

THE CURRENT TREND IN JUDICIAL AND PARLIAMENTARY RESPONSES TO SHAREHOLDERS UNANIMOUS ASSENT: A COMPARATIVE PERSPECTIVE

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Abstract

The doctrine of shareholders unanimous assent principally recognises the powers of the shareholders to override the procedural requirements for passing resolutions in matters of company business. This principle, which has withstood the test of time, is presently generally referred to as the Duomatic principle. Although generally accepted as a useful tool in expediting corporate decisions and enjoys statutory recognition in some jurisdictions, its scope has been subjected to varying judicial definitions to the extent that unless assent is positively expressed by the relevant organs of the company, the reliance by the courts on the equitable principles to impute assent has been unsettling in some cases. The paper compares the judicial and parliamentary responses to the Duomatic principle in three jurisdictions and argues that the principle should apply to every decision that is within the competence of the relevant organs of the company irrespective of where the procedural rules are prescribed.

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1. Introduction

The company as a juristic person functions by its organs. The two basic organs of the company are the board of directors and the general meeting, the latter comprises of all the shareholders as a composite unit. The board of directors and the general meeting usually discharge their respective functions to the company by passing resolutions. The company's constitution and statute lay down rules of procedure for convening and conducting of company's meetings, whether it be that of the board or shareholders, at which resolutions are passed. Those rules of procedure are, however, not always observed by the relevant organs of the company. The courts have also not always insisted on the strict observance of those rules of procedure, and have shown strong willingness to condone non-compliance where the rules are actually made for the benefit of those who, with full knowledge of their existence, decide to disregard them.

It is, however, not settled in all jurisdictions as to when such rules of procedure or formalities could safely be disregarded or waived, and which organ of the company could waive the rules without incurring adverse legal consequences. The courts in some jurisdictions insist that only the shareholders and not the board of directors could waive the rules of procedure contained in the company's constitution and in the statute where what is sought to be done is

intra vires of the company. In other jurisdictions, the courts decisions suggest that this power of the shareholders, which must be exercised by a unanimous consent, must be in relation to those decisions which could be taken by the shareholders by ordinary resolutions and not those that could be reached only by special resolutions. This paper examines the position of the law in the United Kingdom, Canada and South Africa with a view to discovering in those jurisdictions how the courts and the parliaments have responded to the needs of the company for quick decision making, unhindered by rules of procedure, for the efficient conduct of the company's business.

2. The Principle of Unanimous Assent

The generally accepted procedure for decision making by any of the relevant organs of the company is by holding a meeting, before which notices as prescribed by the company's constitution or the statute are given to members, and resolutions passed accordingly on the agenda of the meeting.¹⁵ This decision making procedure was initially enforced by the courts which

¹⁵ For some discussions on company meetings, see Anthony O. Nwafor 'Impracticability As A Ground For Court-Ordered Company Meeting –In Whose Interest – A Comparative Perspective (PART 1)' (2012) 8 *The Company Lawyer* 18. Anthony O. Nwafor 'Impracticability As A Ground For Court-Ordered Company Meeting –In Whose Interest – A Comparative Perspective (PART 2)' (2012) 9 *The Company Lawyer* 27.

insisted that decisions relating to the conduct of the company's affairs could not be taken otherwise than by passing of resolutions at duly convened meetings. In *Re George Newman & Co.*¹⁶ Lindley LJ, delivering the judgment of the Court of Appeal, held that though there is every probability that the holding of a general meeting would have resulted in the same decision assented to by the shareholders without a meeting, the company is entitled to the protection afforded by a duly convened meeting, and by a resolution properly considered and duly recorded. The value of individual assent was recognised by the court only to the extent of precluding those who gave their assent from complaining against what they have sanctioned, 'but for the purpose of binding a company in its corporate capacity, individual assents given separately are not equivalent to the assent of a meeting'.¹⁷ The decision adopts a strict view of the distinct legal personality of the company by suggesting that while the individual shareholders who assented could be precluded from complaining, the company itself is not so precluded unless such decision is taken collectively at a meeting by the shareholders as an organ of the company. It did not matter to the court that the same decision would have been arrived at by the same shareholders in a duly constituted meeting. The court seemed unduly interested in the form in which a decision is taken and not the substance of that decision. By insisting that formal meetings must be held to pass resolutions on every aspect of the company's undertaking, the case failed to address the practical realities of company's operations. Such a stance would protract decision making in company and invariably significantly slow down the company's business.

It is not surprising that the subsequent English courts decisions refrained from following *Re George Newman's* precedent. In *Salomon v Salomon & Co Ltd*¹⁸ Lord Davey expressly recognised the power of the shareholders to take decision informally for the company where, in a concurring judgment, he stated that the company is bound in a matter *intra vires* by the unanimous agreement of its members. This line of reasoning which was adopted in the subsequent English courts decisions,¹⁹ was popularised by

Buckley J in *Re Duomatic Ltd*²⁰ where two directors of the company, who were also the only ordinary shareholders entitled to vote at the company's meeting, paid themselves salaries from the company's account. The liquidator of the company sought to recover the salaries on the ground that they were not approved at the general meeting as required by the company's articles. Buckley J, while upholding the payment, formulated the basis for the application of the unanimous assent principle as follows:

'[W]here 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 would carry into effect, that assent is as binding as a resolution in general meeting would be.'²¹

Subsequent decisions on this principle have focused mostly on the explanations and expatiations of the conditions which must exist in every decision to warrant the application of the principle. In *Re New Cedos Engineering Co Ltd*,²² for instance, Oliver J stated that

'the ratio of Buckley J's decision is that where that which has been done informally could, but for an oversight, have been done formally and was assented to by 100% of those who could have participated in the formal act, if one had been carried out, then it would be idle to insist upon formality as a precondition to the validity of the act which all those competent to effect it had agreed should be effected'. Similarly, in *EIC Services Ltd v Phipps*²³ Neuberger J observed as follows:

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

¹⁶ [1895] 1 Ch 674 (CA).

¹⁷ *Ibid* at 685. Cf *Baroness Wenlock v River Dee Co* (1883) 36 ChD 675n at 681 – 682n where Cotton LJ said: '[T]he court would never allow it to be said that there was an absence of resolution when all the shareholders, and not only a majority, have expressly assented to that which is being done.'

¹⁸ [1897] AC 22 at 57(HL).

¹⁹ See *Re Express Engineering Works Limited* [1920] 1 Ch 466 (CA) where Lord Steddale MR, speaking for the Court of Appeal, concluded that action taken at an improperly constituted meeting was valid notwithstanding the defect, since all directors and shareholders of the corporation assented. In *Re Oxted Motor Company Limited* [1921] 3 KB 32, Lush and Greer JJ validated an extraordinary resolution passed without the requisite notice on the basis that the only two shareholders had agreed. In *Parker and Cooper Ltd v Reading* [1926] Ch 975 Asbury J held that a debenture, the issuance of which was approved at a meeting at which only improperly elected directors were present, was validly issued since all shareholders had assented. See generally the

Canadian cases of *Mulligan v The Queen* 1999 CanLII 226 (TCC), and *Eisenberg (formerly Walton) v The Bank of Nova Scotia* 1965 CanLII 16 (SCC), [1965] SCR 681 where the above cases were considered and approved by the courts.

²⁰ [1969] 2 Ch 365 at 373C-D.

²¹ This statement by Buckley J is now generally referred to as the *Duomatic* principle, which, as explained by Mummery LJ in *Moncor (London) Ltd v Euro Brokers Holdings Ltd* [2005] EWCA Civ 105 para 57, is 'so called because its formulation by Buckley J in *Re Duomatic* [1969] 2 Ch 365 at 373C-D, following a review of the authorities, is familiar to Company Law practitioners in the context of the validity of actions by, or on behalf of a company, without formal authorisation by a resolution of a properly constituted and duly convened board meeting'.

²² [1994] 1 BCLC 797 at 814(Ch).

²³ [2003] EWHC 1507 (Ch) para 122 underlined by his Lordship. Italics supplied.

This expression reflects an expansion of this principle to accommodate conducts which would invoke some equitable considerations that could prevent a shareholder who did not positively express consent from resiling from the decision. The full import of this equitable consideration will be analysed later.

In Canada the trend established by the English courts has been adopted. In *Eisenberg (formerly Walton) v The Bank of Nova Scotia*²⁴ Spence J had, in a case in which the trustee in bankruptcy of the company had sought to recover from the bank certain sums realized by the bank as security for a loan to the director and president, who was also the sole beneficial owner of all the issued shares of the company and who had given his assent to the pledging of the company's property for the loan, while relying on the English authorities,²⁵ held as follows:

'Upon a consideration of the above authorities, I have been led to the conclusion that a corporation, when a matter is *intra vires* of the corporation, cannot be heard to deny a transaction to which all the shareholders have given their assent even when such assent be given in an informal manner or by conduct as distinguished from a formal resolution at a duly convened meeting. Since, of course, George Rideout not only assented to the transaction but instigated it, his assent being, as admitted, that of the sole beneficial shareholder therefore binds the company.'²⁶

The court distinguished the English court's decision in *Re George Newman's case*²⁷ on the ground that the transaction, the subject matter of dispute, was *ultra vires* of the company and could not be validated even by the vote of all the shareholders in a general meeting. Gerald J Rip in *Mulligan v The*

*Queen*²⁸ extended the application of this principle to decisions that fall within the powers of the board by holding that where there is a unanimous shareholder resolution or director approval of an action, the requirement for an actual meeting may be dispensed with.

The South African courts, generally, similarly agree that the shareholders could, by a unanimous assent, waive any prescribed formalities for the passing of resolutions at the general meeting. In *Gohlke and Schneider and Another v Westies Minerale (EDMS) BPK and Another*²⁹ Trollip JA held that the statutory contract embodied in the company's articles is neither immutable nor indefeasible, and that it is within the powers of the members, where they have *bona fide* unanimously agreed, to depart from the articles and to act in a manner *intra vires* of the company's memorandum but contrary to the articles. The rationale for this decision, as observed by the judge, is that since the holding of a general meeting is only the formal machinery for securing the assent of members or the required majority of them, if the assent of all the members is otherwise obtained, that should be just as effective.³⁰ Seligson AJ agreed with this view in *Transcash SWD (Pty) Ltd v Smith*³¹ where he held that if the shareholders of a company unanimously agree, albeit informally, to the appointment of a particular person as an additional director, such appointment would be just as effective as if it had taken place in terms of the articles of association. Similarly, in *Levy and Others v Zalrut Investments (Pty) Ltd*³² Van Zyl J held that the shareholders could by unanimous assent waive formalities prescribed for their own benefit. The extant legal positions were reconsidered and approved by Cameron J in *Southern Witwatersrand Exploration Co Ltd v Bisichi Mining Plc and Others*³³ where he resolved that generally company decisions are arrived at by means of formal resolutions taken at properly constituted meetings of the company, but that the unanimous assent of all the members, when fully aware of what is being done, is an alternative method of passing valid company resolutions - despite the fact that the procedures prescribed by the articles have not been observed.³⁴

²⁴ 1965 CanLII 16 (SCC), [1965] SCR 681.

²⁵ Such as *Re Express Engineering Works Limited* [1920] 1 Ch 466, *Re Oxted Motor Company Limited* [1921] 3 KB 32, *Parker and Cooper Limited v Reading* [1926] Ch 975, *AG Canada v Standard Co of New York* [1911] AC 498, and an earlier Canadian Supreme Court decision in *Re Almur Fur Trading Co, Bank of United States v Ross* [1932] SCR 150 at 158 per Lamont J who held *obiter* that where all the shareholders of the company have ratified or are estopped from objecting to the making of the notes by the president, it is not open to the liquidator to question his authority. Also considered is the British Columbia Court of appeal decision in *Re Allish v Allied Engineering of BC Ltd* (1957) 9 DLR (2d) 688 at 694, where Sheppard JA held that ratification does not require a formal resolution but may be implied from all the circumstances. See also the recent English court decision in *NBH Ltd v Hoare* [2006] 2 BCLC 649, [2006] EWHC 73 (Ch) relating to an informal approval given by the sole shareholder for the sale of company property and was upheld by the court as complying with the statute that requires prior approval by resolution of the company in a general meeting.

²⁶ *Supra* note 10 at 694. See also *Associated Display Services Ltd v Northland Bank* 1986 CanLII 1825 (AB QB) where the court held that there being sufficient evidence that there was unanimous shareholder assent to the issuance of the \$12,500,000.00 debenture and the supplemental debenture, accordingly the \$12,500,000.00 debenture and the supplemental debenture constituted legal, valid and binding obligations of the company.

²⁷ *Supra* note 2.

²⁸ 1999 CanLII 226 (TCC) para 42. See also *Mullin v Canada* TCJ No 104 (Tax Court) where Dassault TCCJ held that where there are discussions during which unanimous agreement is reached, the requirement for formalities may be dispensed with. The court in *Toronto Dominion Bank v Coopers & Lybrand Ltd* 1982 CanLII 1125 (AB QB) also approved the application of this principle.

²⁹ 1970 (2) SA 685 (A).

³⁰ *Ibid* at 693.

³¹ 1994 (2) SA 295 (C).

³² 1986 (4) SA 479 (W).

³³ 1998 (4) SA 767(W).

³⁴ See MS Blackman, 'Companies' in WA Joubert (ed) *The Law of South Africa* (1996) Vol 4 Part 2 para 40 where the writer expressed a similar view as the position of the law in South Africa. See also *Simcha Properties 6CC v San Marcus Properties (Pty) Ltd* [2010] ZASCA 54.

3. Justifications for the Application of Unanimous Assent

The courts have rationalised, on various grounds, the continued application of the principle of unanimous assent which Mummery LJ had described in *Monecor (London) Ltd v Euro Brokers Holdings Ltd*³⁵ as ‘sound and sensible principle of law’ in that it allows members of the company to reach an agreement without the need for strict compliance with formal procedures, where such procedures exist only for the benefit of those who have agreed not to comply with them. A similar reason was advanced by Trollop JA in *Gohlke and Schneider and Another v Westies Minerale (EDMS) BPK and Another*³⁶ where he described the application of this principle as a sound one, which gives effect to the substance rather than the mere form of the members assent. Meagher JA in *Herman v Simon*³⁷ upheld the application of the principle as it ‘enables the shareholders to waive formalities in pursuit of substantial result’. Grantham explained that the point emphasised by the authorities is that, aside from these personal rights, whether the business is transacted at a formal meeting, a gathering of shareholders, or by consultation with shareholders separately, it is the agreement that is operative and not the means by which it is reached or expressed.³⁸

Some writers have similarly proffered justifications for the application of this principle. Davies, Worthington and Micheler observed that the main purpose of the principle is to allow shareholders to decide informally on matters within their competence. Unanimous assent was distinguished from a written resolution by the writers in that the latter allows shareholders to adopt resolutions outside meetings, while the former permits wholly informal methods of giving shareholder consent by those entitled to attend and vote at meetings. The accepted explanation is that it would be inequitable to allow those who have assented to a decision to recede from it.³⁹ This aligns with the decision of Oliver J in *Re New Cedos Engineering Co Ltd*⁴⁰ where the judge held that ‘the ratio of Buckley J’s decision [in *Re Duomatic Ltd*] is that where that which has been done informally could, but for an *oversight*, have been done formally and was assented to by 100 per cent of those who could have participated in the formal act, if one had been carried out, then it would be idle to insist in formality as a precondition to the validity of the act

which all those competent to effect it had agreed should be effected’.⁴¹

A different opinion on written resolution was expressed in *Henochsberg*⁴² where the writers described a written resolution as provided in section 60 of the South African Companies Act 71 of 2008 as ‘a statutory recognition of the *Duomatic* principle’. A close look at that provision does not seem to confirm this assertion. Section 60 provides as follows:

‘(1) A resolution that could be voted on at a shareholders meeting may instead be-

(a) submitted for consideration to the shareholders entitled to exercise voting rights in relation to the resolution; and

(b) voted on in writing by shareholders entitled to exercise voting rights in relation to the resolution within 20 business days after the resolution was submitted to them.

(2) A resolution contemplated in subsection (1)-

(a) will have been adopted if it is supported by persons entitled to exercise sufficient voting rights for it to have been adopted as an ordinary or special resolution, as the case may be, at a properly constituted shareholders meeting; and

(b) if adopted, has the same effect as if it had been approved by voting at a meeting.

(3) An election of a director that could be conducted at a shareholders meeting may instead be conducted by written polling of all of the shareholders entitled to exercise voting rights in relation to the election of that director.’

The only similarity between this provision and the *Duomatic* principle is that it permits company’s resolution to be passed outside a formal meeting. But unlike in *Duomatic*, there are formalities or procedures stipulated for the passing of such resolution under the provision. Not only that the resolution must be in writing, which is not required in *Duomatic*, it must also be passed within 20 business days and by the requisite number of shareholders who could have passed a similar resolution in a duly convened shareholders meeting. Subsection 3 that deals with the election of directors came close but certainly not synonymous with the *Duomatic* principle as it refers to a ‘written polling of all the shareholders’ and not ‘a written consent of all the shareholders’ which would have incorporated that principle. The principle stresses unanimity of shareholders as evidence of a waiver of prescribed

³⁵ [2003] EWCA Civ 105 par 62. See also *Schofield v Schofield* [2011] EWCA Civ 154 para 24.

³⁶ 1970 (2) SA 685 (A).

³⁷ (1990) 8 ACLC 1094 at 1096 (CA).

³⁸ Ross Grantham, ‘The Unanimous Consent Rule in Company Law’ (1993) 52(2) *Cambridge Law Journal* 245 at 251.

³⁹ Paul L Davies QC, Sarah Worthington QC & Eva Micheler *Gower & Davies Principles of Modern Company Law* 9 ed (2012) 443.

⁴⁰ [1994] 1 BCLC 797 at 814 (Ch).

⁴¹ Italics supplied. Waiver is not really attained by ‘oversight’ as the statement literally implies. Waiver is a decision intentionally taken to forgo an existing right, and which could be expressed positively or implied by conduct. See also *Wright v Atlas Wright (Europe) Ltd* [1999] EWCA Civ 669, [1999] 2 BCLC 301 at 314-315, and generally, Derek French, Stephen Mayson & Christopher Ryan *Mayson, French & Ryan on Company Law* 29 ed (2012) 418.

⁴² See Piet Delpont, Quintus Vorster, David Burdette, Irene-marie Esser & Sulette Lombard *Henochsberg on the Companies Act 71 of 2008* 1 ed (2013) Vol 1 at 228.

formalities or procedures for the passing of a resolution which section 60 does not envisage.⁴³

The *Duomatic* principle is also justified on both pragmatic and policy grounds. The former looks at the realities, especially in small companies where shareholders do not have access to legal advice, and therefore conduct their affairs largely informally, the latter considers that so long as they are acting unanimously, the owners of a business need not pay undue attentions to issues of procedure while taking business decisions.⁴⁴ The pragmatic view is further strengthened by consideration of the composition of some of these companies, especially the private companies with limited memberships, the affairs of which are conducted more like a private business, where there is little or no distinctions between the affairs of the company and those of its owners. Insisting that all procedural requirements must be complied in such cases will serve no useful purpose. It is only proper in such cases that the doctrine of corporate separate personality should yield ground to the principle of unanimous assent.

Some hiccups have been observed by Professor Beuthin⁴⁵ in the application of this principle, among which are; the subtle pressure from the chairman that could bring about such decision, depriving of the shareholders of the opportunity of open debate on corporate issues, absence of record of minutes and even resolutions passed, and that the holders of other classes of shares, such as the preference shares, who would ordinarily not be consulted, but would have found ways of putting forth their opinions through other shareholders at a duly convened general meeting are denied of such opportunity.

These are strong, but certainly not insurmountable problems. It should be emphasised that resolution by a unanimous assent is not passed in secrecy. In reality, when shareholders assent is sought, they are at liberty to consult, and often times do consult, their peers if there is need, before giving their assent. Even at formal meetings, all the shareholders need not sit together at same venue, yet it has never been suggested that this should be discouraged as depriving them of the opportunity to engage in robust debate and argument on corporate affairs. It need not be over emphasised that excessive argument could delay decisions on urgent matters and invariably retard corporate progress. Although there may be no record or minutes of the meeting when resolutions are passed by unanimous assent, there is nothing that prevents the company from recording the

resolution, and this is done in most companies that value the importance of keeping records, which could be filed with the registrar if it touches on matters that require registration. The obvious advantages in upholding this principle certainly overshadow the inadequacies which should be seen as no more than the imperfections inherent in every phenomenon, or put more commercially, as part of the risk of corporate operations.

4. Statutory Recognition of Unanimous Assent

The principle of unanimous assent is now recognised either expressly or implicitly by the respective Companies Acts of the jurisdictions under consideration. In Canada, the Business Corporations Act of the British Columbia⁴⁶ of 2002, for instance, provides in section 182 (1) as follows:

‘Subject to subsections (2) to (5), a company must hold an annual general meeting,

(a) for the first time, not more than 18 months after the date on which it was recognized, and

(b) after its first annual reference date, at least once in each calendar year and not more than 15 months after the annual reference date for the preceding calendar year.

(2) Subject to subsection (3), all of the shareholders entitled to vote at an annual general meeting of a company may,

(a) by a unanimous resolution passed on or before the date by which that annual general meeting is required to be held under this section, defer the holding of that annual general meeting to a date that is later than the date by which the meeting is required to be held under subsection (1),

(b) by a unanimous resolution, consent to all of the business required to be transacted at that annual general meeting, or

(c) by a unanimous resolution, waive the holding of

(i) that annual general meeting,

(ii) the previous annual general meeting, or

(iii) any earlier annual general meeting that the company had been obliged to hold.

(5) If a unanimous resolution is passed in relation to an annual general meeting under subsection (2) (b) or (c), the company need not hold that annual general meeting.’

The Companies Regulations made pursuant to this provision clarifies the substantive law in the follows terms:

‘7.2 If all of the shareholders who are entitled to vote at an annual general meeting consent by a unanimous resolution under section 182(2)(b) of the Business Corporations Act to all of the business that is

⁴³ Note that section 288 of the UK Companies Act, 2006 similarly permits the passing of written resolution but that has never been understood as a reflection of the *Duomatic* principle.

⁴⁴ See Nigel Banerjee, ‘Informal Decisions of Shareholders – the Limits of the *Duomatic* Principle’ available at <http://www.jordanslawforbusiness.co.uk/articles/informal-decisions-of-shareholders-the-limits-of-the-duomatic-principle> accessed on 10 July 2013.

⁴⁵ RC Beuthin ‘The Principle of Unanimous Consent’ (1974) 91 *South African Law Journal* 2 at 8-9.

⁴⁶ [SBC 2002] Chapter 57. Note that there is no similar provision under the general statute, ie, Canada Business Corporations Act Chapter C-44 of 2009, yet the court decisions in all the provinces are very much similar.

required to be transacted at that annual general meeting, the annual general meeting is deemed to have been held on the date selected, under section 182(3) of the Business Corporations Act, in the unanimous resolution.⁴⁷

Although specific reference is made by this provision to the annual general meeting, decisions of courts in other provinces are not so restricted. In *Anderson Lumber Company Ltd v Canadian Conifer Ltd*,⁴⁸ a case from the Alberta province, Moore J held that the principle applies as well to extraordinary and special resolutions as it applies to ordinary resolutions, and to resolutions of a class of members, which could be reached in any other shareholders meeting.

The UK Companies Act of 2006 implicitly recognises this principle in section 281(4) (a) which provides that '[n]othing in this Part affects any enactment or rule of law as to things done otherwise than by passing a resolution'.⁴⁹ This provision suggests that company's decisions could be taken in any other manner (which could be by a unanimous assent) other than by passing of resolutions in a formal meeting.⁵⁰ The view expressed by French, Mayson and Ryan that the provision does not mean that a unanimous agreement without meeting, though it may be an effective agreement, is the same as a resolution as defined by the Act,⁵¹ does not seem to capture the true import of that provision. The Act does not specifically define 'resolution', although there are provisions referring to different types of resolutions.⁵² A number of other provisions in the Act show that resolutions are not different from unanimous assent. For instance, section 355 requires every company to keep records comprising copies of all resolutions of members passed otherwise than at general meetings. Unanimous assent is one of those resolutions (decisions) that could be passed outside the general meetings of the company the record of which must be kept under this provision.⁵³ Section 30(1) provides that a copy of every resolution or agreement or (in the case of a resolution or agreement that is not in writing) a written memorandum setting out its terms, must be forwarded to the registrar within 15 days after it is passed or made. A combination of both provisions yields the inference that a unanimous assent is not just an agreement, but a resolution which is not in writing, and which must be recorded by the company in its book and a

memorandum of which should be forwarded to the registrar. A unanimous assent thus commands equal respect under the Act as a resolution passed in a formal meeting of the company.⁵⁴ A specific provision is now contained in section 239 of the UK Companies Act which authorises members to ratify, by unanimous consent, any conduct of a director which amounts to negligence, default or breach of duty of trust in relation to the company.

In South Africa, the Companies Act 71 of 2008 provides for the taking of decisions without following the formalities of a meeting in one shareholder companies and companies in which every shareholder is also a director.⁵⁵ The provision extends to the decision by directors where there is only one director in the company.⁵⁶ In cases in which every shareholder is a director, there are conditions to be fulfilled as set down in section 57(4) of the Act which provides as follows:

(4) If every shareholder of a particular company, other than a state-owned company, is also a director of that company—

(a) any matter that is required to be referred by the board to the shareholders for decision may be decided by the shareholders at any time after being referred by the board, without notice or compliance with any other internal formalities, except to the extent that the Memorandum of Incorporation provides otherwise, provided that—

(i) every such person was present at the board meeting when the matter was referred to them in their capacity as shareholders;

(ii) sufficient persons are present in their capacity as shareholders to satisfy the quorum requirements set out in section 64; and

(iii) a resolution adopted by those persons in their capacity as shareholders has at least the support that would have been required for it to be adopted as an ordinary or special resolution, as the case may be, at a properly constituted shareholder's meeting'.

There is some difficulty in understanding the true import of this provision as relates to the conditions (i) – (iii). Should they be read conjunctively or disjunctively? The use of 'and' instead of 'or' in the second paragraph creates the

⁴⁷ See British Columbia Companies Regulation 65 of 2004, OC 201/2004.

⁴⁸ 1976 CanLII 296 (AB QB).

⁴⁹ The provision is contained in Part 13 of the Act which deals with resolutions and meetings of the company.

⁵⁰ See Davies, Worthington & Micheler op cit note 25 at 443 where the authors described the provision as preserving the common law rules and applies to public as well as private companies.

⁵¹ French, Mayson & Ryan op cit note 27 at 417.

⁵² See ss 282 and 283 for ordinary and special resolutions respectively.

⁵³ The other is a written resolution. See s 288 of the UK CA.

⁵⁴ The reason for the non-specific codification of this principle, as stated by Hannigan, is to preserve the flexibility enjoyed at common law by matters of company resolutions as 'codification would lead to rigidity and restrictions on the operations of this beneficial principle'. See Brenda Hannigan *Company Law* 3 ed (2012) 346.

⁵⁵ See s 57(2)(4) of the SA CA.

⁵⁶ See s 57(3) of the SA CA. Those provisions were commended by Cassim for 'disposing of unnecessary and superfluous compliance with internal formalities'. See Rehana Cassim 'Governance and Shareholders' in Farouk HI Cassim, Maleka Famida Cassim, Rehana Cassim, Richard Jooste, Joanne Shev & Jacqueline. Yeats (eds.), *Contemporary Company Law* (2011) 338, Rehana. Cassim 'Governance and Shareholders' in Farouk HI Cassim, Maleka Famida Cassim, Rehana Cassim, Richard Jooste, Joanne Shev & Jacqueline. Yeats (eds.) *The Law of Business Structures* (2012) 215.

impression that all the conditions must be fulfilled conjunctively, but that would lead to absurdity. If, as in the first paragraph, every shareholder is required to be present in that capacity at the board meeting, the reference to a quorum of shareholders in the second paragraph is simply of no essence.⁵⁷ The first two paragraphs should be construed disjunctively as though there were an ‘or’ at the end of the first paragraph so that the requirement of a quorum in the second paragraph will provide an alternative to having all the members in attendance. If construed in this manner, the effect would be that the first condition reflects the true requirement of a unanimous assent as it demands the presence of all the shareholders who are also directors at the board meeting before a matter is referred to the shareholders. The requirements for a quorum and sufficient support for the passing of resolutions under the other two successive paragraphs respectively, imply that decisions taken under the provision could be without unanimity. A quorum for the purpose of a meeting does not require the presence of all the members entitled to attend and vote at the meeting. A resolution passed at such meeting, though conveniently passed, is not a unanimous resolution under the *Duomatic* principle. This provision is apparently a statutory version of the English court decision in *Re Express Engineering Works Ltd*⁵⁸ which approved of a decision taken by an incompetent board where all the board members are the same as the shareholders of the company. Lord Sterdale MR observed in his judgment that ‘although [the meeting] was referred to in the minutes as a board meeting, yet if the five persons present had said, “We will now constitute this a general meeting”, it would have been within their powers to do so, and it appears to me that that was in fact what they did’.⁵⁹ This is an acknowledgment of the overriding powers of the shareholders to ratify inherent defects in the exercise of the management powers of the board,⁶⁰ which aligns with corporate realities as the directors are accountable to the shareholders, the true owners of the company. A similar position was earlier adopted by the Privy Council in *The Attorney General for the Dominion of Canada v The Standard Trust Company of New York*⁶¹ in which four members of a syndicate incorporated a company to which they sold their assets at a profit. This transaction was ratified at the subsequent meeting of the shareholders at which the four directors who were the four members of the syndicate were present. An attempt by the liquidator to invalidate the transaction and hold the directors accountable was declined by the Privy Council. Viscount Haldane LJ conceded that what the directors

did could be seen as a breach of duty, but even in that case, they were the only shareholders.

‘They and they alone were interested in the capital of the company.... In proceedings of the character of the present the title of the liquidator as representing creditors cannot be higher than the title of the company against whom the creditors claim. In this case the interests of the company and of the syndicate were identical. The only persons beneficially interested in the company were the four members of the syndicate.’⁶²

In cases of this nature, it will not make any business sense to deny the validity of the decision when the result would be obvious if the matter is referred back to the shareholders who are the same members of the board. The South African statutory provision has lowered the threshold for unanimity by laying emphasis on quorum which implies that all members need not agree as is the case under case law. The decisions of the courts in South Africa have, however, shown that in spite of the limits of the statutory provisions, the principle could apply to other areas of corporate decision making based on individual cases.

5. Requirements for the Application of Unanimous Assent

The courts decisions bordering on unanimous assent have shown that recourse to the application of this principle is not lightly had. Certain conditions, some stringent, must be fulfilled by the person seeking the assistance of the court to circumvent formalities provided in the company’s constitution and the Companies statute for taking decisions on behalf of the company and to make such decisions binding on the company and the shareholders alike. The courts insist that there must be consent, even if informally given, by those involved in the decision making and who have powers to make such decision.

(a) What Constitutes Informal Assent

A valid informal assent is that given by the members who are entitled to attend and vote at meeting of the company,⁶³ and must relate to matters *intra vires* of the company.⁶⁴ The assent must be given by the members with full knowledge of the procedural requirements of the subject matter of the decision which exist for their own protection.⁶⁵ A

⁵⁷ The provision in the second paragraph has been described as superfluous. See Delpont, Vorster, Burdette, Esser & Lombard op cit note 28 at 223.

⁵⁸ [1920] 1 Ch 466 (CA).

⁵⁹ Ibid at 470.

⁶⁰ See French, Mayson & Ryan op cit note 37 at 416.

⁶¹ [1911] AC 498 (PC).

⁶² Ibid at 504. See also *Eisenberg (formerly Walton) v The Bank of Nova Scotia* [1965] SCR 681 where this decision was approved by the Supreme Court of Canada.

⁶³ See *Re Duomatic Ltd* [1969] 2 Ch 365 at 373 per Buckley J.

⁶⁴ See *Salomon v Salomon & Co Ltd* [1897] AC 22 at 57 (HL) per Lord Davey.

⁶⁵ See *Euro Brokers Holdings Ltd v Monecor (London) Ltd* [2003] EWCA Civ 105, [2003] 1 BCLC 506 para 62 per Mummery LJ. In *Kinlan v Crimmin* [2006] EWHC 779 (Ch) para 44 Phillip Sales sitting as a Deputy Judge held that the extent to which the *Duomatic* principle may apply in relation to adherence to the specific requirements of the statute turns on the question whether any particular requirement of the provisions which is sought to be waived is properly to be regarded as a provision for the protection

number of the features of a valid assent are reflected in the judgment of Neuberger J in *EIC Services Ltd v Phipps*⁶⁶ as follows:

‘The essence of the Duomatic principle, as I see it, is that, where the articles of a company require a course to be approved by a group of shareholders at a general meeting, 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.’

In *Schofield v Schofield*⁶⁷ Etherton LJ emphasised that such an approval could be given expressly or by implication, verbal or by conduct, given at the time or later, but nothing short of unqualified agreement, objectively established, will suffice. The rationale for insisting on a decision that could be objectively assessed was stated by Newey J in *Rolfe v Rolfe*⁶⁸ as being that

‘a mere internal decision, unaccompanied by outward manifestation or acquiescence, to be enough would ... give rise to unacceptable uncertainty and, potentially, provide opportunities for abuse. A company may change hands or enter into an insolvency procedure; in either event, it is desirable that past decisions should be objectively verifiable...., there must be material from which an observer could discern or (as in the case of acquiescence) infer assent’.

Assent given by acquiescence has not been precisely judicially defined. Acquiescence, as an equitable principle, is usually inferred from the conduct of the parties, and the aim is to prevent a party from asserting the opposite where by his conduct the other party is made to believe that he has accepted the existing position. The conduct, however, must point directly to the established fact to raise the inference of acquiescence. This was buttressed by the decision of Bingham LJ in *The Aramis*⁶⁹ where he said:

‘I do not think it is enough for the party seeking the implication of a contract to obtain "it might" as an answer to these questions, for it would, in my view, be contrary to principle to countenance the implication of a contract from conduct if the conduct relied upon is no more consistent with an intention to contract than with an intention not to contract. It must, surely, be necessary to identify conduct referable to the contract contended for or, at the very least,

conduct inconsistent with there being no contract made between the parties to the effect contended for. Put another way, I think it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract.’⁷⁰

In *Ho Tung v The "Man On" Insurance Co Ltd*⁷¹ the Privy Council held that the shareholders have acquiesced to the contents of unsigned articles of association which was registered, published and put forward as the company’s only articles of association, and has been acted on, amended and added to by the shareholders of the company, and on the basis of which the company’s business was conducted for over 19 years without any objection, and was acknowledged by the company on record as its articles of association. Lord Davey, who delivered the judgment of the Privy Council, held that ‘in these circumstances [their Lordships] are entitled to draw the inference that all the shareholders have accepted and adopted the Articles as the valid and operative Articles of Association of the Company’.⁷²

A unique feature of this case as revealed by the facts is that the challenge against the unregistered articles came from an outsider, the transferee of shares. In such a case, the court could not have justifiably denied the validity of the unregistered articles which the company and the shareholders had acknowledged, and on the basis of which the company’s business was conducted for 19 years. Now the question is; would the court have reached a similar decision if the challenge had come from one of the shareholders who only became aware after 19 years that the articles of association was not registered? The decision of Neuberger J in *EIC Services Ltd v Phipps*⁷³ suggests that a member cannot be deemed to have given assent unless such a member is shown to have been ‘aware of the relevant facts’.⁷⁴ In *Rolfe v Rolfe*⁷⁵ Newey J emphasised that mere internal decision, unaccompanied by outward manifestation is not sufficient to infer acquiescence. Similarly, in *Re D’Jan of London Ltd*⁷⁶ where the negligence of a director, the holder of 99 per cent of the company’s shares, had deprived the company of the benefit of an insurance policy. It was argued in his favour that being the holder of an overwhelming majority of the shares, and his wife the only other shareholder, his negligence should be taken as ratified as his wife did not raise any issues on the matter. Hoffmann LJ,

of the current members of the company or as a provision to confer protection on a wider class of persons (in particular, in relation to the creditors of the company). If it is a provision of the former kind, it would be open to the relevant members of the company acting informally but unanimously to waive compliance with it. If it is a provision of the latter kind, compliance with it could not be waived by the members, even if they act unanimously. See also *Re Torvale Group Ltd* [1999] 2 BCLC 605(Ch).

⁶⁶ [2003] EWHC 1507 (Ch), [2003] 1 WLR 2360 para 122 underlined by his Lordship.

⁶⁷ [2011] EWCA Civ 154, [2011] 2 BCLC 319.

⁶⁸ [2010] EWHC 244 para 41.

⁶⁹ [1989] 1 Lloyd’s Rep 213 at 224(CA).

⁷⁰ See also *Dashfield v Davison* [2008] EWHC 486 (Ch) para 44 where this expression was adopted by Lewison J.

⁷¹ [1901] AC 232 (PC).

⁷² *Ibid* at 234-235.

⁷³ [2003] EWHC 1507 (Ch), [2003] 1 WLR 2360 para 122.

⁷⁴ The court was unwilling to accept that members who were informed by telephone discussion that bonus shares were to be issued and which they actually received, had authorised, (or at least acquiesced) to the issue of the bonus shares as they were not aware that the source of the funds was the capitalisation of the company’s reserves.

⁷⁵ [2010] EWHC 244 (Ch).

⁷⁶ [1994] 1 BCLC 561(Ch).

while dismissing the argument, held that the *Duomatic* principle ‘requires that the shareholders should have, whether formally or informally, mandated or ratified the act in question. It is not enough that they probably would have ratified if they had known or thought about it before the liquidation removed their power to do so’.⁷⁷ In *The Secretary of State for Business Innovation and Skills v Doffman*⁷⁸ Newey J stated that the principle will not apply if the shareholders did not address their minds to the matter in question.

These decisions suggest that there cannot be an inference of acquiescence in matters in which the members are not cognisant or have addressed their minds. It would not make any difference that such a position had existed over a long period of time as in *Ho Tung’s case*. That decision obviously will not assist the company if a member who is unaware of the wrongful conducts of the directors in the exercise of their management functions challenges such conducts. The directors will not be absolved by simply pleading that such wrongful conducts were in the past, they must also show that the members were aware of their existence but refrained from taking action. It is only then that acquiescence could be inferred.

This analysis shows that the doctrine of acquiescence cannot be relied upon in all cases to meet the demands of justice due to its emphasis on knowledge of the existence of the relevant facts. The cloak of knowledge can always be employed to mask obvious indolence and in that guise successfully pull back the wheels of corporate business. The courts are alert to this challenge and have adopted some level of flexibility as permitted by equity while dealing with the facts of individual cases. Newey J demonstrated this judicial attitude in *Doffman’s case* where he stated that the circumstances of the case could make it inequitable for the shareholders to deny that they have given their approval. The intervention of equity was invoked in *Re Bailey, Hay & Co Ltd*,⁷⁹ a case in which all the shareholders had attended a meeting on a notice which unknown to them was one day short of the prescribed period in the company’s articles. The validity of the resolution passed at the meeting was challenged over three years later, by three of the shareholders who had abstained from voting, although one of them at least knew about the defective notice two weeks after the meeting. Brightman J, while dismissing the protest, held as follows:

‘What these corporators did and did not do after 9 December 1965 down to 12 December 1969 when they swore their affidavits disclosing this defence points, in my view, to one conclusion only. The conclusion is that they outwardly accepted the resolution to wind up as decisively as if they had positively voted in favour of it. If corporators attend a meeting without protest, stand by without protest

while their fellow-members purport to pass a resolution, permit all persons concerned to act for years on the basis that that resolution was duly passed and rule their own conduct on the basis that the resolution is an established fact, I think it is idle for them to contend that they did not assent to the purported resolution.’⁸⁰

The decision as borne by the facts could not have been founded on acquiescence as suggested by some writers.⁸¹ Acquiescence as disclosed by the authorities must always be accompanied with knowledge. One does not acquiesce to what one does not know. But the length of time it took to protest that which has come to a person’s knowledge could make it inequitable for the court to accede to such protest. This could invoke the equitable doctrine of laches, a principle explained by Blackburn LJ in *Erlanger v New Sombrero Phosphate Co*⁸² as follows:

‘The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be *practically unjust* to give a remedy, either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material.... Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.... The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry.’

The decision in *Bailey’s case* was not followed by Neuberger J in *EIC Services Ltd v Phipps*,⁸³ it was distinguished in a manner that uncomfortably subjects the application of this principle more to the disposition of the presiding judge than on any established basis. This was a case in which the issue of bonus shares that took place on the 15th December 1999 was challenged on the 18th December 2001 by some of the shareholders who have received the bonus shares, and well after the company has been taken over and its name changed. The ground for protest was that the consent of the shareholders was

⁸⁰ [1971] 3 All ER 693 (ChD) at 693-694.

⁸¹ See French, Mayson & Ryan op cit note 46 at 416-417 where the authors summarised Brightman J’s decision as being that the acquiescence of the shareholders must be taken as an assent to the resolution so that it should be deemed to have been passed by the shareholders unanimously.

⁸² (1878) 3 App Cas 1218 at 1279-1280, quoting from *Lindsay Petroleum Company v Hurd* ((1874) LR 5 PC 221 at 239 a decision relied on by Brightman J in *Bailey’s case*. Emphasis his Lordship’s.

⁸³ [2003] EWHC 1507 (Ch), [2003] 1 WLR 2360 .

⁷⁷ Ibid at 564.

⁷⁸ [2010] EWHC 3175 (Ch).

⁷⁹ [1971] 1 WLR 1357, [1971] 3 All ER 693 (ChD).

not obtained before the bonus shares were issued as required by the company's articles. Neuberger J accepted that 'each of the 13 shareholders was told, on the telephone, of the projected bonus issue, and its general effect, before 15th December 1999, but that there was *no question of their consent being sought or given in those telephone conversations*'.⁸⁴ Accordingly, the Judge held that the *Duomatic* principle was not satisfied by the telephone discussions between the three directors and the 13 shareholders prior to the 15th December 1999.

Question could be asked as to why none of the 13 shareholders who were informed during the telephone discussion express any concern at the bonus issue? His Lordship's response seems to be that '[t]he shareholders have simply been told about the action or intended action, *on the basis that it is something which can be and has been or will be left to the directors to decide on*, and no question of assent arises'.⁸⁵ If that is the true position, the next question would be; why should the directors engage in telephone discussions with the shareholders in a matter that is left to the directors to decide, and before taking that decision? The proper inference from the telephone discussion (not just information) is that at least the support, if not the approval, of the shareholders was sought for the intended action by the directors. The failure by any of those shareholders who was informed to express an objection should justifiably have been construed as acquiescence for the purpose of the application of the *Duomatic* principle.⁸⁶ It is right, as held by the Judge,⁸⁷ that waiver requires the person who waives to have full knowledge of the legal right which he is waiving. But that should not turn the directors, in a case such as the present, into school teachers educating shareholders on the contents of their own undertaking as embodied in the company's constitution. The distinction drawn by the Judge between this case and *Bailey's case*, seems also inappropriate, where he observed that in *Bailey's case* '[b]y attending the meeting and not raising the point that the notice was one day short, and by standing by while the liquidator was appointed, the three non-voting shareholders probably lost their right to take the point'.⁸⁸ These could not have been the reasons for the shareholders in *Bailey's case* losing their rights of protest. It was revealed by the facts that they were not aware of the defective notice as at the time they attended the meeting and up to the time of

passing of the resolution, and as such, could not have raised any objection at the meeting. They were denied the right of protest as a result of their subsequent conduct after they had become aware of the defective notice, such as the length of time it took them to initiate proceedings and other intervening circumstances which made it inequitable to allow their protest against the resolution at that point in time. The same set of equitable considerations should have guided the decision in *EIC Services' case*. They shareholders, in that case, were informed of the bonus issues, they in fact received their bonus shares, the company's name has changed, and has been taken over by a new company, and the protest was raised after a lapse of over two years. These are sufficient facts to invoke the doctrine of laches as in *Bailey's case*. It is some of these inconsistencies in decisions of courts that informed the description by writers of cases that rely on the interplay of acquiescence, estoppel and laches as perhaps the most difficult in applying the *Duomatic* principle.⁸⁹ The solution in such difficult cases would be to consider the purpose and the underlying rationale of the statutory formality in question. Where the purpose of the provision goes beyond the protection of the interests of those who have supposedly waived the formalities, the court should decline to apply the *Duomatic* principle.⁹⁰

In South Africa, the courts have similarly recognised that equitable consideration as represented by the doctrine of estoppel, could be a material factor whenever a breach of company's regulations is alleged. Unless there is an issue of public interest involved, the court will have regard to the mischief which the regulation seeks to prevent on the one hand, and the conduct of the parties and their relationships on the other hand.⁹¹ The parameters within which this principle operates in cases such as those under discussion were defined by Van Zyl J in *Levy and Others v Zalrut Investments (Pty) Ltd*⁹² where the Judge stated that estoppel should be permissible in cases where the particular act is *intra vires* of the company and relates to internal rules. In such a case, persons dealing with the company may assume that the requisite formalities have been complied with and raise an estoppel should non-compliance with such

⁸⁴ Ibid para 132, emphasis supplied.

⁸⁵ Ibid para 133, emphasis supplied.

⁸⁶ See *Re Home Treat Ltd* [1991] BCLC 705 (Ch) at 709 where Harman J held that silence is as good as acquiescence and establishes that the shareholder and his wife assented by conduct to the changes in the objects of the company.

⁸⁷ In *EIC Services* supra note 69 para 134, relying on *Peyman v Lanjani* [1985] Ch 457(CA), and *Herman v Simon* (1990) 8 ACLC 1094 at 1094 (CA) per Meagher JA who emphasised the need for the shareholders to have full knowledge of the matter before they give their consent.

⁸⁸ *EIC Services Ltd v Phipps* supra para 138.

⁸⁹ See Davies, Worthington & Micheler op cit note 36 at 445. Ironically, Neuberger J in *EIC Services' case* denied the existence of such difficulty where he observed that '[a]lthough 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.' Supra note 73 para 122.

⁹⁰ See Hannigan op cit note 40 at 346.

⁹¹ See *Trust Bank van Afrika Bpk v Eksteen* 1964 (3) SA 402 (A) at 415H - 416A per Hoexter AJA, *Credit Corporation of South Africa Ltd v Botha* 1968 (4) SA 837 (N) at 851H.

⁹² 1986 (4) SA 479 (W). See also *Hoisin v Town Clerk, Wynberg* 1916 AD 236 at 239-240, *Roodepoort Settlement Committee v Retief* 1951 (1) SA 73 (O) at 78H - 81B, *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* J 1958 (2) SA 473 (A) at 480A - E.

formalities be pleaded, provided, of course, that the person raising estoppel does not have knowledge of such non-compliance.

The conduct of a shareholder during and after the passing of a resolution should always be a material factor in determining the application of estoppel. In *Mutual Life Insurance Co of New York v Ingle*⁹³ Innes CJ observed that while mere internal decision or harbouring of an intention not communicated to the affected party would not constitute a waiver, when the renunciation, though not communicated, is evidenced by conduct inconsistent with the enforcement of the right, or clearly showing an intention to surrender it, then also the intention may be acted upon, and the right perishes. His Lordship similarly conceded that lapse of time could be a material factor in applying estoppel. A shareholder who has taken a benefit under a supposed resolution in which he participated without objection should not be allowed subsequently to recile from it by denying his assent to the resolution. The renunciation should always be weighed against the impact of a shareholder's presumed assent on the other shareholders, the company and even outsiders.⁹⁴

6. Unanimous Assent And Special Resolution

The company's constitution and the statute usually prescribe that certain decisions relating to the conduct of the affairs of the company be taken by special resolution.⁹⁵ Some of those matters that require special resolutions, such as the change of the name of the company, company's capital, objects, etc, are usually contained in the old styled memorandum of

association. A special resolution under the South African Companies Act of 2008 requires 75% votes at the meeting of the shareholders or expressed in writing without a meeting, except if lower percentage is prescribed by the company's memorandum of incorporation.⁹⁶ Such a resolution is required, under the 1973 South African Companies Act and the earlier statute, to be registered for it to be effective,⁹⁷ a requirement which no longer exists under the 2008 Companies Act. This requirement for registration under the old law informed the decision of Trillop JA in *Quadrangle Investments (Pty) Ltd v Witind Holdings Ltd*⁹⁸ that provisions contained in the company's memorandum cannot be altered by a unanimous consent of the shareholders, but by special resolution passed at the meeting of the shareholders which becomes effective after it has been delivered to the registrar for registration. The rationale for registration under the provisions, as observed by his Lordship, is that the provisions were enacted for the wider interest of the general public. In deference to this perceived legislative policy, the Judge concluded that '[a] purported alteration by the unanimous assent of the shareholders, which can occur informally, even by conduct, would therefore not serve those purposes. A special resolution must therefore be regarded as being essential'.⁹⁹ His Lordship found support in the contention of Professor Beuthin¹⁰⁰ that special resolution relates to matters of public concern, hence the requirement for registration, unlike ordinary resolution that is merely of domestic significance, for which reasons formalities could be overlooked in the latter and not in the former. Sound as these reasons might be, they do not suggest, and it has never been suggested, that the public should be involved in the process of corporate decision making to protect their interests when a special resolution is to be passed. Such decision still remains within the province of the company and to be taking by the shareholders of the company. It does not seem to be so much of the concern of the public which formalities or procedures are adopted, or which of them the shareholders have failed to adopt, in passing of resolution. The public concern is merely in the substance of the resolution as registered. The waiver of the formalities prescribed for passing of resolution is certainly a matter of domestic concern of the company as expressed by the shareholders which is all that the *Duomatic* principle

⁹³ 1910 TPD 540 at 550. The reason for not accepting mere internal decision or harbouring of an intention, as stated by Innes CJ at the same page, is that '[u]ntil the intention to waive the right is communicated to the other party, or evidenced to him by some overt act, a change of mind is always possible and permissible. Otherwise a man might by an entry in his own diary, or an account of a casual conversation with a friend (quite unknown at the time to the party affected) find himself debarred from enforcing a right which on further reflection he was desirous of vindicating'. See also *Botha (now Griessel) and Another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A), *Traub v Barclays National Bank Ltd*; *Kalk v Barclays National Bank Ltd* 1983 (3) SA 619 (A).

⁹⁴ See *Eisenberg (formerly Walton) v The Bank of Nova Scotia* [1965] SCR 681. In *Re Almur Fur Trading Co, Bank of United States v Ross* [1932] SCR 150 at 158 Lamont J held that where all the shareholders of the company have ratified or are estopped from objecting to the making of the notes by the president, it is not open to the liquidator to question his authority. See also *Anderson Lumber Co Ltd v Canadian Conifer Ltd* 1976 CanLII 296 (AB QB).

⁹⁵ For instance, s 65(11) of the South African Companies Act of 2008 provides in s 65(11) that a special resolution is required to— (a) amend the company's Memorandum of Incorporation to the extent required by section 16(1)(c); (b) approve the voluntary winding-up of the company, as contemplated in section 80(1); or (c) approve any proposed fundamental transaction, to the extent required by Part A of Chapter 5. The scope is now expanded by s 43 of the SA Companies Amendment Act No 3 of 2011.

⁹⁶ See s 65(9)(10) of the SA CA 2008. See also s 283 of the UK CA of 2006 which prescribes a similar percentage for special resolution. Section 2 of the Canada Business Corporations Act Cap C-44 of 2009 defines 'special resolution' as 'a resolution passed by a majority of not less than two-thirds of the votes cast by the shareholders who voted in respect of that resolution or signed by all the shareholders entitled to vote on that resolution.'

⁹⁷ See ss 200 and 203 of the SA CA No 61 of 1973.

⁹⁸ 1975 (1) SA 572 (A). The court considered ss 11 and 65 of the South African Companies Act of 1926 bearing similar requirements as ss 200 and 203 of the 1973 Act.

⁹⁹ *Ibid* at 581.

¹⁰⁰ Beuthin op cit note 31 at 13 -15.

projects. It could therefore not be reasonable to suggest that it would be offensive to the public interest for the shareholders to waive such formalities. Beuthin had further observed that '[t]here can be no real *hardship* to the company or to the existing members in an insistence that in those cases where the Act requires a special resolution no legal effect should be accorded to any attempted legal formulation and expression of the corporate will other than a duly recorded resolution'.¹⁰¹

Hardship, with respect, would inevitably occur if the company is required to observe all the procedures prescribed by law and in the company's constitution before it could pass a resolution. The time and expense involved could impact negatively on the corporate enterprise, a course which could be avoided by simply upholding the discretion of the members to waive the formalities. The recording of resolution should not be construed as synonymous with the recording or taking of minutes of meeting. The *Duomatic* principle is not averse to the recording of resolution, what it seeks to curtail is the expense, in both time and money, involved in convening a formal meeting in a situation where the shareholders could informally agree and expedite the execution of the company's mandate. Such resolutions, whether passed as special or ordinary resolution, can be recorded and duly registered if required by law.

It is not in doubt that the delivery to the companies Registrar for registration of resolutions passed by the company brings the existence of such resolution, and a fortiori, the present status of the company, to the attention of the interested members of the public. But suggesting that simply because the law has prescribed a special resolution which requires registration, a unanimous assent cannot be accepted will amount to undue adherence to the letters as against the spirit or purpose of the law. It cannot strongly be argued that a special resolution, as defined by the law, commands stronger respect than a unanimous assent.¹⁰² Indeed, the reverse is the case, for in a special resolution, only a specified percentage of the members exercising their voting rights are required to pass a resolution, but a unanimous assent envisages the consent of all the members. A unanimous assent, when it touches on matters of public interest, could still be recorded in the company's books and a memorandum of it delivered to the companies registrar for registration in the same

manner as a special resolution.¹⁰³ The relevant consideration should be whether what is sought to be done or is done is within the competence of the members.¹⁰⁴ Once this is answered in the affirmative, it becomes immaterial where the formalities are set down, whether in the memorandum, the articles, or even in the companies statute, and the type of resolution required to achieve that object is also immaterial. In *Levy and Others v Zalrut Investments (Pty) Ltd*¹⁰⁵ Van Zyl J sought to restrict the impact of the decision in *Quadrangle's case* by holding that the absence of registration as required in a special resolution would not hinder unanimous assent, but would count in favour of a third party who is not aware that the company has passed such a resolution by a unanimous assent which is not registered.¹⁰⁶ This position should be preferred to the Appellate court's decision in *Quadrangle's case* which invariably generally circumscribed the powers of the shareholders to deal with matters that are within their competence.

A combination of the existing provision in the South African Companies Act of 2008¹⁰⁷ that has merged the memorandum and articles of association which are therein referred to as Memorandum of Incorporation, and the non-mandatory requirement for registration of special resolution to give it legal effect, suggests that under the new dispensation, what should govern the competence of the shareholders to take decision by unanimous assent is the nature of the decision itself, i.e., whether it is a matter that affects the shareholders interests alone or outsiders, and not the type of resolution required to give effect to such decision.

In Canada, the courts have been consistent in holding that the principle of unanimous assent applies to all types of resolutions; be it ordinary, extraordinary, or special resolutions, and includes resolutions by class of members.¹⁰⁸ The only conditions for the adoption of a unanimous assent in such cases are that the decision must relate to matters *intra vires* of the company, and must be within the competence of the members to take such decision.¹⁰⁹

¹⁰³ There is now a specific requirement under section 30(1) of the UK CA Act of 2006 authorising the registration of a memorandum of unanimous assent.

¹⁰⁴ See Davies, Worthington & Micheler op cit note 75 at 444 where the writers observed that the principle applies whenever the shareholders are competent to act.

¹⁰⁵ 1986 (4) SA 479 (W). See also *Southern Witwatersrand Exploration Co Ltd v Bisichi Mining Plc and Others* 1998 (4) SA 767 (W).

¹⁰⁶ See also *Southern Witwatersrand Exploration Co Ltd v Bisichi Mining Plc and Others* 1998 (4) SA 767 (W) at 776 where Cameron J held that there is no reason where a unanimous assent should not be upheld at least against the assenting members even without registration as required by a special resolution.

¹⁰⁷ See s 15 SA CA 2008. See, similarly, s 6 of the Canada Business Corporations Act, 2009.

¹⁰⁸ See *Anderson Lumber Co Ltd v Canadian Conifer Ltd* 1976 CanLII 296 (AB QB).

¹⁰⁹ See *Eisenberg (formerly Walton) v The Bank of Nova Scotia* [1965] SCR 681.

¹⁰¹ Ibid at 18. Emphasis supplied.

¹⁰² In *Ho Tung v The "Man On" Insurance Co Ltd* [1901] AC 232 the Privy Council described special resolution simply as a machinery for securing the assent of the shareholders or a sufficient majority of them. In *Phosphate of Lime Co v Green* LR 7 CP 43 it was held that the company was bound by the acquiescence of the shareholders in an act done by the directors in direct violation of the articles of association although there have been no alteration of the articles by a special resolution

The Canadian courts are quite liberal on issues of unanimous assent to the extent that even casual discussions leading to a consensus on company's business could constitute a resolution. In *Roman Hotels Ltd v Desrochers Hotels Ltd*¹¹⁰ Bayda JA accepted that although a formal resolution, considered, passed and duly recorded at a formal meeting properly constituted is, generally speaking, the best evidence of the fact of corporate decision, but that is not necessarily the only evidence.

'Where during the course of an informal consideration of the company's affairs there comes a point at which occurs a meeting of the minds of all those entitled to participate in a decision to do, on behalf of the company, a certain act which is *intra vires* followed by the actual doing of that act, then generally speaking and apart from a specific company rule or statutory provision to the contrary, it may be said that corporate decision came into existence when that meeting of the minds occurred, despite the lack of observance of formalities pertaining to meetings and passing of resolutions.'

In *Mulligan v The Queen*¹¹¹ Gerald J Rip, drawing inference from the above decision, observed that 'it would appear that the state of corporate law today is that the formalities required by statute or the articles of the corporation may be bypassed if the shareholders or directors who have the power to authorise the action unanimously approve of the action'.¹¹²

The English courts have, well before the enactment of the provision now contained in section 30(1) of the UK Companies Act of 2006 that authorises the registration of resolutions passed by a unanimous assent, insisted that the *Duomatic* principle applies to all resolutions and that it does not matter where the relevant formalities or procedures are set down. The only condition, as in Canada, is that those who have assented must be competent to do so if formal procedures are followed. In *Re Home Treat Ltd*¹¹³ Harman J held that the law is that consent of all members expressed together is as good as a special resolution. In *Ho Tung v The "Man On" Insurance Co Ltd*¹¹⁴ Lord Davey observed that a special resolution is only a machinery for securing the assent of shareholders or a sufficient majority of them. This strengthens Harman J's decision that a unanimous assent is as good as special resolution, and that being so, there is no basis for not accepting a unanimous

assent where special resolution is prescribed as earlier seen in some South African courts decisions.

In *Monecor (London) Ltd v Euro Brokers Holdings Ltd*¹¹⁵ Mummery LJ emphasised that it does not matter where the formal procedures are prescribed, whether in the articles of association, Companies Act or in the shareholders agreement. 'What matters is that all the members have reached an agreement. If they have, they cannot be heard to say that they are not bound by it because the formal procedure was not followed.'¹¹⁶ This decision contrasts sharply with that of Trollop JA of the South African Appeal Court in *Quadrangle Investments (Pty) Ltd v Witind Holdings Ltd*¹¹⁷ to the extent that the latter suggests that procedures prescribed in the company's memorandum cannot be waived by a unanimous assent, and that the shareholders must follow all the formalities for the passing of a special resolution to effect the alteration. The English court's approach which lays emphasis on the interests protected by the relevant procedures¹¹⁸ and the competence of those who assent to take such decision seems more pragmatic and accords with the realities of corporate business.

7. Conclusion

It is not in doubt that the best way of arriving at corporate decisions is by resolutions passed at meetings duly convened by the company. Such meetings provide opportunities for the members to

¹¹⁵ [2003] EWCA Civ 105 para 62.

¹¹⁶ See also *Schofield v Schofield* [2011] EWCA Civ 154 para 24 per Etherton LJ.

¹¹⁷ 1975 (1) SA 572 (A).

¹¹⁸ For instance, it is settled that a provision that protects the interests of creditors cannot be waived by shareholders unanimous assent. See *The Secretary of State for Business and Innovation v Doffman* [2010] EWHC 3175 (Ch) paras 44-45 where Newey J observed that the company's financial circumstances may preclude the application of the *Duomatic* principle, and this would occur when the interests of creditors 'intrude' even when a company may not be strictly insolvent. In such a case, the directors' duties would shift to accommodate the interests of creditors. See *Kinsela v Russell Kinsela Pty Ltd* (1986) 4 NSWLR 722 (CA) where Street CJ proffered the rationale as being that in a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholders' assets that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency, or the imposition of some alternative administration. See also *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250, [1988] 4 BCC 30 at 33 (CA), *Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd* [2002] EWHC 2748 (Ch), [2003] 2 BCLC 153 para 74, *Re MDA Investment Management Ltd* [2004] 1 BCLC 217 (Ch) para 70.

¹¹⁰ (1876) 69 DLR (3d) 126 (Saskatchewan Court of Appeal) at 133-134.

¹¹¹ 1999 CanLII 226 (TCC) para 41.

¹¹² See also *North West Battery Ltd v Hargrave* (1913) 15 DLR 193 (KB), *Mullin v Canada* [1992] TCJ No. 104 (TCC), *Toronto Dominion Bank v Coopers & Lybrand Limited*, 1982 CanLII 1125 (AB QB).

¹¹³ [1991] BCLC 705 at 708 (Ch). See also *Re Oceanrose Investment Ltd* [2008] EWHC 3475 (Ch) para 23 per Richards J who held that the principle applies even where the Companies Act requires a special resolution which is defined in terms that requires a meeting.

¹¹⁴ [1901] AC 232 (PC).

have full discussions and debate on matters of corporate business and arrive at well considered resolutions as found by Lindley LJ in *Re George Newman & Co.*¹¹⁹ But the benefit of a meeting to the company must not be over stretched. On the contrary, insisting on a meeting could delay corporate decisions, and in matters of business which could require a quick response, observing all the procedures for convening and conducting a meeting could be quite disadvantageous as the company may not always be able to meet the demands of its own business needs. Thus, it is beneficial to the company when corporate decisions are taken by a unanimous assent as it obviates the rigours and expense involved in holding a meeting. In companies that have one or few shareholders, and in those companies in which every shareholder is also a director, it would be unreasonable to insist that meetings must be held when all the members have, acting within their powers, assented to a particular business decision.

The realization that corporate decisions taken by a unanimous assent is beneficial to the company is evidenced by the increasing statutory recognitions accorded to this principle in the modern Companies legislation in jurisdictions under consideration.¹²⁰ Although the UK Companies Act does not generally expressly provide for passing of resolutions by a unanimous assent, it is implicitly recognised in section 281(4) of the Act. If the reason for not providing expressly for the use of a unanimous assent in place of resolutions passed at meetings is to preserve the flexibility enjoyed by this principle at common law as suggested by Hannigan,¹²¹ it is submitted that a general provision recognising the use of unanimous assent is not likely to diminish such flexibility, but would rather strengthen the hands of the courts in applying this principle in all cases whenever the need arises. There is the danger under the present dispensation that the specific mention of this principle under section 239 of the UK Companies Act¹²² could lead to the contention that it is excluded in other cases.

The South African statutory recognition of unanimous assent is restricted to companies that have only one shareholder and companies in which every shareholder is also a director.¹²³ The provision is extended to the decisions of the board that consists of just one director. Although it could be easier in those circumstances recognised by the Act to arrive at a unanimous assent, but the propensity is not diminished even in bigger companies to have such unanimity in the decision making by the relevant organs of the company. The number of members or

directors in a company should not be a material consideration in matters of unanimous assent.

The reliance by the courts on acquiescence, which requires knowledge of the relevant facts, to infer assent may not meet the demands of justice in all cases. The alternative approach in cases where there has been significant delay in challenging a company's decision is to fall back on the equitable doctrine of laches as explained by the court in *Erlanger v New Sombbrero Phosphate Co.*,¹²⁴ a decision relied upon by Brightman J in *Bailey's case* with commendable outcome. Laches focuses mainly on the intervening factors such as the conduct of the parties, interests of third parties and lapse of time, since the impugned decision was made. Laches, unlike acquiescence, would not allow a party to resile from a corporate decision merely because he was not aware of the irregularities as at the time the decision was made.

It is settled by courts' decisions in both UK and Canada that the *Duomatic* principle applies in all resolutions; whether special, ordinary, or extraordinary resolutions. In both jurisdictions, it is immaterial whether the procedural requirements are set down in the company's constitution or in the Companies Act. The only relevant considerations are that the subject matter of unanimous assent is *intra vires* of the company, and is within the competence of the relevant organs of the company to take such decision.

The South African courts decisions, especially that of the appellate court delivered by Trollip JA in *Quadrangle's case*, draws a distinction between ordinary and special resolutions, and took into consideration the instrument where the procedural requirements are prescribed in arriving at a decision that a unanimous assent was not applicable in that case. Such considerations should not be decisive in matters that are within the competence of the relevant organs of the company. The considerations adopted by the UK and Canadian courts on similar issues are more pragmatic and are aligned to the corporate needs, similar considerations should be adopted by the South African courts.

¹¹⁹ [1895] 1 Ch 674 (CA).

¹²⁰ The most elaborate of all is s 182 of the Business Corporations Act (British Columbia) 2002.

¹²¹ See Hannigan op cit note 76 at 346.

¹²² The section provides for the ratification of a director's breach of duty by a unanimous assent.

¹²³ See s 57(2)(4) of the SA CA 2008.

¹²⁴ (1878) 3 App Cas 1218 at 1279-1280 (HL).