

**IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THE COURT OF CIVIL APPEAL OF THE SUPREME COURT
OF MAURITIUS**

BETWEEN:

EGALLYS LIMITED

Appellant

-and-

THE INFORMATION AND COMMUNICATION TECHNOLOGIES AUTHORITY

Respondent

WRITTEN CASE FOR THE RESPONDENT

References to the Electronic Bundle appear in the form **[EB/Page]**.

A. INTRODUCTION

1. This appeal raises two short points concerning the power to institute and continue proceedings in the name of a company: (1) where the board of a company is inquorate, can the sole serving director validly authorise the commencement of proceedings in the company's name; and (2) whether a sole director has unilateral authority, without proof of any delegation or ratification, to commence and continue proceedings in the name of the company.
2. The Bankruptcy Division of the Supreme Court of Mauritius held that, where the authority of a director is put in issue, a sole director must prove that he has been validly delegated a power vested in the board in order to commence and continue proceedings in the company's name. The judge made a factual finding that no such delegation had been established in the present case. The Court of Civil Appeal upheld that decision. For the reasons developed in this written case, those decisions were correct and this appeal should be dismissed.
3. Both parties seek to raise new arguments before the Board that were not raised in the Bankruptcy Division or the Court of Civil Appeal, although only the ICT Authority has sought permission to do so (see paragraphs 39-43 below). Both parties also seek

to rely on documentary evidence that was also not before the courts below. The additional evidence comprises a total of two documents: the constitution of Egallys Limited (“**Egallys**”) [EB/1301] (on which the Respondent seeks to rely) and an extract from Egallys’s minutes (on which the Appellant seeks to rely) [EB/266]. The Respondent has taken the pragmatic position that both parties should be permitted to rely on this evidence and their new arguments and invited the Appellant to agree to this approach. As that agreement has not been forthcoming, the Respondent seeks the Board’s permission to rely on Egallys’s constitution and to advance the further reasons set out in its notice of acknowledgment [EB/15-16].

B. FACTUAL CONTEXT

4. Egallys was incorporated on 29 July 2010 as a private company pursuant to the Companies Act 2001 (the “**Companies Act**”). With effect from incorporation, the company adopted a constitution dated 23 July 2010, as permitted by section 39 of the Companies Act [EB/994]. Consequently, the rights, powers, duties and obligations of the company, the board, any director and any shareholder of Egallys are those set out in the Companies Act save to the extent restricted, limited or modified by Egallys’s constitution (the “**Constitution**”): Companies Act, section 40 [EB/994].
5. Mr Jose Esteves (“**Mr Esteves**”) is the only director of Egallys [EB/117]. He is also the registered shareholder of a majority of the issued shares in the company [EB/135].
6. Egallys held a 15-year international long distance network licence issued by the Respondent, the Information and Communication Technologies Authority (the “**ICT Authority**”), under section 24 of the Information and Communication Technologies Act 2001 (the “**ICT Act**”) on 27 August 2013 (the “**ILD Licence**”) [EB/111]. The ICT Authority, a body corporate established by section 4 of the ICT Act, is the national regulator for the Mauritian information and communications technology sector. Its functions include the administration of a licensing system for the operation of information and communication networks and services in Mauritius [EB/18].
7. The terms of the ILD Licence required Egallys to pay licence fees to the ICT Authority. Egallys was required to pay an initial licence fee of Rs 3,000,000 and an annual licence fee of Rs 2,000,000, which the ICT Authority authorised to be paid in monthly instalments of Rs 166,666.66 [EB/112-113]. Egallys paid the initial licence

fee and four instalments of Rs 166,666.66 in respect of the annual licence fee for the first year of the IDL Licence. Thereafter the company ceased paying quarterly instalments of the annual licence fee as they fell due [EB/113].

8. On 8 November 2017, the ICT Authority wrote to Egallys requesting that the company settle all outstanding licence fees. Save for a payment of Rs 250,000 made on 26 January 2018, no further payments were made to discharge the outstanding fees [EB/171].
9. On 4 August 2020, the ICT Authority caused a statutory demand to be served on Egallys pursuant to section 180 of the Insolvency Act 2009, claiming the sum of Rs 14,066,666.68 in respect of unpaid licence fees, plus attorney's commission, VAT and costs relating to the demand [EB/108]. The debt claimed by the statutory demand reflected the outstanding amount of annual licence fees owed by Egallys as at May 2020.
10. On 28 August 2020, an application to set aside the statutory demand was filed by notice of motion in the name of Egallys in the Bankruptcy Division of the Supreme Court of Mauritius pursuant to section 181 of the Insolvency Act 2009 (the “**Set Aside Application**”) [EB/106]. The Set Aside Application was supported by a founding affidavit sworn by Mr Esteves, in which he stated that he was “*the director*” of Egallys and that he was “*duly authorised*” to make the affidavit on its behalf.¹
11. The Set Aside Application was made on two principal grounds. First, it was contended that a substantial dispute existed whether the outstanding licence fees were owing or due [EB/108-109]. This was based on a clause of the ILD Licence (on which Egallys was said to be entitled to rely) that excused Egallys's performance of its obligations (including the obligation to pay licence fees) if such performance was hindered or prevented by any occurrence beyond its reasonable control. Secondly, it was argued that Egallys had a counterclaim against the ICT Authority arising from alleged breaches of statutory duty by the regulator (although the counterclaim was and remains unquantified) [EB/109-110].

¹ Affidavit of Mr Esteves dated 28 August 2020, paragraph 1 [EB/107].

12. Neither of these grounds have received prior judicial consideration. For, although the ICT Authority opposed the Set Aside Application on the merits, it also put in issue Mr Esteves's claim to be authorised by Egallys. That objection was made both in the ICT Authority's evidence filed in response to the Set Aside Application and its written submissions for the first substantive hearing of the matter in the Bankruptcy Division. It is on the basis of this objection that the Set Aside Application was dismissed in the Bankruptcy Division and that dismissal was upheld in the Court of Civil Appeal.
13. The ICT Authority's responsive evidence in the Bankruptcy Division took the form of an affidavit made by Mr Harish Bhoolah dated 14 October 2020 [EB/112] by which it required Mr Esteves's claim to be authorised by Egallys to be proven. Referring to the relevant paragraph of Mr Esteves' affidavit in which he claimed to be authorised by Egallys, Mr Bhoolah stated:²

“Without making any admission to the averments contained in paragraph 1 of RA1 [i.e. Mr Esteves's first affidavit dated 28 August 2020], the Respondent [i.e. the ICT Authority] avers that no document has been annexed to RA1 in support of the averment that the deponent has been duly authorized to affirm RA1 on behalf of the Applicant.”
14. An affidavit sworn by Mr Esteves dated 30 December 2020 [EB/117] was filed in reply to Mr Bhoolah's evidence. In that affidavit, Mr Esteves stated that he was “*the sole director*” of Egallys and “*by law authorised to make this affidavit on its behalf*”.³ In direct reply to the passage from Mr Bhoolah's affidavit quoted above, Mr Esteves's evidence was that “[t]he Applicant takes note” of the passage.⁴ The affidavit was otherwise silent about how and when Mr Esteves was authorised by Egallys, and no documents concerning his authority were annexed to the affidavit. A further, third affidavit from Mr Esteves was filed and served on 3 September 2021, in which he repeated that he was “*the director*” of Egallys and “*duly authorised*” to make the affidavit on its behalf but otherwise took matters no further [EB/132].
15. The ICT Authority developed its objection to Mr Esteves's authority in its written submissions filed on 7 June 2022 prior to the first hearing of the Set Aside Application on 15 June 2022 [EB/170]. As one of its preliminary objections to the application, the

² Affidavit of Mr Bhoolah dated 14 October 2020, paragraph 4 [EB/112].

³ Affidavit of Mr Esteves dated 30 December 2020, paragraph 1 [EB/117].

⁴ Affidavit of Mr Esteves dated 30 December 2020, paragraph 4 [EB/118].

ICT Authority submitted that Mr Esteves lacked authority to represent Egallys in causing it to make the Set Aside Application and in giving affidavit evidence on its behalf because there was (a) no documentary evidence proving his authority and (b) no evidence that he was ordinarily resident in Mauritius, as required by section 132 of the Companies Act [EB/1056].⁵ Relying on three recent decisions of the Supreme Court of Mauritius,⁶ the ICT Authority submitted that the exercise of the power to commence legal proceedings in the name of a company required a resolution validly passed by the company's board of directors, and in the absence of proof of such exercise an application made in the company's name should be set aside.⁷ Its case was that:

“It was incumbent on the Applicant to provide the evidence and/or compelling reason to depart from the well-settled case law but it has failed to do so. The Respondent therefore, submits that the Applicant Company, having failed to undertake the procedural steps to validate the legal capacity of Mr Esteves to represent the Applicant, does not have any locus to enter the present application.”

16. The Bankruptcy Division accepted the ICT Authority's submission and dismissed the Set Aside Application on the basis that the Appellant had failed to establish that the company had validly authorised Mr Esteves to represent the company and give evidence on its behalf. That decision was upheld on the Appellant's appeal to the Court of Civil Appeal.

C. THE STATUTORY AND LEGAL CONTEXT

The board's management powers

17. Section 129 of the Companies Act [EB/1054] provides the starting point for the analysis of the powers of directors of a company under Mauritian law and the manner in which such powers are required to be exercised. Under this section, the powers of managing the company's business and affairs are conferred on the board of directors:

⁵ Written Submissions of the ICT Authority dated 7 June 2022, paragraphs 12-14 [EB/171-172].

⁶ *Meaders Feeds Ltd v Parboteeah* 2020 SCJ 317 [EB/661], *Barachois Villas Co Ltd v Super Builders Co Ltd* 2022 SCJ 201 [EB/310] and *Laser Informatics Ltd v RBRB Construction Ltd* 2021 SCJ 407 [EB/641].

⁷ Written Submissions of the ICT Authority dated 7 June 2022, paragraph 13 [EB/172].

“129. Management of company

- (1) The business and affairs of a company shall be managed by, or under the direction or supervision of, the Board.
- (2) The Board shall have all the powers necessary for managing, and for directing and supervising the management of, the business and affairs of the company.
- (3) Subsections (1) and (2) shall be subject to any modifications, adaptations, exceptions, or limitations contained in this Act or in the company’s constitution.”

18. Section 129 accordingly contemplates the board of directors managing the business and affairs of the company directly as well as the possibility of delegation of such management subject to oversight by the board. Section 131(1) [EB/1056] confirms the conferral on the board of ability to delegate its powers save for powers conferred by certain provisions of the Companies Act (such as the power under section 52 to authorise the issue of shares). It provides relevantly as follows:

“131. Delegation of powers

- (1) Subject to any restriction in the constitution of the company, the Board of a company may delegate to a committee of directors, a director or employee of the company, or any other person, any one or more of its powers other than its powers under any section specified in the Seventh Schedule.”

The requirements for exercise of the board’s powers

19. The rules governing proceedings of a company’s board, and therefore how the powers of management and delegation conferred on it must be exercised, are contained in the Eighth Schedule to the Companies Act [EB/1262], subject to any modifications that may be contained in the company’s constitution: Companies Act, section 158 [EB/1077]. Paragraph 23 of Egallys’s Constitution applies the Eighth Schedule without modification, providing that: *“The Directors [sic] meetings and the proceedings of Directors shall be conducted in accordance with the Eighth Schedule to the Act.”* [EB/1311]
20. Whether the board directly manages the company’s business and affairs or makes a partial or full delegation of such powers, the directors are required to act by together passing resolutions in accordance with the company’s constitution and the Companies

Act. The Eighth Schedule provides for two methods for the board validly to pass resolutions:

- 20.1. The first method is by a meeting of the board, which is defined in paragraph 3 of the Eighth Schedule [EB/1260-1261] as follows:

“3. Methods of holding meetings

A meeting of the Board may be held either –

- (a) by a number of directors who constitute a quorum, being assembled together at the place, date, and time appointed for the meeting; or
- (b) by means of audio, or audio and visual, communication by which all directors participating and constituting a quorum can simultaneously hear each other throughout the hearing.”

A board resolution is passed at a meeting of the board if it attracts unanimous support of the directors present at a quorate board meeting or a majority of the votes of those present: Eighth Schedule, paragraph 5 [EB/1261].

- 20.2. The Eighth Schedule also provides for a resolution to be made in writing pursuant to paragraph 7 [EB/1261]. Where the requirements of paragraph 7 are met, the resolution is deemed to have the same force and effect as a resolution passed at a meeting within the meaning of paragraph 3. Paragraph 7 provides that:

“7. Resolution in writing

- (1) A resolution in writing, signed or assented to by all directors then entitled to receive notice of a Board meeting, is as valid and effective as if it had been passed at a meeting of the Board duly convened and held.
- (2) Any such resolution may consist of several documents (including facsimile or other similar means of communication) in like form each signed or assented to by one or more directors.
- (3) A copy of any such resolution must be entered in the minute book of Board proceedings.”

21. In connection with the matters it covers, the Eighth Schedule provides a set of rules that only the company in general meeting is permitted to alter. By paragraph 8 of the

Eighth Schedule [EB/1262], the board is permitted to regulate its own procedure but not in respect of matters addressed in the Eighth Schedule.

22. The prima facie requirement under the Companies Act that the board of a company must act by resolutions passed at meetings of the directors in accordance with the Eighth Schedule reflects the default position under the general law. It is “*fundamental to an understanding of the manner in which directors are obliged to act*” that “*the general law denies that directors can determine any matter except by way of a meeting*”: *Brick and Pipe Industries Ltd v Occidental Life Nominees Pty Ltd* [1992] 2 VR 279 at 303 [EB/363] per Ormiston J (decision upheld in substance on appeal: [1992] 2 VR 350 [EB/387]). Absent provision otherwise in a company’s constitution, a director has no authority to bind the company except by joining in a resolution passed at a board meeting: *Perkins v National Australia Bank* [1999] SASC 280 at [37] [EB/732]. As Dawson J explained in the High Court of Australia in *Northside Developments Pty Ltd v Registrar-General* (1989) 170 CLR 146 at 205 [EB/706]:

“the position of director does not carry with it any ostensible authority to act on behalf of the company. Directors can act only collectively as a board and the function of an individual director is to participate in decisions of the board.”

23. The principle that directors of a company can only act by passing resolutions at meetings of the board has a long pedigree. In *D’Arcy v Tamar, Kit, Hill and Callington Railway Co* (1867) LR 2 Ex 158 (“*D’Arcy*”) [EB/412], the Court of the Exchequer held that directors of a company governed by the Companies Clauses Consolidation Act 1845 must act together as a board by passing resolutions at meetings. Baron Martin (with whom the other Exchequer Barons agreed) said that “*it is quite clear that the directors are to act together, and in a meeting*”: (1867) LR 2 Ex 158 at 161 [EB/415]. In *Re Haycraft Gold Reduction and Mining Co* [1900] 2 Ch 230 at 235 (“*Re Haycraft*”) [EB/846], Cozens-Hardy J held that the principle applied with equal force to companies formed under and governed by the Companies Act 1862. In doing so, he distinguished and cast doubt on the earlier decision of Bacon V-C in *Re Bonelli’s Telegraph Co* (1871) LR 12 Eq 246 [EB/824].

The power to institute legal proceedings

24. The power to manage the company and its affairs includes the institution of proceedings in its name and (by extension) the authorisation of individuals to give evidence on the company's behalf in such proceedings: *Mitchell & Hobbs (UK) Ltd v Mill* [1996] 2 BCLC 102 at 108 [EB/676]. As a power conferred on the board of directors, it must be exercised in accordance with such requirements as apply under the Companies Act and the company's constitution to the exercise of board powers. It follows that the board must either exercise the power to institute proceedings directly, by passing a resolution authorising their commencement and continuation, or validly delegate that power to a person who is then authorised to take steps to commence and continue the proceedings. Where proceedings are commenced without the board adopting one of these approaches, the proceedings are unauthorised and liable to be struck out. The board may, however, pass a resolution to ratify the commencement of proceedings and thereby adopt the proceedings on behalf of the company.
25. Where there is no functioning board (for example, as a result of a deadlock among the directors or where the number of directors has fallen below the minimum required), the company is unable to authorise the commencement of proceedings or ratify the unauthorised commencement or continuation of proceedings for as long as the board remains unable to function: *Rushbrooke UK Ltd v 4 Designs Concept Ltd* [2022] EWHC 1110 (Ch) at [44] [EB/892]; *Massey v Wales* (2003) 57 NSWLR 718 at [45]-[47], [71] [EB/655/659]; *Perkins v National Australia Bank* [1999] SASC 280 at [39] [EB/732].

The position of one-director companies

26. The discussion above concerning the powers conferred on the board of a company and the requirements for their exercise under Mauritian law has considered the position of Mauritian companies in general. Fundamental to the Appellant's Written Case is the assumption that the exercise of board powers in a one-director company is permitted to operate differently than in companies with multiple directors. That assumption is inconsistent with the legislative framework and design of the Companies Act and should not be accepted.

27. Prior to the entry into force of the Companies Act, it was a legislative requirement for every Mauritian company to have a minimum of two directors both of whom were to be ordinarily resident in Mauritius: Companies Act 1984, section 95(1). The enactment of the Companies Act permitted such companies to have a single director: Companies Act, section 132 [EB/1056]. However, unlike other enactments in Commonwealth jurisdictions that loosened the requirement of the minimum number of directors to one, the Companies Act includes no provision as to how (if at all) the requirements for exercise of board powers change in a one-director company. For example:

27.1. In Hong Kong, section 483 of the Companies Ordinance [EB/1290] provides that:

- “(1) If a private company has only one director and the director takes any decision that—
 - (a) may be taken in a meeting of directors; and
 - (b) has effect as if agreed in a meeting of directors,the director must (unless that decision is taken by way of a resolution in writing) provide the company with a written record of that decision within 7 days after the decision is made.
- (2) If the director provides the company with a written record of a decision in accordance with subsection (1), that record is sufficient evidence of the decision having been taken by the director.”

27.2. In Australia, section 248B(1) of the Corporations Act 2001 (Cth) [EB/1293] permits the director of a one-director company to pass a resolution by recording it and signing the record.

27.3. In England and Wales, the Model Articles issued in regulations made under the Companies Act 2006 provide, in article 7(2) that the general rule (in article 7(1)) [EB/923] that directors must make decisions by majority decision in a meeting or by a unanimous decision in accordance with article 8 does not apply to a one-director company. Instead, “*the director may take decisions without regard to any of the provisions of the articles relating to directors’ decision-making*”.

28. The Companies Act only makes special provision for a single-director company that where the director is also the sole shareholder, defining such a company as a “*one person company*”: Companies Act, section 2(1) [EB/960]. By section 13 [EB/976], a one person company or any other company in which all shareholders were also directors are excepted from conducting separate meetings of shareholders and directors on condition that “*all matters required by the Act to be dealt with by a meeting of shareholders or a meeting of directors are dealt with by way of a unanimous resolution*”. An “*unanimous resolution*” is defined in section 2(1) [EB/964-965] to mean a resolution that has the assent of every shareholder entitled to vote given either at a duly convened meeting or in writing signed by each such shareholder.
29. The legislative decision in the Mauritian Companies Act to omit special treatment for decision-making by the director of a one-director company with more than one shareholder is significant. It provides a strong indication that the legislature intention in enacting the Companies Act was that decision-making by the director of a one-director company was required to be by resolutions passed in accordance with the Eighth Schedule unless other provision was made in the company’s constitution. It is an illustration of the principle that there should remain a clear division between ownership and management of a company and that board should remain accountable to the company’s shareholders by being required to comply with a formal process for exercising the powers conferred on them. The shareholders may agree to amend the company’s constitution to alter that clear division and the level of accountability but must do so specifically.

D. REASONS WHY THE APPEAL SHOULD BE DISMISSED

30. The validity of the proceedings in which this appeal arises depends on establishing that the board of Egallys was capable of authorising the Set Aside Application to be issued and continued in the company’s name or ratifying those steps and did in fact authorise or ratify them. The arguments before the courts below focussed on the second aspect and the courts below concluded (correctly) that the Appellant had failed to establish that the requirements for the exercise of the board’s power to authorise or ratify legal proceedings were met. As explained below, the grounds on which the Appellant appeals do not demonstrate any error that would justify interfering with the

Court of Civil Appeal's decision to uphold the dismissal of the Set Aside Application on this basis.

31. However, a further and more fundamental reason exists to support the conclusions of the courts below. Egallys lacks a board able to authorise the commencement and continuation of this litigation because at all relevant times the board has been inquorate. This is because Egallys was legally required to have at least two directors for the board to exercise the powers vested in it to commence and continue proceedings but, as is common ground, Mr Esteves was its only director.

The two-director minimum applicable to Egallys

32. The requirement for Egallys to have at least two directors arises from the company's Constitution and/or as an implication drawn from the application of the Eighth Schedule to the Companies Act.
33. Paragraph 19.4 of the company's Constitution stipulates a minimum and maximum number of directors: "*The number of Directors shall not be fewer than two nor more than twenty-five.*" [EB/1308] These requirements are alterable only by ordinary resolution passed by the company's shareholders pursuant to paragraph 19.5 of the Constitution [EB/1308]. There is no evidence or suggestion that this requirement has been validly altered nor has the Appellant suggested that it has been. Accordingly, Egallys was required by its Constitution at all times relevant to these proceedings to have a minimum of two directors but only ever had one, Mr Esteves.
34. Further or alternatively, a two-director minimum arises as an implication from the provisions governing proceedings of the board of Egallys as set out in the Eighth Schedule to the Companies Act. Section 158 of the Companies Act [EB/1077] applies the provisions of the Eighth Schedule to a company subject only to its constitution. If a company lacks a constitution (or, it is submitted, there is no admissible evidence to suggest it has adopted a constitution or the terms of such constitution), the Eighth Schedule will apply. As explained above, the terms of the Eighth Schedule [EB/1260] require proceedings of the board to be conducted at meetings (regulated by paragraphs 1-6 [EB/1260-1261]) or by written resolutions (regulated by paragraph 7 [EB/1261]). Paragraph 3 of the Schedule permits board meetings to be held either in person or by means of audio and/or visual communication but requires them to be held

by directors who constitute a quorum. Paragraph 4 of the Schedule [EB/1261] regulates the quorum for board meetings and provides as follows:

- “(1) A quorum for a meeting of the Board shall be fixed by the Board and if not so fixed shall be a majority of the directors.
- (2) No business may be transacted at a meeting of the directors if a quorum is not present.”

Two features of these provisions support an implication that, subject to a company’s constitution, a company must have more than one director. First, as a matter of ordinary language, the *prima facie* meaning of “*meeting*” is a coming together of more than one person: *Sharp v Dawes* (1876) 2 QBD 26 [EB/908]; *In re Sanitary Carbon Co* [1877] WN 223 [EB/570]. There is nothing in the terms of paragraphs 3 or 4 of the Eighth Schedule [EB/1260-1261] that suggests that the ordinary meaning of “*meeting*” should be displaced. Indeed, the definition in paragraph 3 of a valid “*meeting of the Board*” refers directors needing to be “*assembled together*” (paragraph 3(a)) or “*simultaneously hear each other throughout the meeting*” (paragraph 3(b)). Neither requirement is consistent with the ordinary meaning of “*meeting*” being displaced. Secondly, and in any event, the stipulation in paragraph 4 that the default quorum be “*a majority of the directors*” requires that a company to which the Eighth Schedule applies without modification cannot have a single director. There can be no “*majority*” if a board is composed of a single person.

- 35. The provisions regulating the making of board resolutions reinforce the implied requirement that a company must have at least two directors unless its constitution provides otherwise. Paragraph 5(3) of the Schedule concerns voting at board meetings, providing that a board resolution “*is passed if it is agreed to by all directors present without dissent or if a majority of the votes cast on it are in favour of it.*” [EB/1261] Paragraph 7 permits the board to pass resolutions in writing without a meeting but still requires the resolution to be signed or assented to “*by all directors then entitled to receive notice of a Board meeting*” [EB/1261].
- 36. The operation of the Eighth Schedule is therefore premised on a requirement that a company must have more than one director. The board of a company is unable to transact any business in the absence of a quorum and the default quorum under paragraph 4 of the Eighth Schedule requires there to be at least two directors. Egallys’s

Constitution expressly requires “*the proceedings of Directors*” (emphasis added) to be conducted in accordance with the Eighth Schedule. But even in the absence of that stipulation, the terms of the Eighth Schedule would apply by default and require the company to have at least two directors.

37. An inquorate board cannot authorise the commencement of proceedings or the ratification of proceedings commenced without authority: *Massey v Wales* (2003) 57 NSWLR 718 at [45]-[47] [EB/655]. Moreover, the sole remaining director of an inquorate board cannot hold himself out as having such authority: *Perkins v National Australia Bank* [1999] SASC 280 at [39] [EB/732]. In those circumstances, the proceedings below and indeed this appeal were incapable of being authorised by Egallys.

The Appellant also failed to establish that Mr Esteves remained qualified to be a director

38. Irrespective whether the Constitution and/or the Eighth Schedule permitted Egallys to have a single director, on the evidence before the courts below, the Appellant failed to prove that the requirement in section 132 of the Companies Act that the company “*shall have at least one director who shall be ordinarily resident in Mauritius*” [EB/1056] was met. Mr Esteves oscillated between giving two different addresses in Mauritius in his affidavits and the Appellant failed to adduce any documentary evidence, after the ICT Authority put the point in issue, to prove that Mr Esteves was “*ordinarily resident in Mauritius*”. In the absence of such proof, the only available inference was that Mr Esteves was not ordinarily resident. He therefore ceased to be a director of the company pursuant to section 139(1)(c) of the Companies Act [EB/1060]. Accordingly, Mr Esteves had no authority to cause the Set Aside Application to be issued and pursued in Egallys name and no authority to give evidence on its behalf.

The ICT Authority should be permitted to advance the inquorate board argument and adduce Egallys’s Constitution

39. The ICT Authority seeks permission to advance the inquorate board argument (set out above) notwithstanding that it was not advanced in the courts below. The argument raises a short and straightforward question of legal interpretation on the basis of Egallys’s Constitution and, further or in the alternative, the provisions of the Eighth

Schedule to the Companies Act. The ICT Authority accepts that permission is needed to admit the Constitution (and for the reasons set out below such permission should be granted) but in the event permission is refused the argument based on the Eighth Schedule requires no further evidence to be adduced in order to be advanced. The argument is in substance and properly viewed as a point of pure law.

40. In such cases, an appellate court retains a discretion to refuse permission to advance the argument but will generally grant permission where the other party has had a sufficient opportunity to meet it, has not acted to their detriment on the faith of the earlier omission to raise the argument and can be protected in costs: *Pittalis v Grant* [1989] 1 QB 605 at 611 [EB/740].
41. Strong grounds exist in support of the Board permitting this new argument to be advanced and it would be unjust to preclude the ICT Authority from advancing it.
 - 41.1. First, no further factual enquiry is needed for the Board to consider and determine the point. The argument does not involve any contested or potentially contested evidential issue: there is no suggestion that the version of the Constitution adopted by Egallys upon incorporation has been amended in any way and the Appellant's consistent case throughout these proceedings is that Mr Esteves is the only director. No witness testimony is required to construe its terms or the provisions of the Eighth Schedule. Accordingly, all possible evidence (with the exception of the Constitution) had been adduced in the courts below and the relevant facts have all been the subject of findings. Moreover, the basis of the argument arises from the terms of a matter that has at all times been within the knowledge of the Appellant and Mr Esteves.
 - 41.2. Secondly, this is not an appeal from a decision made following a trial or a hearing on the merits. The nature of the proceeding itself (as an application to set aside a statutory demand) was a summary one as was the hearing at which the decision under appeal was made (a hearing to determine preliminary objections). These factors diminish the weight that might otherwise be given to the policy of finality in litigation and the reluctance to permit new points to be argued on appeal: see *Notting Hill Finance Ltd v Sheikh* [2019] 4 WLR 146 at [35] [EB/720].

- 41.3. Thirdly, the ICT Authority clearly identified the point in its Notice of Acknowledgment as a new argument that it would pursue as a further reason why the Court of Civil Appeal’s decision was correct [EB/14-16]. The Appellant therefore has had a year’s notice of the argument and the ICT Authority’s intention to raise it before the Board: see Notice of Acknowledgment [EB/13, 16]. It has referenced the argument in its Written Case: see paragraphs 33, 80, 84-85, 88, 92 [EB/37, 46, 48-50]. Indeed, no objection was communicated to the ICT Authority until after the Appellant’s Written Case was served. The only ground identified in support of the objection was that the argument “*would require further factual enquiry*”, although no details of the alleged further factual enquiry that would be required have been provided. In any event, for the reasons already identified, the objection on this basis is unfounded.
- 41.4. Fourthly, for reasons that have never been explained, the Appellant chose to adduce no documentary evidence on the question of Mr Esteves’s status as a director and his authority as such in the courts below. In particular, the Appellant elected not to adduce a copy of Egallys’s Constitution while maintaining the position that Mr Esteves was the “*sole director*” and thereby authorised “*by law*” to represent the company and make affidavits on its behalf. Moreover, reliance is now placed for the first time before the Board on the extract of minutes of an alleged board meeting of Egallys (without any application for permission to do so) seemingly to establish that Mr Esteves’s actions have been validly ratified: see Written Case, paragraph 31 [EB/36]. Precluding the ICT Authority from introducing the inquorate board argument would maintain the false premise under which the Appellant permitted the courts below to proceed.
42. In the circumstances, permission should be granted to allow the ICT Authority to advance this argument.
43. The ICT Authority also applies to the Board for permission to adduce a copy of Egallys’s Constitution [EB/1301], in support of its new argument.

- 43.1. The Board generally exercises its power to admit new evidence on an appeal by reference to the factors identified in *Ladd v Marshall* [1954] 1 WLR 1489. Those factors consider whether the evidence (a) could not have been obtained with reasonable diligence for use at trial; (b) is such that, if given, would probably have an important influence on the result of the case (though not necessarily decisive); and (c) is apparently credible (though not necessarily incontrovertible). The power is discretionary: the *Ladd v Marshall* factors “are not to be taken as a straitjacket” and should be applied flexibly: *Singh v Habib* [2011] EWCA Civ 599 at [14]. Evidence may be admitted even where all three factors are not fulfilled and vice versa: *Al Sadeq v Dechert LLP* [2024] EWCA Civ 28; [2024] KB 1038 at [141].
- 43.2. However, the principles of *Ladd v Marshall* do not apply in relation to appeals from decisions on applications to set aside statutory demands: *Salvidge v Hussein* [2000] BCC 36 at 38 [EB/906]; *Sadrolashrafi v Marvel International Food Logistics Ltd* [2004] EWHC 777 (Ch) at [15]-[16], [19] [EB/900, 901]. This steps from the fact that the hearing of such an application is not a trial or a hearing on the merits: see *AIB Finance Ltd v Debtors* [1997] 4 All ER 677 [EB/296]. Nevertheless, certain similar considerations should be taken into account, such as the importance of the evidence that is sought to be adduced, the reasons for not adducing it at first instance and the degree of prejudice that would be caused to the other side in dealing with the matter on appeal if the evidence is permitted to be adduced. But, compared with the strictures of *Ladd v Marshall* principles, “the approach which is adopted is considerably more tolerant with much more of a disposition to allow all relevant evidence to be before the court”: *Salvidge v Hussein* [2000] BCC 36 at 38 [EB/906].
- 43.3. The factors relevant to the Board’s exercise of discretion support the grant of permission to adduce the Constitution. The document is of central importance to the issues on this appeal. Its importance lies in the fact that it establishes that Egallys was at all times required to have a minimum of two directors (see Constitution, paragraph 19.4 [EB/1308]) and therefore its board was inquorate when the Set Aside Application was made and at all times

thereafter, due to the uncontested fact that Mr Esteves was the only director. While the ICT Authority does not suggest that the document was unavailable to it prior to the appeal to the Board, it is curious that the Appellant chose not to draw the attention of the courts below to the Constitution given the argument it advanced on Mr Esteves's authority. The ICT Authority became aware of paragraph 19.4 of the Constitution as part of preparing the ICT Authority's response to the appeal to the Board (in which the Appellant had produced for the first time an extract of minutes from an alleged board meeting of the company [EB/266]). In re-investigating the grounds available to support the decision of courts below, it identified the argument that it now seeks to advance and disclosed its intention to rely upon paragraph 19.4 of the Constitution as soon as it had obtained and considered the terms of the Constitution, in its Notice of Acknowledgment filed and served almost 12 months ago on 7 October 2025 [EB/15]. Where the Appellant has had that period to prepare a response to the argument (and in any event ought to be treated as aware of the issue from the outset of these proceedings), it suffers little if any prejudice in dealing with this argument on appeal to the Board rather than in the courts below.

43.4. In those circumstances, permission to adduce the Constitution should be granted.

E. THE APPELLANT'S GROUNDS OF APPEAL

44. None of the Appellant's grounds of appeal have identified a basis for reversing the decisions reached below. The Court of Civil Appeal upheld the conclusion of the trial judge that Mr Esteves had not been authorised by the Appellant to commence proceedings or swear affidavits on its behalf. Before the Court of Civil Appeal, the Appellant conceded that the issue was one of pure fact [EB/208, 214]. Accordingly, the trial judge's conclusion could only be disturbed if it was plainly wrong, i.e. if no reasonable judge could have reached that conclusion on the evidence before him or her. The Appellant failed to reach that threshold in its appeal to the Court of Civil Appeal and the court was correct to dismiss his appeal. In any event, no error of law in either court's decision has been or can be identified.

Ground 1

45. Under this ground, the Appellant contends that where a company is permitted to have and has a sole director, the person occupying that office becomes one and the same as the company such that the requirements otherwise applicable to the exercise of board powers no longer apply.
46. The Appellant's argument in support this ground is based exclusively on section 128(7) of the Companies Act [EB/1054]. That section provides as follows:

"128. Meaning of 'Board' and 'directors'"

...

- (7) In this Act, 'Board' or 'Board of directors', in relation to a company, means –
- (a) the directors of the company where the number is not less than the required quorum acting together as a Board of directors; or
 - (b) where the company has only one director, that director."

47. The Appellant contends that section 128(7) has the effect of overriding any other requirements, whether in the Companies Act or in the company's constitution, as to how powers conferred on the board may validly be exercised.⁸ In the Appellant's own words, the acceptance of that argument involves the "collapse" of any distinction between the different capacities in which the person who occupies the office of sole director may act when acting *qua* the board and that person's individual capacity.⁹
48. It can be accepted that, where a company is permitted under the Companies Act and its constitution to have a single director, the effect of section 128(7) is that references in the Companies Act to the "Board" of that company are to that director acting in his or her capacity as the company's board. However, the section says nothing about the way in which by which the board (whatever its composition) is permitted to exercise

⁸ Written Case, paragraph 23 [EB/34] (*"In a one-director company, there are no other directors to convene, no quorum of directors to satisfy, and no vote of directors to take."*); paragraph 28 [EB/36] (*"Mr Esteves was the sole director, there was no Board separate from him."*); paragraph 30 [EB/36] (*"Delegation presupposes a distinction between the person or organ conferring authority and the person or body receiving it. In a one-director company, that distinction collapses."*).

⁹ Written Case, paragraph 30 [EB/36] (*"Delegation presupposes a distinction between the person or organ conferring authority and the person or body receiving it. In a one-director company, that distinction collapses."*).

the powers conferred on it. Section 158 of the Companies Act mandates that “*the provisions set out in the Eighth Schedule shall govern the proceedings of the Board*” unless a company’s constitution provides otherwise [EB/1077]. Nothing in the terms of section 128(7) qualifies or permits a derogation from the rules set out in the Eighth Schedule.

49. The only evidence before the courts below concerning Mr Esteves’s authority was his assertion in his affidavits that he was “*duly authorised*”. In the Bankruptcy Division, the Appellant’s counsel conceded that he had not enquired whether any board resolution had been passed to authorise the commencement of the Set Aside Application and the steps required to pursue that (including a board resolution) [EB/193].
50. The Appellant has suggested in its Written Case (albeit in relation to other grounds of appeal) that a board may act “*informally*” and that this supports its contention that the Court of Civil Appeal erred in concluding that Mr Esteves was not authorised to cause Egallys to commence and continue these proceedings.¹⁰ This was not an argument either advanced or considered in the courts below; permission would therefore be required to pursue it now. However, even if such permission were granted, the alleged principle that a board is permitted to exercise its powers informally (i.e. the board can exercise its powers without passing a resolution in accordance with the Eighth Schedule to the Companies Act or otherwise contrary to the requirements of the company’s constitution) should not be recognised under Mauritian law.
 - 50.1. First, such a principle is inconsistent with the legislative policy of the Companies Act and the default requirement under the general law that the powers conferred on the board must be exercised by passing resolutions.
 - 50.2. Secondly, to the extent the principle may be said to exist in English law, it depends on a series of first-instance cases in which the principle was either unnecessary for the decision reached (*Reuter v Electric Telegraph Co* (1856) 6 E & B 341 [119 ER 892] [EB/850]; *Re Bonelli’s Telegraph Co* (1871) LR 12 EQ 246 [EB/824]; *Barron v Potter* [1914] 1 Ch 895 [EB/314]; *Runciman v Walter Runciman Pty Ltd* [1993] BCC 223 [EB/860]; *Hunter v Senate*

¹⁰ Written Case, paragraphs 45, 94 [EB/39/50].

Support Services Ltd [2005] 1 BCLC 175 at [103] [EB/511]) or was the subject of a concession between the parties and therefore not argued (*Charterhouse Investment Trust v Tempest Diesels Ltd* [1986] BCLC 1 [EB/398]). These cases are in any event directly inconsistent with the earlier decisions in *D’Arcy* [EB/412] and *Re Haycraft* [EB/841] (which expressly disapproved the foundation of the line of authority, *Re Bonelli’s Telegraph Co*), neither of which appear to have been cited to the courts in any of the later cases. The only English appellate support for the alleged principle derives from the dissenting judgment of Arden LJ in *Base Metal Trading Ltd v Shamurin* [2005] 1 WLR 1157 at [84] [EB/347], where her Ladyship asserted (without reasoning) that it was an extension to the proceedings of directors of the *Duomatic* principle as that applied to proceedings of shareholders. In none of the cases from which the principle is said to derive is any principled justification or explanation offered as to how directors (who lack the power to change a company’s constitution) may depart from the legislative and constitutional requirements imposed on the exercise of their powers.

Ground 2

51. This ground contends that the Court of Civil Appeal erred by adopting as a legal test of Mr Esteves’s authority whether “*an actual board resolution*” had been passed authorising him to represent Egallys and make affidavits on its behalf. The approach that the Court of Civil Appeal should have but did not follow, according to the Appellant, involved the court asking whether it could be satisfied on the balance of probabilities that Mr Esteves “*had such authority*”. In short, the gist of this ground is that the Court of Civil Appeal wrongly proceeded on the basis that the only sufficient proof of Mr Esteves’s authority was a board resolution.
52. Ground 2 mischaracterises the decision and reasons of the Court of Civil Appeal. The only case advanced by the Appellant before the courts below was that Mr Esteves had been “*duly authorised*” by Egallys. Before the Court of Civil Appeal, the Appellant’s principal ground of appeal was “*that there was no need for [Mr Esteves] to produce any delegation of authority from the Board since there was no provision in the law requiring him as a sole director to draw up and sign a board resolution authorising*

himself to represent the company” [EB/215]. It was an inherent feature of that argument that if its central premise (i.e. that Mr Esteves did not need to comply with any of the procedural requirements otherwise imposed on proceedings of the board of a company under the Companies Act and the company’s constitution) was rejected, Mr Esteves was not “*duly authorised*”.

53. The Appellant rests this ground on a single sentence in the Court of Civil Appeal’s judgment stating that a director may “*only institute proceedings on behalf of a company by showing that he has been validly delegated the power to do so*” [EB/98]. In doing so, the Appellant takes that passage out of context. The Court of Civil Appeal’s reasoning on this point proceeded in a stepwise fashion.

53.1. First, it quoted extensively from its earlier decision in *ENL Ltd v Independent Commission Against Corruption* 2023 SCJ 190 (“*ENL*”) [EB/], including the passage that: “*All decisions which fall within the powers of the Board are taken by the passing of resolutions at a properly constituted meeting of the Board.*” [EB/95]

53.2. Secondly, relying on *ENL*, the Court of Civil Appeal held that “*for the purposes of litigation by a company, it is generally the Board of directors who has authority to act in the name of the company in the manner provided for in the Act*” [EB/97]. It acknowledged that the board could delegate that power “*in conformity with its Constitution and articles of association*” [EB/97].

53.3. Thirdly, it went to identify two ways in which a director (including a sole director) could become empowered to institute proceedings in the company’s name, namely either “*in conformity with the Constitution and Articles of Association of the company vesting the director with the authority to do so*” or “*in accordance with the provisions of the Companies Act i.e. by virtue of a power of Attorney granted pursuant to Section 182(1) of the Act or any resolution or decision duly taken by the Board in conformity with the Act authorising him to act on behalf of the company*” [EB/98].

53.4. Finally, the Court’s conclusion was that no special or specific provision existed in the Companies Act “*entitling or empowering the sole director of a*

company to institute legal proceedings otherwise than in conformity with the provisions set out above” and “no evidence indicating that Mr Esteves was lawfully authorised by the company to enter the application and act on its behalf for the purpose of the present proceedings” [EB/98].

54. In any event, even if the Appellant had not mischaracterised the basis of the Court of Civil Appeal’s decision, Ground 2 raises no new or additional alleged error of law. If as, the ICT Authority submits, Ground 1 should be dismissed on the basis that the courts below were correct to hold that section 128(7) does not override the requirements imposed on the valid exercise of board powers, Ground 2 simply seeks to challenge concurrent findings of fact that there was insufficient evidence to establish that Mr Esteves had been authorised to cause Egallys to commence these proceedings. As the Appellant submitted to the Court of Civil Appeal, “[t]he question of Mr Esteves’ authority is first and foremost a factual question” [EB/214].
55. The Board’s practice is not to interfere with concurrent findings of primary fact and a case must be shown to be exceptional to justify departure from that practice. This involves a “*super-added constraint*” (*Dass v Marchand* [2021] 1 WLR 1788 at [16]) that goes beyond the general reluctance of any appellate court to disturb findings of fact. It is generally necessary for an appellant to establish “*some miscarriage of justice or violation of a principle of law or procedure which means that what has occurred is not in a proper sense a judicial procedure*”: *Glory Trading Holding Ltd v Global Skynet International Ltd* [2022] UKPC 35 at [15]. As the Board observed in *Sancus Financial Holdings Ltd v Holm* [2022] UKPC 41 at [8] “*the requisite exceptionality will need to be demonstrated in clear terms in the appellant’s written case and, if the Board is not persuaded by pre-reading it, established at the outset of the hearing by concise oral submissions*” and requires provision of “*specific reasons*”. None of these requirements have been met in the present case and Ground 2 therefore provides no basis to interfere with Court of Civil Appeal’s decision.

Ground 3

56. Under this ground, the Appellant appears to contend that the Court of Civil Appeal should have considered as separate questions Mr Esteves’s authority (a) to make an affidavit on behalf of Egallys; (b) to represent Egallys before a court; and (c) to

instruct attorneys to commence proceedings. This represents a new argument that the Appellant seeks to raise for the first time before the Board, which requires permission:

- 56.1. In the Bankruptcy Division, the judge characterised the ICT Authority’s successful preliminary objection as impugning whether Mr Esteves “*had locus to enter the application*” [EB/86]. The question of Mr Esteves’s authority to make affidavits in support of the Set Aside Application was therefore treated as part of a single question whether he had authority to cause Egallys to issue and pursue the Set Aside Application (including but not limited to making affidavits on its behalf).
- 56.2. The Appellant raised no objection to this approach in its appeal to the Court of Civil Appeal. None of the three grounds of appeal pursued in that court suggested that the question of Mr Esteves’s authority to make affidavits on Egallys’s behalf raised separate or distinct issues from the question whether there was authority to cause the Set Aside Application to be issued in Egallys’s name [EB/93-94]. Indeed, the Appellant’s own skeleton argument before the Court of Civil Appeal characterised the decision in the Bankruptcy Division as determining whether Mr Esteves “*had been appointed to represent the Appellant and swear affidavits on its behalf*” (emphasis) [EB/212]. The Appellant itself also conflated the questions of authority to represent Egallys and swear affidavits as a single question in describing his own grounds of appeal [EB/213, 215].
57. The Appellant has not applied for permission to advance this argument for the first time. Absent permission, the Appellant is not entitled to rely on this ground.
58. Without prejudice to the ICT Authority’s position that the Appellant requires permission, the ground offers no basis in any event to overturn the decision of the Court of Civil Appeal. For the reasons explained above, the board of a company is the sole repository of the power to commence legal proceedings in the name of the company. That power includes the power take all steps related to commencing and continuing proceedings. Accordingly, if the Board accepts the ICT Authority’s new argument that the board was and remains inquorate or concludes (as the Court of Civil Appeal did) that the requirements for a valid exercise of the board’s power to authorise

the commencement of legal proceedings or delegate that power had not been satisfied, it follows that the company was unable to authorise any of the steps required to commence and continue proceedings.

Ground 4

59. Under this ground, the Appellant contends that the ICT Authority conceded (or should be treated as having conceded) the issue of Mr Esteves's authority before the Bankruptcy Division. The evidence and reasoning said to support that contention is thin and difficult to discern. Both the Bankruptcy Division and the Court of Civil Appeal were correct to reject the argument.
60. There can be no doubt that, at the very latest by the first substantive hearing of the Set Aside Application, the Appellant was aware that the ICT Authority's case was that Mr Esteves lacked authority to cause the Set Aside Application to be made in Egallys's name. The ICT Authority put in issue Mr Esteves's authority to cause Egallys's to make the Set Aside Application and expressly pointed to the absence of any document establishing that matter in its responsive evidence in the Bankruptcy Division. That evidence was served on 14 October 2020 [EB/112], well over 18 months before the first substantive hearing of the Set Application (on 15 June 2022) [EB/188]. The ICT Authority's preliminary objection was confirmed and elaborated in its written submissions filed and served a week before that hearing [EB/170].
61. The Appellant appears to suggest that the ICT Authority was required expressly to deny Mr Esteves's authority in its affidavit evidence but can point to no case that has held that requirement to apply. The only case identified in the Appellant's Written Case [EB/42], the decision of the Court of Civil Appeal in *RKG Fruits Co Ltd v Maersk (Mauritius) Ltd* 2025 SCJ 220 [EB/854], does not assist. In that case, the board of the applicant company had passed a resolution authorising a director to represent the company in legal proceedings and the board resolution was annexed to an affidavit filed in support of the company's case. In reply evidence, the respondent had "taken note" [EB/856] of the board resolution without disputing its validity or effect and was thereby deemed to have accepted the board resolution as conferring authority on the director [EB/858]. The court held that the reply "*leaves no doubt that it was no longer challenging the representation*" of the company by the director

[EB/858]. By contrast, in the present case, no board resolution was produced in evidence by the Appellant and the Appellant was in doubt before the Bankruptcy Division that the ICT Authority continued to challenge Mr Esteves's authority.

62. Before the Board for the first time, the Appellant has placed additional reliance on three letters from the ICT Authority to Egallys sent in connection with matters unrelated to these proceedings and on the parties' dealing in separate judicial review proceedings which it says supports its case that the ICT Authority conceded Mr Esteves's authority.¹¹ As to the letters, the Appellant's argument that addressing correspondence addressed to "The Director" of Egallys involved a concession for the purposes of these proceedings that Mr Esteves had authority need . As to the judicial review proceedings, the Appellant identifies no evidence before the Board as to the initial objections to the grant of leave for judicial that the ICT Authority is said subsequently to have withdrawn and why that would entail a concession in these proceedings.
63. Even if the ICT Authority was required but omitted to put the fact of Mr Esteves's authority in issue (which is denied), the Bankruptcy Division was still entitled to decide that the action was unauthorised and should be dismissed. The court retains an inherent jurisdiction to strike out an action issued purportedly on behalf of a company by a person who lacks authority to do so: *John Shaw & Sons (Salford) Ltd v Shaw* [1935] KB 113 at 131, 145-146, 147 [EB/589, 603-605].
64. Ground 4 is therefore misconceived and should be dismissed.

Grounds 5 and 6

65. The Appellant's final two grounds impugn the Court of Civil Appeal's conclusion that the Bankruptcy Division did not fall into error in setting aside the Set Aside Application without giving the Appellant time to produce a board resolution establishing Mr Esteves's authority.
66. The Appellant's case on these grounds relies on several incorrect factual premises.

¹¹ Letter dated 10 December 2020 from the ICT Authority to Egallys [EB/123, 149]; letter dated 24 December 2020 from the ICT Authority to Egallys [EB/127]; letter dated 19 April 2021 from the ICT Authority to Egallys [EB/134, 148].

- 66.1. First, the Appellant claims that ratification was “*far from obvious*” on the basis of a line of Mauritian cases decided prior to the hearing before the Bankruptcy Division. Even if that were the case (which it is not), the decision in *ENL* (in which it was made clear that retrospective ratification was available) was handed down on 19 May 2023 [EB/464], before the Appellant’s appeal to the Court of Civil Appeal was filed let alone heard.
- 66.2. Secondly, it claims that the ICT Authority’s objection to Mr Esteves’s authority was “*belated*”. However, as explained above and held by the Court of Civil Appeal, Mr Esteves’s authority was put in issue more than a year before the hearing in the Bankruptcy Division in responsive evidence.
- 66.3. Thirdly, the Appellant claims it lacked an opportunity to produce a board resolution. However, it is now almost six years since Mr Esteves’s authority was put in issue in these proceedings and the Appellant has still not produced a board resolution showing that the litigation was authorised prior to its commencement or has since been ratified. All that has been produced is a document dated 14 November 2024 purporting to “certify” prospectively (and not ratify retrospectively) Mr Esteves’ actions [EB/266].
67. In truth, several courses of action were open to the Appellant but inexplicably none were taken. Before the Bankruptcy Division, the Appellant could have sought an adjournment or, alternatively a stay of the lower court’s order, to permit it to produce a board resolution ratifying the commencement and continuation of the proceedings. The Appellant also could have procured a board resolution in the 18 months that passed between the decision of the Bankruptcy Court (on 4 May 2023) and the hearing before the Court of Civil Appeal (on 9 September 2024). Without explanation, it failed to take any of those steps and has failed to identify any legitimate impediment to taking those steps.
68. In those circumstances, the Court of Civil Appeal cannot be faulted for determining that the Set Aside Application fell to be dismissed.

The Appellant's argument concerning relief

69. In its Written Case, the Appellant invites the Board, if the appeal is not dismissed, not only to set aside the Court of Civil Appeal's decision but also to grant the Set Aside Application [EB/55]. The decision at first instance in the Bankruptcy Division did not examine the merits of the Set Aside Application. In the Court of Civil Appeal, the Appellant did not advance any argument that if its appeal to that court succeeded the Set Aside Application ought to be granted. The Appellant's notice of appeal before the Board did not seek any relief other than an order setting aside the decision of the Court of Civil Appeal [EB/5]. Nor do the Appellant's grounds of appeal suggest that it intended to invite the Board to grant the Set Aside Application [EB/7].
70. In the event that the appeal is allowed, there is no basis for the Board to take up the merits of the Set Aside Application and determine whether the statutory demand should be set aside or not on those grounds. The appropriate order in this scenario would be for the matter to be remitted to the Bankruptcy Division for the Set Aside Application to be determined in the ordinary way.

F. CONCLUSION

71. The ICT Authority invites the Board to dismiss the appeal and uphold the decision of the Court of Civil Appeal for the following

Reasons

- (1) BECAUSE the board of Egallys was inquorate and therefore unable to authorise the commencement and continuation of any legal proceedings in the name of the company; and
- (2) BECAUSE the Court of Civil Appeal correctly concluded that the requirements for a valid exercise of the board's power to authorise the commencement and continuation of legal proceedings in the name of the company or ratify such proceedings
- (3) BECAUSE there is no basis to disturb the finding of fact at first instance and upheld on appeal that Mr Esteves had not been delegated the power to commence and continue proceedings in the name of Egallys.

ANDREW McLEOD