot indeed have used the correct words. Even Mr Chaisty did not submit that the proviso should be interpreted in that way, and could think of no viable alternative which did not do violence to its words. Furthermore Art 13 (b) appears to dis-apply Reg 55 in Table A for no rational purpose which anyone has been able to identify, and puts no alternative provision in place to deal with co-owners of a flat. Thus one approaches Art 13 as a whole with a less than ordinary disinclination to think that these parties have made a linguistic mistake in a formal document. Art 13 is, taken as a whole, riddled with them. It is, in short, a drafting shambles.

46. However tempting, it is wrong to assume that the drafting malaise which I have described infects every part of Art 13, and the critical words which precede the proviso in Art 13(a) are not themselves incomprehensible, viewed on their own. The real question is whether the parties can really be taken to have meant by those words to prescribe one member one vote on a poll. It is truly bizarre to think that the promoters of this management company really meant to confer power on (say) 2 flat owners to control the management policy for the whole block where all the other 102 flats were owned by a single investor owner which would be powerless to use its single vote to intervene. Furthermore the care with which these Articles prescribe that each flat owner (whether an individual or co-owning group) has one share and no more (in circumstances where share ownership confers voting rights and nothing else) suggests at least at first sight that Art 13 was not meant to distribute votes, at least on a poll, regardless of the number of shares held. These considerations seemed to me, at least initially, to provide real force in favour of the judge's view that the literal meaning of the relevant words in Art 13(a) produced a commercial absurdity which could not be its intended or real meaning.

47. There are however two factors which have persuaded me, on a narrow balance, that the judge was wrong in his finding of commercial absurdity. The first is that there is, as Mr Chaisty pointed out, a good reason for the prescription of one share per flat owner, quite apart from an implication that the number of a member's shares should govern the number of his votes. It creates a structure where a member who owns multiple flats can confer membership and therefore voting participation on the buyer of one of his flats, while remaining a voting member in respect of the remainder.

48. The second, perhaps more fundamental, point is that it is dangerous to test commercial absurdity by reference to extreme examples, such as the 102 flats under single ownership, capable of being out-voted by the separate owners of the remaining 2 flats. The court looks at the words used in the context of what the promoters might have thought was a typical or not unlikely ownership pattern, because that is the context in which the assertion of a commercially absurd meaning must be tested. It strikes me as wholly unlikely that the promoters would have given any thought at all

to the possibility of one person owning all but 2 of the flats or, for that matter (although this is what later occurred), that as many as 66 flats would come to be owned by a single investor.

49. Looked at in that way, the outcome of a one member one vote structure falls short of absurdity, even if it may still appear unreasonable, un-commercial or even undemocratic, to many. It creates a regime in which each flat-owning person (or group of co-owners of a flat) have the same say in management as the other members of a community affected by the quality and cost of the management of the block as a whole, regardless of how many flats they each own. That may be an unusual structure, but it is not absurd. It might be an attraction to the intending purchaser of a single flat, and even an intentional disincentive to the concentration of the ownership of an excessive number of flats in a single investor.

50. For those reasons I have come to the conclusion, on a narrow balance, that the unambiguous meaning of Art 13, as described by my Lord, must prevail.