Neutral Citation: [2022] UKFTT 00431 (TC)

Case Number: TC08647

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video/ hearing

Appeal reference: TC/2020/02844

Interim dividend – payment to shareholders on different dates - whether later dividend due and payable when first dividend paid – no

Heard on: 29 and 30 September 2022
Judgment date: 01 November 2022

BETWEEN

PETER GOULD **Appellant**

-and-

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE IAN HYDE
SUSAN STOTT

The hearing took place on 29 and 30 September 2022. With the consent of the parties, the form of the hearing was video with all parties attending remotely on the Tribunal video platform. A face to face hearing was not held because a remote hearing was considered appropriate. The documents to which we were referred were a trial bundle

of 343 pages, a supplemental bundle of 38 pages, an authorities bundle of 624 pages and the parties' skeleton arguments.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

David Yates KC, for the appellant

Charles Bradley, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This appeal is concerned with whether an interim dividend paid by a company to its shareholders should be treated as paid for tax purposes to one shareholder on the earlier date that a dividend was paid to another shareholder rather than the actual payment date.

2. In this appeal the board of directors of Regis Group (Holdings) Limited ('Regis') resolved on 31 March 2016 to pay an interim dividend of £40m which was paid as to £20m to the appellant's brother Nicholas Gould on 5 April 2016 and £20m to the appellant on 16 December 2016.

3. If the dividend is treated as paid on 5 April 2016, that is in the tax year 2015-16 when HMRC say the appellant was entitled to be paid it, then he is liable to pay tax on the dividend whereas if it treated as paid on 16 December 2016, in the 2016-17 tax year, when it was actually paid, no tax is payable, the appellant being non-resident for tax purposes in that year.

THE FACTS

4. The facts in this appeal are not in issue. The appellant, his brother Nicholas Gould and the chief financial officer Sydney Taylor all gave evidence in the appeal and we accept their evidence.

Regis Group (Holdings) Limited

5. The appellant is one of the principal shareholders in Regis, a private property, investment and private equity company established by the appellant's father, Frank Gould. Regis has a number of subsidiaries but the group structure is not relevant to this appeal.

6. Frank Gould's two sons, the appellant and Nicholas Gould, both work full time in the business. They work closely together, have an excellent relationship, and trust each other.

7. At the material time, the issued share capital of Regis consisted of 2,320 ordinary A shares and 116 ordinary B shares, of which the appellant and Nicholas Gould both held 656 A shares and 58 B shares and the trustees of the Frank Gould 1998 No 1 Settlement ('the Settlement'), under which the appellant and Nicholas Gould were joint life tenants, held the remaining 1008 A shares. The A shares and the B shares ranked pari passu save that the B shares carried no right to vote at general meetings. The distinction between the A and B shares is not relevant to the issues in this appeal.

8. The directors of Regis at the time were the appellant, Nicholas Gould, Paul McFadyen, Sydney Taylor and Michael Pearson. Michael Pearson was Sydney Taylor's predecessor as chief financial officer but was still a director and had been retained as a consultant, particularly on the family side. Paul McFadyen was the director of the property side of the business and was an expert in property finance but not in tax or corporate law. Sydney Taylor became a director on 29 March 2016.

9. The trustees of the Settlement were the appellant, Nicholas Gould and Keith Bell, an adviser working at Rickard Luckin, Regis' auditors and tax advisers. Keith Bell was also a former friend of Frank Gould and longstanding adviser to Regis and the family.

10. Regis' articles of association provided that (save for exceptions not material here) the articles constituting Table A in the Schedule to the Companies (Tables A to F) Articles SI 1985/805 (as amended) ("Table A") should apply to Regis. Table A included the following articles which therefore applied to Regis:

> "Dividends

> 102. Subject to the provisions of the Act, the company may by ordinary resolution declare dividends in accordance with the respective rights of the members, but no dividend shall exceed the amount recommended by the directors.
>
> 103. Subject to the provisions of the Act, the directors may pay interim dividends if it appears to them that they are justified by the profits of the company available for distribution...
>
> 104. Except as otherwise provided by the rights attached to shares, all dividends shall be declared and paid according to the amounts paid up on the shares on which the dividend is paid..."

The appellant

11. The appellant has worked for Regis all his working life, as has his brother. From 2004 Regis's business expanded from the United Kingdom to the United States and in 2004 established an office in Dallas, Texas. Nicholas Gould and the appellant decided that the appellant would work from the office in Dallas and in other locations in the US whilst Nicholas remained in the UK.

12. In 2013 the appellant rented a property in Jamaica, a convenient location for flights to New York and Dallas. In 2015, following the death of his mother, the appellant decided to relocate to Jamaica and bought the rented property.

13. Regis operated a director's loan account for the appellant out of which the appellant paid for various costs including the cost of building the school in Jamaica. At the time of the declaration of the dividend the loan account stood at some £18m in debit.

Discussions about paying a dividend

14. In the years prior to 2014 Regis sold a number of properties and generated sale proceeds of some £100m. In 2014 Regis appointed Sydney Taylor as the new chief financial officer. From March 2015 Sydney Taylor had been discussing with advisers and the brothers whether Regis should pay shareholders a dividend but in late 2015 and early 2016, having considered the matter for some time, Sydney Taylor came to a concluded view that the business did not need all these resources. He therefore recommended that Regis should pay a dividend to its shareholders of the surplus cash.

15. Part of the reasoning for delaying the payment of the dividend to the appellant was that he was experiencing difficulties opening a bank account in Jamaica, principally because they did not accept large transfers and the risk of fraud.

16. Another part of the thinking was tax planning for both brothers.If the appellant was non-resident for tax purposes in the year in which the dividend was taxed he would not be liable to tax in the UK. Following his move to Jamaica in 2013, the appellant had anticipated being non-resident for tax purposes in tax year 2015-16 but the death of his mother in December 2015 required him to be in the UK for more time than he had intended. Accordingly, there was some doubt as to whether he was non-resident in that tax year. It was therefore decided that out of caution the appellant should receive his dividend in tax year 2016-17.

17. Nicholas Gould was UK resident for tax purposes but due to changes in the taxation of dividends introduced by Finance Act 2016 he would be taxed at an effective tax rate of 30.56% if he was taxed on the dividend in 2015-16 and at 38.1% in tax year 2016-17.

18. Accordingly, the brothers' tax planning required them to be paid the dividend in different tax years.

19. There were a number of discussions with the brothers and with advisers as to how to make the dividend and these discussions continued up to March 2016. Sydney Taylor led the exercise and first took advice from tax specialist Chris Cook at solicitors Rooks Rider. The brothers and Sydney Taylor then had discussions with Michael Bell at Rickard Luckin, Regis' auditors and tax advisers. Stephen Hanlon at Shipleys was also consulted. In several discussions with the brothers, particularly around mid-February and early March the issue of enforceability of any delayed interim dividend was discussed, that is to say it might never be paid to the appellant if something went wrong in the business.

20. The advice culminated in an email of 29 March 2016 from Keith Bell to Sydney Taylor and Michael Pearson, advising that an interim dividend would be taxed on the date of payment in contrast to a final dividend which would be taxed on the date it was declared. The advice in the e mail was:

> "there is no doubt that any dividend should be an interim dividend, as you have already indicated"

21. As Sydney Taylor said, this advice confirmed that an interim dividend should be declared, what followed was about the mechanics.

22. We find that there were five factors influencing the payment and structure of the dividend:

(1) Sydney Taylor's opinion that there was surplus cash in the business

(2) The appellant was finding it difficult to open a bank account in Jamaica

(3) The tax advantage to be secured in paying Nicholas Gould in the tax year 2015-16

(4) The tax advantage to be secured in paying the appellant in the tax year 2016-17

(5) The Settlement did not have a bank account

23. We also find that immediately prior to the meetings on 31 March, as a result of the extensive discussions, both brothers were fully advised and understood the proposed dividend arrangements. Specifically, they understood that Nicholas Gould's dividend would be paid in the 2015-16 tax year and the appellant's dividend would be paid later. The precise timing of the payment of the appellant's dividend was not agreed, save that it would be after the end of the 2015-16 tax year and most likely once the appellant had identified a suitable bank account and had advised Regis that he was happy for it to be paid.

24. Further, the appellant accepted that he would not be able to enforce payment of the dividend and so was reliant for its payment on the directors of Regis and principally his brother to make the payment. However, the appellant was content to take that risk given his relationship of trust with his brother, the solid financial position of Regis and the practical and tax advantages to him of delaying the payment.

25. Further, we find that at no point did anyone give any consideration as to whether the proposals were permitted by Regis' articles of association or more generally.

Declaration and payment of the dividend

26. The authorisation of the dividend was effected by two meetings held on 31 March 2016.

27. The first meeting was a meeting of the trustees of the Settlement, and was attended by the trustees being the appellant (by telephone), Nicholas Gould and Mr Bell. The minutes of the meeting record that the trustees were aware a meeting of the Regis board was due to take place that afternoon at which an interim dividend would be declared. The trustees noted that

the Settlement did not have a bank account and so resolved to direct the company to pay half of any dividend directly to the appellant and Nicholas Gould.

28. As life tenants the brothers were entitled in any event to the income arising in the Settlement. It is common ground that we can treat the dividends paid to the brothers in respect of the Setttlement's shares as being taxed identically to dividends received by each brother in respect of their own shares.

29. The second meeting was a meeting of Regis' board of directors and was attended by the appellant, Nicholas Gould, Paul McFadyen, Sydney Taylor and Michael Pearson with Michael Bell in attendance. The meeting took place half an hour after the trustee meeting.

30. The meeting noted the performance and cash position of the group. Distributable reserves as at 31 March 2015 were £110m and subsequent management accounts showed additional profit of some £8m accruing since that date. Further cash would also become available to the group and there was no need to hold such large cash reserves. Sydney Taylor proposed that Regis should declare an interim dividend of £40m. He clarified the position of the Settlement and Keith Bell advised that that a letter of direction from the trustees to pay one half of any dividend to the appellant and one half of any dividend to Nicholas Gould would be provided in view of the fact that the Settlement did not have a bank account.

31. The appellant is recorded in the minutes of the board meeting as noting that he was now non-resident and needed to locate a reliable local bank in Jamaica. It was accepted by Sydney Taylor in cross examination that this minute did not accurately reflect that the tax reasons for delaying the payment of the dividend were also briefly mentioned. However, there was no need to discuss it as the issues had been discussed before and were well known.

32. The minutes of the record that, the appellant and Nicholas Gould abstaining, the directors:

> 'resolved that an <u>interim</u> dividend of £40m be declared on the A and B shares in issue' (emphasis in original).

33. The minutes did not record any decisions about the payment date for the dividend.

34. On 5 April 2016, the Company paid £20m to Nicholas Gould.

35. Following the board meeting Sydney Taylor spoke to Peter regularly and continued to explore how the dividend could be paid to the appellant. The appellant was unable to open a bank account in Jamaica which was capable of receiving large deposits and there were still concerns as to whether the money would be safe. Sydney Taylor therefore suggested to the appellant that the dividend be paid into his bank account with JP Morgan in Belgium. Both the appellant and Nicholas Gould were content for this to happen.

36. On 16 December 2016, the Company paid by way of two transfers $22m (equivalent to £17,711,650) and £2,288,350 to the appellant's bank account at JP Morgan in Belgium.

37. On 21 December 2016 the appellant used the dividend payment to repay the outstanding balance on his director's loan account.

Tax investigation

38. HMRC opened enquiries into the appellant's tax returns for 2015-16 and 2016-17.

39. HMRC issued closure notices on 13 March 2020 in which HMRC amended the appellant's tax return on the basis that he should be treated as having received the interim dividend in the tax year 2015-16 as opposed to 2016-17 when was actually paid. The closure notice for 2015-16 states as follows:

> "Our conclusion £20m UK dividend declared on your 2016-2017 tax return, as paid by Regis Group (holdings) ltd, is taxable in the 2015-2016 tax year
>
> **Reason for our conclusion**
>
> You were entitled to the interim dividend of £20m at the earlier date of 05/04/16"

40. On 2 April 2020 the appellant appealed the closure notices to HMRC.

41. On 10 July 2020 the appellant appealed to the Tribunal.

TAXATION OF DIVIDENDS

42. The relevant tax principles in this appeal can be stated very succinctly.

43. Section 383(1) Income Tax (Trading and Other Income) Act 2005 ("ITTOIA") imposes a charge to income tax on 'dividends...of a UK resident company'.

44. Section 384(1) ITTOIA provides that '[t]ax is charged under this Chapter on the amount or value of the dividends paid...in the tax year'.

45. Section 1168(1) Corporation Tax Act 2010 ("CTA") provides that '[f]or the purposes of the Corporation Tax Acts dividends are to be treated as paid on the date when they become due and payable'.

46. Section 384(1) ITTOIA is part of 'the Corporation Tax Acts' because it relates to the taxation of company distributions (Schedule 1 to the Interpretation Act 1978).

47. Accordingly, it is common ground that a dividend is subject to income tax in the hands of a shareholder when it becomes "due and payable".

48. For this purpose and leaving aside both the terms of the relevant company's constitution and the terms upon which the dividend is declared, there is a distinction in principle between a final dividend declared by the shareholders of a company and the payment of an interim dividend by the directors of a company.

49. In *Lagunas Nitrate Company Ltd v Schroeder and Co and Schmidt* (1901) 85 LT 122 the question arose as to whether the directors could change their mind about paying an interim dividend they had previously declared, and Joyce J held:

> "The article as to the payment of an interim dividend is in different terms. It provides (art.91):
>
> > "The directors may from time to time pay to the members on account of the next forthcoming dividend such interim dividends as, in their judgment, the position of the company justifies."
>
> As at present advised I do not see why the board of directors might not before an interim dividend is actually paid, acting bona fide, reconsider the question as to whether it ought to be paid at all."

50. The taxation treatment of interim dividends was considered in *Potel v Commissioners of Inland Revenue* 46 TC 658 which was concerned predecessor legislation but is equally relevant to section 1168 of CTA Brightman J held:

> "There is a difference between declaring a dividend and paying a dividend. The declaration of a dividend by a company in general meeting creates a debt enforceable immediately or in the future, according to whether the dividend is or is not expressed to be payable at a future date. The payment of the dividend is a different operation. It is an actual distribution of part of the assets of the company. The two processes, declaration and payment, are quite separate. Article 125 in the present case did not in terms authorise the

> directors to declare a dividend, that is to say, to create the relationship of debtor and creditors between the company and its members. It only authorised the act of payment. This is usual in the case of an interim dividend: see, for example, article 115 of Table A of the Companies Act 1948, and compare the wording of article 114. I have been referred to no authority that the resolution of a board of directors pursuant to such an article creates the relationship of creditor and debtor between a member and the company. In fact, the law is stated to be precisely the contrary in Buckley's Company Law, 13th edn. (1957), at page 897, and I am told that this is a reflection of what appeared in earlier editions. The note in Buckley reads:
>
> > "Where the directors are authorized to pay interim dividends, a mere resolution to pay does not create a debt as between the company and the member so as to prevent the directors from subsequently rescinding the resolution."
>
> I think that is a correct conclusion from the decision in the *Lagunas Nitrate* case, which establishes that an interim dividend is, as it were, subject to the will of the directors until it is actually paid."

51. Accordingly, it is common ground that in contrast to a final dividend, an interim dividend is normally not regarded as due and payable when it is declared and is only taxed when paid.

ISSUES IN THIS APPEAL

52. Both parties accepted the general principles set out in *Lagunas Nitrate* and *Potel* and neither counsel sought to distinguish the articles of association in either case from the articles relevant in the current appeal.

53. The issue on this appeal is where one shareholder is paid an interim dividend ahead of another holding the same class of shares, does the general position derived from *Lagunas Nitrate* and *Potel* apply or is the tax treatment different. Specifically, HMRC argue that in those circumstance the second shareholder can enforce payment of the dividend from the date of payment to the first shareholder so that the interim dividend should be treated for tax purposes as "due and payable" from that date for the purposes of section 1168(1) CTA.

54. The detailed arguments can be summarised as follows:

(1) HMRC argued that, by virtue of Nicholas Gould having been paid, the appellant has an enforceable debt against Regis whether under Article 104 of Table A as adopted in the articles of association or general principles requiring shareholders to the treated equally:

(2) The appellant argued that, even if the dividend is otherwise due and payable, the shareholders should be treated as having varied their rights under the *Duomatic* principle:

(3) The appellant further argued that, again even if the dividend is otherwise due and payable, the appellant waived his right to be paid at the same time as his brother: and

(4) HMRC argued that, even if the dividend was not due and payable on general principles, the appellant would have been able to obtain an order for payment under a petition for unfair prejudice under section 994 of the Companies Act 2006 ("CA 2006")

55. It was agreed by the parties, and we also take the same view, that in discussing the appellant's rights to the dividend the question is what remedy would have been available to the appellant had he sought to enforce his rights. It was therefore irrelevant whether the

appellant would in fact exercise those rights or, indeed, whether Regis would have voluntarily paid the dividend to the appellant had he asked to be paid.

56. It is convenient to consider each argument separately and in sequence.

ARTICLE 104 AND DOHERTY

HMRC's arguments

57. Mr Bradley for HMRC argued that the question when the dividend became 'due and payable' was equivalent to the question as to when the appellant could have enforced payment by Regis, that is to say there was a debt due.

58. *Lagunas Nitrate* and *Potel* established the proposition that the directors may rescind the payment of an interim dividend but those cases were simply concerned with situations where the relevant interim dividend was either not paid at all or was paid to all shareholders of the relevant class at the same time. The position was different where (as is the case in the current appeal) the interim dividend is actually paid to some but not all shareholders. If that is the case, the shareholders that have not been paid have a right to payment as from the date of the payment to those that had.

59. Article 104 of Table A as adopted in the articles of association provides that:

> 'all dividends shall be…paid according to the amounts paid up on the shares on which the dividend is paid'.

60. HMRC relied upon a decision of the Principal Sherriff of Grampian, Highland and Islands in *Doherty v Jaymarke Developments (Prospecthill) Ltd* 2001 SLT (Sh Ct) 75. Mr Bradley accepted *Doherty* was not binding but it was persuasive. In Mr Bradley's submissions *Doherty* was therefore persuasive authority for two principles:

(1) if and when a company pays an interim dividend it must pay others of the same class; and

(2) those shareholders who have not been paid have an enforceable debt against the company from the date of payment to the shareholders that have been paid

61. That must be the right conclusions as it would be surprising if a company could discriminate between shareholders by paying some shareholders but not others, leaving them only with a claim for unfair prejudice.

62. In *Doherty* the company, which had also adopted Table A, declared an interim dividend on 30 March 1998 and paid the controlling shareholder his share of the dividend on 28 April 1998 but not the other shareholders. The company purported to have made a resolution, also on 28 April 1998, that the two minority shareholders' shares of the dividend should not be payable until 31 December 1999. The minority shareholders, who had initially been unaware of the dividend, commenced proceedings in February 1999 for payment of their share of the dividend.

63. The company argued, in reliance on *Potel*, that the minority shareholders could not have had any right to payment until, at the earliest, 31 December 1999. The court rejected this argument (at 77L-78C):

> "Although it is perfectly true that only reg 103 [of table A] expressly refers to interim dividends, and that such dividends are not referred to in terms in regs 102 and 104, I am not persuaded that it follows from that that the latter Articles have no relevance whatever in respect of interim dividends. There is nothing in regs 102 and 104 which expressly restricts them to final dividends and, as I have noted earlier, the whole section in the Articles from reg 102 to reg 108 is simply headed by the generic word "Dividends".

> I accept, of course, that a date for payment of an interim dividend can be set down, and that nothing will be due until that date arrives. I also accept that as was observed by Brightman J in *Potel*, a decision to pay an interim dividend can be rescinded at any time before the date for payment arrives. In the present case, however, it seems to me that the argument advanced on behalf of the defenders totally ignores the fact that the appropriate share of the interim dividend was in fact paid to Mr Shaw on 28 April 1998. It may be that, as was submitted on behalf of the defenders, the sheriff was technically wrong to conclude that the resolution of that date postponing payment until 31 December 1999 was ultra vires of the company. In my view, however, that resolution was at least of no effect given that payment was simultaneously being made to one of the shareholders. I was not referred to any authority to support a proposition that a company can discriminate between shareholders of the same class: and in any event any such discrimination appears to me to be at odds with the general import of reg 104 which in my view applies to the payment of dividends of any kind." (*emphasis added*)

64. The court upheld the decision of the first-instance judge that the minority shareholders had an enforceable debt against the company from 28 April 1998. In the current appeal the appellant's share of the £40m dividend was therefore due and payable on 5 April 2016.

65. Mr Bradley argued that even it were wrong on *Doherty*, to hold that a shareholder did not have a debt enforceable against the company would be to ignore the principle of equality between shareholders, for example in *Marex Financial Ltd v Sevilleja* [2021] AC 39;

> "103. A shareholding in a company confers a right of participation in the affairs of the company in accordance with the terms of the company's articles of association, often in the form of voting on resolutions at general meetings, and it entitles the shareholder to ensure that other shareholders comply with the rules imposed on them by the articles of association: section 33(1) of the Companies Act 2006 ("the 2006 Act"). A shareholder in an unfair prejudice application under section 994 of the 2006 Act can also invoke equity to protect it from unfairness by restraining the exercise by another shareholder of its legal rights which are contrary to the understandings reached or promises made: *In re A Company* (No 00709 of 1992) [1999] 1 WLR 1092. It is a significant principle of company law that, in the absence of agreement to the contrary such as that expressed in the terms of a share issue, shares confer the same rights and impose the same liabilities: see for example section 284 of the 2006 Act and *Birch v Cropper* (1889) 14 App Cas 525, 543, per Lord MacNaghten.
>
> 104 A shareholding will usually entitle its holder to participate in the success of the company's enterprise by receiving distributions from the company out of its profits and to receive a return of its capital and a proportionate share of any surplus assets of the company on its winding up: Macaura [1925] AC 619, 626—627, per Lord Buckmaster; Birch v Cropper 14 App Cas 525, 543."

66. The articles of association are a contract (section 33 CA 2006, *In re Compania de Electricidad de la Provincia de Buenos Aires Ltd* [1980] 1Ch 146 at 188 D-E). The principle of treating shareholders equally should be read into Article 104 to provide that where a dividend is not paid in such circumstances the unpaid shareholder has a right to enforce a debt against the company.

The appellant's arguments

67. Mr Yates for the appellant sought to challenge the correctness of the decision in *Doherty*. It was not binding on the Tribunal and concerned very different facts and issues, being the amount of interest due on late payment of a dividend.

68. In any event, *Doherty* was incorrectly decided. Final dividends are declared and become due at this point whereas interim dividends are merely paid, indeed Table A does not recognise a declaration of an interim dividend. Further, it has long been held that directors may simply pay interim dividends without requiring shareholder consent.

69. Article 104 of Table A provides:

> 104. Except as otherwise provided by the rights attached to shares, all dividends shall be declared and paid according to the amounts paid up on the shares on which the dividend is paid..."

70. If Article 104 applied to interim dividends it would require all interim dividends to be "declared and paid" in accordance with the amounts paid up on the shares. The clear suggestion, therefore, is that when article 104 refers to "dividends" it is referring only to final dividends in article 102.

71. Further, the clear principle from *Potel* (Brightman J at 669B) is that only shareholders can create a dividend that amounts to a debt, the directors cannot do that. Paying an interim dividend to one shareholder but not another cannot create a debt which the directors could not in normal circumstances do. The wronged shareholder may have other remedies but not as a debt claim.

72. Whether or not *Doherty* is right in terms of Article 104 applying to interim dividends, it is wrong to suggest that merely because one shareholder has been paid an interim dividend (contrary to either the articles or under general principles) that this means that the other shareholders are entitled to demand payment of a dividend. A shareholder might obtain an order to that effect on the basis of unfair prejudice but some other order might be granted.

73. However, no such complaint could have been made by the appellant on the facts here. This case could not be more different from *Doherty* which involved an abuse by the majority shareholder to benefit himself without even informing the minority shareholders. In this appeal the shareholders of Regis agreed that Nicholas Gould would receive his dividend prior to the appellant. This meant that, in theory at least, the appellant was vulnerable to the board of Regis being able to rescind the interim dividend prior to being paid. However, this was not something he was concerned about given the financial health of Regis and his own regular monitoring of its position.

Discussion

74. We accept and understand it is common ground in this appeal that shareholders of the same class must be treated equally. The question is as to what is the remedy for breach of this principle.

75. HMRC's reading of Article 104 treats the requirement that "all dividends shall be declared and paid" (in effect) equally, as applying to both final and interim dividends. Both declaring and paying a dividend would appear to apply to final dividends. However, as interim dividends are not declared but only paid. For Article 104 to apply "declared and paid" must be read as several requirements or with the addition of "insofar as relevant" or similar wording. This is not a clear reading of Article 104.

76. No guidance was provided to us on the purpose of Article 104, indeed one might speculate that it is intended only cover the payment of dividends when shares are part paid.

Whatever its purpose and even if Article 104 can be read as applying to interim dividends, we do not accept that whether by reading Article 104 in isolation or by taking into account a universal principle of equal treatment of shareholders, Article 104 is to be read as creating a debt (as opposed to any other remedy) in the circumstances of the delayed payment of an interim dividend to some but not all the shareholders of the same class.

77. We therefore decline to follow *Doherty* in the circumstances of this appeal and reject HMRC's principal argument that by virtue of the principle of equality and Article 104, the payment of the interim dividend to Nicholas Gould on 5 April 2016 made the dividend to the appellant due and payable on the same date.

78. As we have found against HMRC on the interpretation of Article 104 and the application of *Doherty*, it is not necessary for us to consider whether the appellant had varied his rights in accordance the *Duomatic* principle or whether the appellant had waived his rights but we will do so for completeness.

THE DUOMATIC PRINCIPLE

The appellant's arguments

79. Mr Yates argued that, even if *Doherty* was rightly decided so that the dividend was otherwise due and payable, the appellant had varied his rights in accordance the *Duomatic* principle (*Re Duomatic Ltd* [1969] 2 Ch 365).

80. We were not taken to the decision in *Duomatic* but Mr Yates suggested that the *Duomatic* principle was best summarised by Neuberger J. in *EIC Services Ltd & Anor v Phipps & Ors* [2003] BCC 931 (at [122]) as follows:

> "Although the principle has been characterised in somewhat different ways in different cases, I do not consider that that is because its nature or extent is in doubt or the subject of debate. The difference in language is attributable to the fact that the principle will have been expressed by reference to the particular facts of the case. The essence of the *Duomatic* principle, as I see it, is that, where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. Whether the approval is given in advance or after the event, whether it is characterised as agreement, ratification, waiver, or estoppel, and whether members of the group give their consent in different ways or at different times, does not matter."

81. Further, in *Ciban Management Corpn v Citco (BVI) Ltd* [2021] AC 122, a decision of the Privy Counsil, Lord Burrows JSC said:

> "31 The *Duomatic* principle is, in short, the principle that anything the members of a company can do by formal resolution in a general meeting, they can also do informally if all of them assent to it. See generally Palmer's Company Law, looseleaf ed, vol 2, paras 7.434—7.449; and Peter Watts, "Informal Unanimous Assent of Beneficial Shareholders" (2006) 122 LQR 15. The principle derives its name from *In re Duomatic Ltd* [1969] 2 Ch 365, in which it was encapsulated by Buckley J, at p 373, as follows:
>
> > "where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be."

> 32 The origins of the principle pre-date *In re Duomatic Ltd* itself. So, for example, Lord Davey in *Salomon v A Salomon & Co Ltd* [1897] AC 22, 57 stated that "A company is bound in a matter intra vires by the unanimous agreement of its members"."

82. We were also taken by Mr Yates to passages in *Sharma v Sharma* [2013] EWCA Civ 1287 (paragraphs [44] to [52]) including at [45] and [47]:

> "45. The principle which emerges from *Duomatic* (above) is that if payments are made by a company with the full knowledge and consent of all the shareholders, then those payments are duly authorised as if there had been a formal resolution to that effect at a general meeting…
>
> 47. These principles are also applicable when the question is whether the shareholders of a company have authorised a director to do that which would otherwise be a breach of fiduciary duty. In such a situation, however, the court is scrupulous to ensure that the director has made full disclosure of all relevant facts to the shareholders: see *Gwembe Valley Development Co Ltd (in rec.) v Koshy (No.3)* [2003] EWCA Civ 1048; [2004] 1 B.C.L.C. 131 at [64]–[66]. Although the shareholders must be made aware of the relevant facts, it is not necessary that they understand the legal characterisation of those facts, namely that they would constitute a breach of fiduciary duty: see *Knight v Frost* [1999] B.C.C. 819 at 828.

83. In *Cane v Noble* [1980] 1 WLR 1451, a case concerning whether the provision in the company's articles providing for a chairman's casting vote had been disapplied by a shareholder's agreement, there was no resolution or meeting of the shareholders and the agreement did not purport to amend the articles. Further the party seeking to rely on the casting vote being overridden was not party to the shareholders agreement and so did not have privity of contract. The court rejected these arguments.

84. In *The Sherlock Holmes International Society Limited Appellant v Mr John Aidiniantz* [2016] EWHC 1076, the articles of the company limited by guarantee required directors to be members. The issue arose as to whether a director who was not a member had been validly appointed and the articles varied by conduct as directors had been appointed on three occasions without being members. Mark Anderson QC sitting as a High Court judge, commented as follows:

> "72. Agreements can be inferred from conduct (*Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195; *Modahl v British Athletic Federation* [2002] 1 WLR 1192), and there is no reason in principle why that cannot apply to an agreement to amend the constitution of a company (as in *Re Home Treat Ltd* [1991] BCC 165). Moreover the conduct from which agreement may be inferred may include acquiescence in circumstances where the members knew that their assent was being sought or where there was some reason why conscience demanded that they object sooner rather than later (*Sharma v Sharma* [2014] BCC 73). However conduct may be ambiguous. A court should not infer an agreement from conduct where such an agreement is only one of several equal possibilities. Where conduct alone is relied upon, that conduct must lead to the conclusion that on the balance of probabilities the members intended to amend the articles and, further, intended to make the particular amendment contended for."

85. The Court found an intention on the part of the members to allow non-members to be appointed as directors, thus:

> "83…The far more natural conclusion is that when Grace became a director in 2004 jointly with her daughter; and when she resigned as a director in 2005 to be replaced by her other daughter; and when she resigned again in 2011 to be replaced by her son, she knew about the arrangements and participated in them and assented to them; and that she did so with knowledge of the membership requirement. I have no reason to conclude that all that was done without her knowledge or that she did not assent to the identity of her replacement or that she did not know that her assent was required."

86. In *Re Tulsesense* [2010] EWHC 244, the *Duomatic* argument was rejected on the basis that the articles were ignored rather than there being any intention to modify:

> "66…. The evidence indicates that too little regard was paid to the terms of Tulsesense's articles, not that they were varied…There is, more specifically, no evidence in the present case that anyone intended to dispense with the provision in article 95 of Table A to the effect that an appointment under that article should continue, in the first instance, only until the next annual general meeting. In short, this is a case where the articles were not always followed, not one where they were modified or disapplied"

87. Mr Yates argued that in the current appeal it was clear from the witness evidence that all shareholders (including the trustees of the Settlement) agreed to the interim dividend otherwise due to the appellant would not be paid at the same time as Nicholas and indeed would not even be "due" at this time. Assuming that HMRC are right on the effect of *Doherty*, the shareholders' agreement would have entailed a temporary alteration of the articles. It is clear from *Re Sherlock Holmes* (eps at [71] and [76]) that *Duomatic* can apply to amending articles on a temporary basis.

88. In particular, it was understood that the appellant's and Nicholas Gould's consent was required for the proposal that the interim dividend be paid on different dates, not least because circumstances might arise which prevented Regis from paying an interim dividend to the appellant even though it had already paid one to Nicholas.

89. Finally, Mr Yates noted that it cannot be the case, as suggested by Mr Bradley in his skeleton argument, that failure to file the amendment at Companies House prevents there being a *Duomatic* amendment. Necessarily all applications of *Duomatic,* where amendments to the articles are deemed to have taken place, must involve such a breach but that cannot disapply the principle (*Gunewardena v Conran Holdings Ltd* [2017] B.C.C. 135 at [70]).

HMRC's arguments

90. Mr Bradley took the comments in *Re The Sherlock Holmes International Society Ltd* [2016] EWHC 1076 (Ch) at [61] as being a summary of the *Duomatic* principle:

> "…where all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting could carry into effect that assent is as binding as a resolution in general meeting would be"

91. He also noted the comment in *Re Tulsesense* at [41]:

> "In my judgment, there must be material from which an observer could discern or (as in the case of acquiescence) infer assent. The law applies an objective test in other contexts: for example, when determining whether a contract has been formed. An objective approach must, I think, also have a role with the *Duomatic* principle."

92. The only matter which could have been effected at a general meeting was a temporary amendment of the articles but the amendment in question is not specified and there is no evidence that the shareholders agreed, or even remotely had in mind, an amendment of Regis' articles.

93. Had there been such an amendment a written memorandum setting out the terms of the shareholders' agreement giving rise to it would have had to be registered within 15 days on pain of criminal sanction: sections 26, 29(1)(b), 30 of the CA 2006.

94. Mr Bradley's objection to the appellant's argument both on *Duomatic* and waiver, was that it was an attempt retrospectively to fit an implausibly complex legal analysis onto some basic facts. The evidence, according to Mr Bradley, showed:

(1) The appellant, Nicholas Gould and Sydney Taylor (on behalf of Regis) obtained tax advice during March 2016 to the effect that (i) it would be advantageous for the brothers to be taxed in different years (ii) this might be achieved by paying the appellant his share of the interim dividend after Nicholas Gould's and (iii) in the meantime the appellant would have no enforceable right to payment of his share, albeit that the appellant was not concerned about this given Regis' financial position and his strong relationship with his brother.

(2) According to the minutes of the board meeting on 31 March 2016:

> 'PG pointed out that he was now non-UK resident and wanted to address the location of his bank accounts as he had yet to locate a reliable local bank in Jamaica and was now taking advice from local contacts as to how best to manage his personal financial affairs locally.'

(3) Besides the appellant mentioning this, there was no discussion at the board meeting about the timing of the dividend payment.

95. There was therefore no express agreement of the kind now asserted and no discussion of amending the articles. That makes sense because the advice received by the shareholders and Regis was that none of this was needed. The evidence merely shows the brothers' understanding of the tax advice.

96. To the extent that inferences from conduct are relied upon, as the court held in *Sherlock Holmes*:

> "71. A court should not infer an agreement from conduct where such an agreement is only one of several equal possibilities. Where conduct alone is relied upon, that conduct must lead to the conclusion that on the balance of probabilities the members intended to amend the articles and, further, intended to make the particular amendment contended for.'

97. The facts of an agreement must also be objectively ascertainable where an agreement is inferred from informal discussions (contrast the agreement in *Cane v Jones*) and not merely one of a number of alternatives. Here that conclusion cannot be drawn. For example, the shareholders' agreement is also consistent with the appellant agreeing not to enforce until 2016/17, the appellant not believing he had any right to enforce anyway, or the appellant not having even thought about the point. Accordingly, *Duomatic* does not apply.

98. Finally Mr Bradley tempered his argument in his skeleton argument that failure to file the amendment to the articles at Companies House prevents there being a *Duomatic* amendment. It was a background point about illustrating the parties' intention.

Discussion

99. Having heard and considered the evidence it is clear to us that the parties, including all the shareholders, intended the directors to resolve to pay an interim dividend and that payment would be made as to £20m on 5 April 2016 to Nicholas Gould and to the appellant at some date to be agreed but in any event after the start of tax year 2016-17. The parties believed that they were permitted to do so, certainly they did not believe they were acting contrary to Regis' constitution. Indeed, for the brothers they were acting on considered advice.

100. However, the *Duomatic* argument is only relevant if HMRC are right and the principle set out in *Doherty* applies and so must be considered on that basis. Accordingly, it must be assumed that the payment of the dividend to Nicholas Gould on 5 April 2016 created an enforceable debt in the appellant's favour. The question is whether there was an agreement to vary even temporarily the articles so that the directors were permitted to pay dividends at different times without creating a debt. It is not necessary that the parties understand that to do otherwise would be a breach of fiduciary duty (*Sharma* at [47]).

101. In our view that is what occurred in this instance. The shareholders agreed the appellant's dividend would be delayed into the new tax year and the appellant was at risk of it not being paid. The appellant's evidence was that he accepted the risk but relied upon Regis having substantial cash reserves and the trust he placed in his brother. We do not find any ambiguity in the evidence on this point.

102. Even if there were not an agreement, in receiving the clear advice on the point and then following through in the meetings, we find that the brothers assented to the course of action so as "to make it inequitable for them to deny that they have given their approval" (Neuberger J in *EIC Services* at [122]). The appellant could not have demanded payment of the dividend on 5 April 2016, even if he had wanted to and irrespective of whether Regis would in practice have paid him had he asked.

WAIVER

The appellant's arguments

103. Mr Yates submitted that even if HMRC were right and there was otherwise and enforceable debt, the appellant clearly intended to waive his right to receive his share of any dividend at the same time as Nicholas Gould and did so before the directors resolved to exercise their power to pay an interim dividend. Therefore, at the date that the appellant promised to waive his rights, Regis was not under a legal obligation to pay the appellant a dividend. On the contrary, the shareholders had no entitlement to an interim dividend unless and until the directors exercised their power to do so. The agreement by the directors of Regis to pay an interim dividend to the appellant at a later date (insofar as Regis was in a position to do) therefore served as consideration for the appellant's agreement to waive his right to receive an interim dividend at the same time as Nicholas Gould.

104. In any event, even if Regis was agreeing to do no more than what it was required to do albeit at a later time, this still gave rise to a substantial "practical benefit" to the appellant given that he would not be liable to tax if the dividend did not become due until later. This is adequate consideration as matter of English law following the Court of Appeal's judgment in *Williams v Roffey* [1991] 1 QB 1, notwithstanding the decision in *Foakes v Beer* (1884) 9 App.Cas. 605 where the House of Lords held that agreeing to pay an outstanding debt was not consideration for a contract.

105. Mr Yates recognised the tension between the binding authority in *Foakes v Beer* and *Williams v Roffey* as noted in later cases, so *In re Selectmove* at p,481 B-D and obiter dicta by

Lord Sumption in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2019] AC 119 at [18] but has been confirmed to be good law by the Supreme Court in *Simantob v Shavleyan* [2018] EWHC 2005 (QB). Lord Sumption said, at [18]:

> "That makes it unnecessary to deal with consideration. It is also, I think, undesirable to do so. The issue is a difficult one. The only consideration which MWB can be said to have been given for accepting a less advantageous schedule of payments was (i) the prospect that the payments were more likely to be made if they were loaded onto the back end of the contract term, and (ii) the fact that MWB would be less likely to have the premises left vacant on its hands while it sought a new licensee. These were both expectations of practical value, but neither was a contractual entitlement. In *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 the Court of Appeal held that an expectation of commercial advantage was good consideration. The problem about this was that practical expectation of benefit was the very thing which the House of Lords held not to be adequate consideration in *Foakes v Beer* (1884) 9 App Cas 605: see, in particular, p 622, per Lord Blackburn. There are arguable points of distinction, although the arguments are somewhat forced. A differently constituted Court of Appeal made these points in *In re Selectmove Ltd* [1995] 1 WLR 474, and declined to follow *Williams v Roffey*. The reality is that any decision on this point is likely to involve a re-examination of the decision in *Foakes v Beer*. It is probably ripe for re-examination. But if it is to be overruled or its effect substantially modified, it should be before an enlarged panel of the court and in a case where the decision would be more than obiter dictum."

106. Mr Yates suggested the effect of subsequent case law was to confine *Foakes v Beer* to earlier payment of an existing debt not being good consideration. In the current appeal that point did not apply as what is being waived (at the time of waiver) were shareholder's rights as opposed to a debt.

HMRC's arguments

107. Mr Bradley argued that what was being waived, if anything, was not the right to the dividend but the appellant's right, in the event that the Regis paid an interim dividend to his brother, to be paid his share at the same time.

108. Mr Bradley submitted that it was difficult to see how the appellant could have intended to waive a right which at the material time, and on the basis of professional advice, he did not believe he had. In any event there is no evidence that the appellant communicated such an intention to Regis. Further, for a waiver unsupported by consideration to be binding, there must be a clear and unequivocal representation by the promisor that he will not insist on his legal rights together with detrimental reliance by the promise (Chitty on Contracts (34th ed) at 6-094 ff). These requirements are not satisfied here.

109. Further, there was no evidence to support the appellant's submission that the appellant agreed to waive his prospective right to be paid his share of the interim dividend at the same time as Nicholas Gould in consideration of an agreement by the directors of Regis to pay an interim dividend to the appellant at a later date. Even if there had been discussions between the brothers and Sydney Taylor prior to the board meeting of 31 March 2016, there were three other directors and there was no discussion of this point at the board meeting at all. In any event, the 'consideration' given by Regis under this putative agreement would in substance amount to a promise to pay a debt at a point later than it was due, and as such would not be good consideration: *In re Selectmove Ltd* [1995] 1 WLR 474.

110. Again, the facts are equally consistent with other possibilities such as the parties not addressing their mind to the possibility there was a debt.

Discussion

111. As with the Duomatic issue, we have to assume that HMRC are right and the principle set out in *Doherty* applies so that, absent a waiver, the payment of the dividend to Nicholas Gould on 5 April 2016 created a debt in the appellant's favour. However, we agree that any agreement would have been prior to the board meeting so there was no debt to vary, even applying *Doherty*.

112. We find the principles set out by counsel on the waiver issue difficult to apply, specifically the argument as to whether there was consideration is in many ways unsatisfactory in the circumstances. The application of the principles in *Duomatic* better reflects the nature of the relationship between the parties than looking for consideration in essentially the management of a family company.

113. That said, the position does not seem to us to fall into the problematic territory of *Foakes v Beer* as the issue must be considered prior to the (assumed) creation of the debt on 5 April 2016. At this point there is no subsisting obligation.

114. As we have found, the shareholders including the appellant agreed Nicholas Gould would be paid in 2015-16 but the appellant's dividend would be delayed into the new tax year and the appellant accepted he was at risk of it not being paid. In doing so there has been a waiver by the appellant of his (assumed) right to enforce payment of the dividend at the same time as his brother. The agreement by Regis, principally through Sydney Taylor and Nicholas Gould, who presumably have authority to do so, to pay an interim dividend to the appellant at a later date amounted to consideration for the appellant's waiver.

UNFAIR PREJUDICE

The Companies Act 2006

115. The relevant legislation is contained in CA 2006.

116. Section 994(1) provides:

> "A member of a company may apply to the court by petition for an order under this Part on the ground–
>
> (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or
>
> (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.'

117. The Court's powers are then set out under section 996:

> "(1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.
>
> (2) Without prejudice to the generality of subsection (1), the court's order may–
>
> (a) regulate the conduct of the company's affairs in the future;
>
> (b) require the company–
>
> (i) to refrain from doing or continuing an act complained of, or
>
> (ii) to do an act that the petitioner has complained it has omitted to do;

> (c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;
>
> (d) require the company not to make any, or any specified, alterations in its articles without the leave of the court;
>
> (e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly."

HMRC's arguments

118. Mr Bradley's alternative argument is that, even if the payment of the dividend to Nicholas Gould did not crystallise a debt under general principles or Article 104, had Regis refused a request by the appellant for payment of the dividend to him on 5 April 2016, he would have been able to obtain an order for payment of that sum under section 996 CA 2006.

119. Section 994(1) CA 2006 provides that a shareholder may petition the court on the ground that the company's affairs are being conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself).

120. If the court is satisfied that the petition is well-founded, 'it may make such order as it thinks fit for giving relief in respect of the matters complained of' including an order requiring the company 'to do an act that the petitioner has complained it has omitted to do': section 996(1), (2)(b)(ii).

121. The relevant concept of 'unfairness' includes both cases in which the act or omission complained of would be unlawful apart from section 994 and those 'in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers': *O'Neill v Phillips* [1999] 1 WLR 1092 at 1098H-1099A.

122. Mr Bradley argued that even if there were not a debt owing from Regis to the appellant on 5 April 2016, it would have been inequitable for Regis to refuse payment of the appellant's share of the dividend. Whilst other orders, such as an order requiring the shareholder to be bought out might be appropriate where the relationship between shareholders has broken down, that is not the case here. The inevitable remedy in this case would have been an order that Regis pay the appellant his dividend (s 996(2)(b)(ii)).

123. Accordingly, the dividend was due and payable on 5 April 2016.

The appellant's arguments

124. The appellant relied upon a summary of the relevant law set out in *Routledge v Skerritt* [2019] EWHC 573:

> "19. The relevant law is not in dispute and I have adopted the general propositions set out in Mr Davies QC's skeleton argument (at [20]–[25] below).
>
> 20.If the court is satisfied, on an application by a member of a company under s.994 of the 2006 Act, that the affairs of the company have been conducted in a manner unfairly prejudicial to the interests of the member, or members generally, the court may, under s.996 of the 2006 Act, make such order as it thinks fit for the purposes of giving relief in respect of the matters complained of. It is established that in order for this jurisdiction to be engaged, the conduct complained of must be shown to have been both unfair

> and prejudicial to the petitioner: *Re Saul D Harrison & Sons Plc* [1994] B.C.C. 475.
>
> 21. Regarding the concept of unfairness for the purpose of the jurisdiction under s.994 of the 2006 Act, the touchstone for liability is a breach of the agreement between the members regarding the conduct of the affairs of the company: *O'Neill v Phillips* [1999] 1 W.L.R. 1092; [1999] B.C.C. 600.
>
> 22. The agreement between the members for this purpose is most obviously to be found in the company's articles of association, but its terms may also be derived from other sources, such as separate shareholders' agreements and company resolutions setting out the rights attached to shares. It is also well established that not every breach of the constitution or shareholders agreement will constitute unfairness. Trivial or technical breaches will not."

125. The appellant also relied upon *Fisher v Cadman and others* [2006] 1 BCLC 499 where Phillip Sales (sitting as a Deputy Judge of the High Court) added (at [90]):

> "[…] it is my view that, in considering whether the conduct of the controllers amounts to conduct unfairly prejudicial to the interests of a member, it is also relevant to take into account any agreement, understanding or clearly established pattern of acquiescence on the part of that member which may have led the controllers to act or continue to act in a particular way, even if their action may have involved a departure from a strict adherence to the terms of the articles. In such a case, in the light of their common understanding as to what conduct will be regarded as acceptable between themselves despite the terms of the articles of association, it would not be correct to characterise the action of the controllers as unfair within the context of the whole relationship between them and the member. In my view, this is a corollary of the approach to the test of unfairness adopted in the authorities to which I have referred above, whereby the agreement between the members as set out in the articles of association may be subject to equitable considerations and obligations arising out of the particular circumstances of their relationship overall. There is no good reason why such equitable considerations should not qualify, as well as add to, the expectations about how the controllers of the company ought to behave to be derived from a simple reading of the articles of association."

126. Mr Yates argued, based on those principles, that the appellant did not have any realistic prospect of successfully bringing proceedings under section 994. The court's powers under section 996 are discretionary. Even if unfair prejudice proceedings could feasibly have been brought by the appellant this would not have caused the interim dividend to have become "due" on 5 April 2016.

127. The *Routledge* case was itself concerned with an unfair allocation of dividends. On the facts, following a special resolution, two classes of shares were created, A and B. Mr Routledge agreed to acquire all of the B shares. The rights of the B shares were as follows:

> "the right of the holder to receive dividends declared by the company but only to the extent that there are profits available for distribution after the declaration of dividends to which the ordinary "A" shareholders of the company are entitled and in accordance with the policy in relation to dividends as made and as amended by the company's Board of Directors from time to time".

128. However, no dividend policy was ever made by the board and instead the company simply paid dividends on the A shares with no dividends being paid on the B shares. Mr

Routledge therefore brought proceedings under section 994. The judge made the following finding in relation to the B shares rights in the absence of a dividend policy:

> "48. I therefore agree with Mr Davies QC that, if no policy on dividends was adopted by the board of directors, there is no basis for treating the A shares and the B shares differently in respect of dividends. Prior to the special resolution, the B shares and the A shares were all ordinary shares, and the operation of the dividend regime introduced by the special resolution depended entirely upon the existence of a board policy on dividends. Therefore, and as a matter of construction, if there is no board policy in relation to dividends the B shares have throughout ranked pari passu with the A shares in respect of dividends. This reflects the default position as a matter of law. Thus, absent any applicable distinguishing provision in the Articles of association, the shares of a company rank equally: *Birch v Cropper* (1889) 14 App. Cas. 525 at 543 per Lord Macnaghten."

129. Mr Yates noted that despite this finding that the A and B shares ranked equally (and therefore the dividends should have been declared and paid on both), the judge did not find that payment was "due" on the B shares but rather having found unfair prejudice to be made out, adjourned matters to consider the question of relief. The remedy for any unfair prejudice was at the court's discretion and, as *Routledge* shows, does not obviously lead to an order to pay the unpaid dividend.

Discussion

130. This issue turns on two points, and HMRC must succeed on both to make good this argument. The points are, first, whether the appellant would have been successful in petitioning the court under section 994 and, second, whether the remedy ordered by the court would be the payment of the unpaid dividend. We reject HMRC's argument on both grounds.

131. We accept that, in accordance with *Fisher v Cadman,* the court would look at the wider circumstances not just the articles of association or other formal agreements to identify whether there has been unfair prejudice. In the current circumstances the appellant has clearly agreed to the deferral of his indemnity: he is an experienced businessman, the consequences of the Regis board declaring an interim dividend in this way were made very clear to him, it was in his interests to do so and he acted on advice.

132. Further, whilst this point is less clear, nevertheless we find that any remedy would be at the court's discretion and it cannot be said with any confidence that the court would have ordered the payment of the dividend, still less make an order that it was due and payable from 5 April 2016.

DECISION

133. We find for the above reasons that the interim dividend of £20m declared by Regis on 29 March 2016 and paid to the appellant on 16 December 2016 was not due and payable until paid. The appellant's appeal is therefore allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

134. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

IAN HYDE
TRIBUNAL JUDGE

Release date: 01st NOVEMBER 2022