Trinity Term
[2019] UKPC 30
Privy Council Appeal No 0023 of 2018

JUDGMENT

East Asia Company Ltd (Respondent) *v* PT Satria Tirtatama Energindo (Appellant) (Bermuda)

From the Court of Appeal of Bermuda

before

Lord Reed
Lord Carnwath
Lady Arden
Lord Kitchin
Lord Sales

JUDGMENT GIVEN ON

27 June 2019

Heard on 16 and 17 January 2019

Appellant	*Respondent*
Michael Todd QC	Mark Howard QC
Philip Gillyon	Kyle Lawson
Shuvra Deb	Rhys Williams
	Zeev Weiss
(Instructed by Harcus Sinclair LLP)	(Instructed by Withers (London))

LORD KITCHIN:

1. In these proceedings the appellant, PT Satria Tirtatama Energindo ("PT Satria"), seeks an order under section 67 of the Bermuda Companies Act 1981 ("the 1981 Act") for the rectification of the register of members of Bali Energy Ltd ("BEL") by striking out the name of the respondent, East Asia Co Ltd ("EACL"), as the holder of all of BEL's issued shares and inserting in its place the name of PT Satria.

2. PT Satria relies for this purpose upon a document called "Heads of Agreement on the Sale and Purchase of Bali Energy Ltd" dated 27 February 2015 ("the HOA"). This was executed on behalf of PT Satria by Mr Wisnu Suhardono, its sole director, and on behalf of EACL by Mr Edwin Joenoes, one of its three directors. It was witnessed by Mr Ira Hata as the Chief Executive Officer of BEL.

3. PT Satria also relies upon a share transfer form ("the Share Transfer") dated 1 March 2015 for the transfer of the shares in BEL from EACL to PT Satria. The Share Transfer was signed by Mr Joenoes on behalf of EACL as transferor in the presence of Mr John Columbo, an employee of PT Satria, who signed it as a witness. It was also signed by Mr Suhardono on behalf of PT Satria as transferee. The Share Transfer was purportedly approved by board resolutions of EACL and BEL on 1 March 2015.

4. The central issue in these proceedings is whether effect should be given to the HOA and the share sale agreement which it is said to contain, and to the Share Transfer. PT Satria contends that it should. It argues that the HOA was entered into by Mr Joenoes with ostensible authority, and that in any event it was properly ratified on 1 March 2015. It also argues that the Share Transfer was properly entered into by EACL and that it was duly approved by the boards of EACL and BEL on 1 March 2015.

5. EACL contends that it is not bound by the HOA. It argues, among other things, that Mr Joenoes had no ostensible authority to enter into it on behalf of EACL; that PT Satria was put on inquiry as to Mr Joenoes' lack of authority; and that Mr Joenoes and Mr Hata had a financial interest in the proposed sale which they failed to disclose to the board of EACL or the board of BEL with the consequence that the purported ratification of the HOA on 1 March 2015 was invalid and EACL was entitled to avoid the transaction, which it subsequently did. EACL also contends that, for like reasons, the Share Transfer was invalid and without legal effect; that BEL has properly refused to register it; and that BEL gave appropriate notice of that refusal within the three months required by the 1981 Act.

6. The action came on for trial before Hellman J in the Commercial Court of the Supreme Court of Bermuda. It lasted for ten days. On 21 October 2016, he gave judgment. He found in favour of PT Satria and ordered the rectification of the register which it sought ([2016] SC (Bda) 90 Com).

7. On 18 September 2017, the Court of Appeal for Bermuda (Clarke JA, Kawaley AJA and Baker, President) allowed EACL's appeal and dismissed PT Satria's claim ([2016] CA (Bda) 20 (Civ)). The Court of Appeal held, among other things, that the HOA was entered into by Mr Joenoes without the ostensible authority of EACL; that PT Satria was in any event put on inquiry as to Mr Joenoes' lack of authority; and that the HOA was not validly ratified by EACL at the meeting of its board on 1 March 2015 because the meeting was inquorate, and the HOA was avoidable at the election of EACL. For like reasons, there was no valid approval of the Share Transfer. It admitted into evidence a resolution of the board of BEL on 7 May 2015 not to register the Share Transfer and held that notice of that refusal was given in the time and manner required by the 1981 Act.

8. PT Satria now appeals to the Judicial Committee of the Privy Council with permission of the Court of Appeal granted by order dated 30 October 2017. It seeks restoration of the order for rectification made by the trial judge.

9. The issues to which the appeal gives rise are these:

i) whether Mr Joenoes had apparent or ostensible authority to enter into the HOA on behalf of EACL;

ii) whether PT Satria was put on inquiry as to Mr Joenoes' lack of authority to enter into the HOA on behalf of EACL;

iii) whether the HOA and the Share Transfer were avoidable at the election of EACL;

iv) whether the Court of Appeal was right to admit into evidence a resolution of the board of BEL on 7 May 2015; and

v) whether BEL refused to register the Share Transfer and gave notice within the three-month period stipulated by the 1981 Act.

10. There are three other issues before the Board: first, whether the Share Transfer was a proper instrument of transfer within the meaning of section 48(2) of the 1981 Act;

secondly, whether a lack of consent from the Bermuda Monetary Authority precluded registration by BEL of the Share Transfer; and thirdly, whether a failure by BEL to provide notice of its rejection of the Share Transfer within the three-month statutory period would mean that PT Satria was entitled to registration as the owner of the shares in BEL. However, for reasons which will become apparent, it is not necessary for the Board to address them.

The facts

11. PT Satria is a company incorporated in Indonesia and is part of an Indonesian conglomerate called PT Satria Gemareska ("SGR"). SGR's business includes power generation and PT Satria's business includes the development of geothermal energy sites in Indonesia. Mr Suhardono is the president of SGR and one of its directors. He also owns 85% of the issued shares in PT Satria.

12. BEL is a company incorporated in Bermuda as an exempted company. At the relevant time it owned the rights to develop a geothermal energy site at Bedugul in Bali, Indonesia. These rights were secured by two agreements. One was a contract with PT Pertamina Persero, an Indonesian state-owned company, under which it was obliged to build and operate an electric power plant at Bedugul at its own cost and risk. The other was an energy sales contract under which, once the power plant had been built and was operational, PT PLN Persero ("PLN"), the Indonesian State power company, would buy electricity from BEL.

13. EACL is also incorporated in Bermuda as an exempted company. At least until the events giving rise to these proceedings, EACL owned all of the shares of BEL, and that shareholding was its only asset. The shares of EACL were originally held by a Japanese company, AIM Holdings Ltd ("AIM"). The chairman and principal of AIM was Mr Koji Matsumoto. He was also a director of BEL but resigned in 2013 when he was declared bankrupt by a court in Japan.

14. Affluent Ocean Ltd ("AOL"), a company incorporated in the Seychelles, became the owner of the shares of EACL in 2013. AOL is now owned and controlled by Mr Matsuo Watabe, though quite when and how he became its owner is not clear. He was entered on the register as holder of the one issued share in AOL on 20 January 2015.

15. At the beginning of 2015, BEL's two longest serving directors were Mr Joenoes and Mr Hata. They worked closely together and effectively ran BEL. Neither of them owned any shares in it. Mr Joenoes was appointed as a director of BEL in 2004 and as Chief of General Affairs on 4 December 2009. Mr Hata was appointed as Chief Executive Officer of BEL on 4 December 2009 and as a director on 24 December 2010.

16. BEL had three other directors at the beginning of 2015, Mr Kiyoshi Yamaura, Mr Yoshinori Matsumoto and Ms Masayo Matsumoto. None played any active role in the business of the company. Mr Yamaura was an old friend of Mr Koji Matsumoto, and Mr Yoshinori Matsumoto and Ms Masayo Matsumoto are Mr Koji Matsumoto's children. Mr Yamaura and Ms Masaya Matsumoto resigned as directors of BEL with effect from 1 April 2015, and Mr Yoshinori Matsumoto resigned as a director with effect from 15 April 2015.

17. As from 15 April 2015, the register of directors and officers of BEL showed that its directors were Mr Hiroichi Kitamoto and Mr Motonari Takeyama. They were purportedly elected as directors on 4 March 2015, and it is EACL's case that on that same day Mr Hata and Mr Joenoes were removed as directors.

18. At the beginning of 2015, EACL had three directors, Mr Joenoes, Mr Hata and Mr Yamaura. EACL contends that Mr Joenoes and Mr Hata were removed as directors on 4 March 2015 and that Mr Kitamoto and Mr Naotake Manaka were elected as directors in their place. Mr Yamaura resigned with effect from 20 March 2016.

19. By 2015 BEL had been in severe financial difficulties for many years. Indeed, by 2008 it had accumulated a substantial deficit and had a negative operating cash flow. Mr Joenoes and Mr Hata therefore sought a suitable investment partner or buyer and entered into discussions with several leading companies in the engineering and power generation sector. One of the companies with which they had discussions in 2011 and 2012 was PT Satria. Another was PT Praja Bumi Selaras ("PBS"). In 2012, PBS entered into a memorandum of understanding ("MOU") with EACL and EACL's then beneficial owner, Mr Matsumoto. That expired in 2013 and PBS then entered into a second MOU with EACL and its new owner, AOL. PBS cancelled that second MOU in October 2014 which left BEL with a pressing need to secure funding. BEL issued cash calls to EACL and EACL in turn issued cash calls to AOL, but no cash was forthcoming.

20. PT Satria heard that PBS had terminated the second MOU and, in December 2014, contacted BEL to discuss re-opening talks. Negotiations began in the middle of January 2015. PT Satria undertook due diligence in relation to BEL, and as part of this exercise reviewed its assets and value. It had conducted substantial due diligence in 2012 and so only had to update the findings it made at that time. In this way it became aware that by 2015 BEL had accumulated debts of nearly US$2m and was cash-flow insolvent. Indeed, Mr Suhardono estimated BEL would need an investment of US$60m if PT Satria were to develop the site and realise a profit. Nevertheless, it began final negotiations on 16 February 2015.

21. In the meantime, Mr Joenoes and Mr Hata had been taking steps to secure the transfer to themselves of a substantial shareholding in BEL and to remove Mr Yamaura, Mr Yoshinori Matsumoto and Ms Masaya Matsumoto as directors.

22. The minutes of board meetings of EACL and BEL held by Skype on 18 December 2014 and attended only by Mr Joenoes and Mr Hata recorded the earlier issue to themselves of share transfer agreements and acknowledged their entitlement to, respectively, about 10% and 7% of the shares in BEL. On the same day, Mr Yamaura, Mr Yoshinori Matsumoto and Ms Masaya Matsumoto signed a written request to Mr Joenoes and Mr Hata not to hold meetings of BEL by Skype, and for discussion and vote to be by email. Mr Yamaura made a similar request in relation to EACL. However, on 22 December 2014, the boards of EACL and BEL rejected these requests at meetings held by Skype in which only Mr Joenoes and Mr Hata participated.

23. Two other important events took place on 18 December 2014. First, Mr Joenoes and Mr Hata gave notice to the members and board of BEL that there would be a special general meeting of BEL on 31 December 2014 in Japan for the purpose of removing Mr Yamaura, Mr Yoshinori Matsumoto and Ms Masaya Matsumoto as directors. Secondly, AOL, as owner of the shares in EACL, issued a written warning to Mr Joenoes and Mr Hata in respect of their recent activities.

24. On 31 December 2014, the special general meeting of BEL took place and was attended by Mr Hata and a Mr Paul Unger (as proxy for Mr Joenoes), purportedly representing between them all of the shares in BEL. At that meeting it was resolved immediately to remove Mr Yamaura, Mr Yoshinori Matsumoto and Ms Masaya Matsumoto as directors. However, this resolution was invalid because the directors in question had not been given adequate notice, and they had been given no opportunity to be heard, contrary to BEL's bye-laws.

25. Over the course of the next few weeks further steps were taken by Mr Joenoes and Mr Hata to secure the transfer of shares in BEL to themselves in accordance with the share transfer agreements. They also maintained Mr Yamaura, Mr Yoshinori Matsumoto and Ms Masaya Matsumoto had been removed as directors of BEL.

26. For its part, AOL gave notice to Mr Joenoes and Mr Hata of a special general meeting of EACL to be held on 4 March 2015 for the purpose of removing them as directors of EACL; and Mr Yamaura, Mr Yoshinori Matsumoto and Ms Masaya Matsumoto gave them notice of a special general meeting of BEL to be held on the same day for the purpose of removing them as directors of BEL. As a result, Mr Joenoes and Mr Hata were aware that they were at risk of being removed as directors of EACL and BEL on 4 March 2015. Yet, as the Board will explain, they continued to negotiate

and then executed the sale of EACL's shareholding in BEL to PT Satria, and they did so without informing Mr Watabe or any other director of EACL or BEL.

27. On 27 February 2015, PT Satria and EACL purported to execute the HOA. As the Board has mentioned, it was signed by Mr Suhardono for PT Satria and Mr Joenoes for EACL, and it was witnessed by Mr Hata on behalf of BEL. No other directors of BEL, EACL or AOL were aware of what was going on. Under the terms of the HOA, EACL agreed to sell and PT Satria agreed to buy the shares held by EACL in BEL for a consideration of US$2m payable within 30 days of the "commissioning of the final unit of the Project". The HOA also set out the financial liabilities of BEL to be assumed by PT Satria and these comprised a sum of about US$518,500 which was payable to Mr Joenoes and Mr Hata, including a sum of US$35,400 for the lease of an apartment for Mr Hata.

28. On the following day, 28 February 2015, Mr Joenoes gave Mr Hata and Mr Yamaura notice by email of a meeting of the board of EACL to be held by Skype on 1 March at 10.00 am Japanese time. Very shortly afterwards, Mr Joenoes gave Mr Hata, Mr Yamaura, Ms Masayo Matsumoto and Mr Yoshinori Matsumoto notice by email of a meeting of the board of BEL to be held by Skype on 1 March 2015 at 10.15 am Japanese time. The business stated in the agenda of each of these meetings included "Share transfer cancellations" and "Share transfer approval".

29. These notices provoked a swift response. By letter of 28 February 2015, sent by email to Mr Hata and Mr Joenoes on 1 March 2015, Mr Yamaura, Ms Masayo Matsumoto and Mr Yoshinori Matsumoto objected to the convening of the EACL board meeting on the basis that they were not able to participate by Skype; stated that no dealings in the shares held by EACL could be approved without the approval of AOL as the sole shareholder of EACL; and asserted that Mr Joenoes and Mr Hata should not be approving any actions relating to the assets or shares of EACL because a special general meeting had been convened by AOL for 4 March 2015 to remove them as directors of EACL.

30. Further and by another letter of 28 February 2015, sent by email to Mr Hata and Mr Joenoes on 1 March 2015, Mr Yamaura, Ms Masayo Matsumoto and Mr Yoshinori Matsumoto objected to the convening of the BEL board meeting on the basis that they were not able to participate by Skype and that Mr Joenoes and Mr Hata should not be approving any actions which related to the assets of BEL because a special general meeting had been convened for 4 March 2015 to remove them as directors of BEL.

31. What was more, by emails dated 28 February 2015 and 1 March 2015, ISIS Law Ltd ("ISIS"), the Bermudan lawyers acting on behalf of AOL, informed Mr Joenoes and Mr Hata that they owed statutory and common law fiduciary duties to BEL, that they

would be liable as a matter of Bermudan law if they breached those duties, and that the actions they proposed would, in ISIS's view, amount to a breach of those duties.

32. Nevertheless, on 1 March 2015, a meeting of the board of EACL took place by conference call. It was attended by Mr Hata and Mr Joenoes. At that meeting, Mr Hata and Mr Joenoes passed a resolution to approve the sale and transfer of the shares in BEL to PT Satria. But as the Court of Appeal noted, there was no reference in the minutes to the HOA, which does not appear to have been presented to the meeting, nor of the benefits Mr Joenoes and Mr Hata stood to gain from it; nor was there any declaration of interest.

33. Shortly after that meeting, a meeting of the board of BEL took place by Skype. It was again attended by Mr Hata and Mr Joenoes. The minutes record that they had received the Share transfer, and that it had been duly executed. They resolved "that the transfer be approved and the register of members be updated accordingly."

34. The Share Transfer is dated 1 March 2015. It was signed by Mr Joenoes on behalf of EACL as transferor. It was also signed by Mr Suhardono on behalf of PT Satria as transferee. It stated that PT Satria had assumed the outstanding liabilities of BEL in the sum of US$1.9m and that EACL thereby sold, assigned and transferred to PT Satria all of the shares it held in BEL.

35. The next day, 2 March 2015, ISIS wrote to Mr Hata and Mr Joenoes at EACL and BEL asserting that AOL objected to the business conducted at the board meetings of EACL and BEL on 1 March 2015 and stating that formal notice would be sent to PT Satria that the purported transfer by EACL of the shares in BEL was ineffective and invalid. That formal notice was duly sent to PT Satria on the same day.

36. On 4 March 2015, the special general meetings of the boards of EACL and BEL took place. Each was attended by Mr Katsumi as proxy holder for AOL and by Mr Yamaura. At the meeting of the board of EACL it was resolved that Mr Hata and Mr Joenoes be removed as directors, that Mr Manaka and Mr Kitamoto be elected in their place, and that the meeting of the board on 1 March 2015 should be rejected as invalid. At the meeting of the board of BEL it was resolved that Mr Hata and Mr Joenoes be removed as directors and that Mr Kitamoto and Mr Takeyama be elected in their place.

37. On 6 March 2015, ISIS, on behalf of BEL, wrote to Mr Suhardono at PT Satria stating that the actions of Mr Hata and Mr Joenoes had not resulted in a valid or effective transfer of the shares held by EACL in BEL to PT Satria.

38. On 7 May 2015, unanimous written resolutions of the boards of directors of EACL and BEL were passed and signed rejecting the purported transfer of the shares in BEL to PT Satria as being invalid, null and void. The resolution of the board of EACL was signed by Mr Manaka, Mr Kitamoto and Mr Yamaura, who together constituted the board. It stated that "for the avoidance of doubt, the purported share transfer of [BEL] shares to [PT Satria] is completely rejected as being invalid, null and void".

Did Mr Joenoes have ostensible authority to enter into the HOA?

39. It is no longer contended by PT Satria that Mr Joenoes had actual authority to enter into the HOA on behalf of EACL, and rightly so. Bye-law 45 of EACL provided that the business of the company was to be managed and conducted by the board of directors or by the directors present at a quorate meeting. The board was empowered by bye-law 46 to appoint one or more directors to the office of managing director or chief executive officer and, indeed, to delegate its powers to any person and on such terms as it thought fit. However, the board had not appointed Mr Joenoes to the office of managing director or chief executive officer; nor had it delegated any of its relevant powers to him. This aspect of PT Satria's case therefore depended upon its establishing that Mr Joenoes had ostensible authority.

40. One further matter must be mentioned at this stage. Section 97 of the 1981 Act provides that every officer of a company in exercising his powers and discharging his duties shall act honestly and in good faith with a view to the best interests of the company; and an officer shall be deemed not to be acting honestly and in good faith if he fails to disclose at the first opportunity at a meeting of directors or by writing to the directors his interest in any material contract or proposed material contract with the company or any of its subsidiaries. Consistently with this provision, EACL's bye-laws provided at 52.2 that: "A director who is directly or indirectly interested in a contract or proposed contract shall declare the nature of such interest as required by the Act"; and at 52.3 that: "Following a declaration being made pursuant to this bye-law, and unless disqualified by the chairman of the relevant board meeting, a director may vote in respect of any contract or proposed contract or arrangement in which such director is interested and may be counted in the quorum for such meeting". Bye-law 60 provided that a written resolution "signed by all the directors shall be as valid as if it had been passed at a meeting of the board duly called and constituted". The bye-laws of BEL were substantially to the same effect.

41. The general principles governing the existence of ostensible authority of an agent of a company are well established. It must be shown that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor; that the representation was made by a person or persons who had actual authority to manage the business of the company either generally or in respect of the particular matter to which the contract relates; that the

contractor was induced by the representation to enter into the contract; and that under its memorandum or articles of association the company was not deprived of the capacity to enter into a contract of the kind sought to be enforced or to delegate authority to the agent to enter into a contract of that kind: *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 505, per Diplock LJ.

42. It is also important to have in mind that ostensible authority is a relationship between the principal and the contractor and it is one created by the representation of the principal that the agent has the authority on behalf of the principal to enter into a contract of a particular kind. The representation, if acted upon by the contractor by entering into the contract, operates as an estoppel which prevents the principal from contending that he is not bound by that contract: *Freeman & Lockyer* [1964] 2 QB 480, 503 per Diplock LJ. For the estoppel to operate, the representation must be one upon which the contractor could and did reasonably rely: *Egyptian International Foreign Trade Co v Soplex Wholesale Supplies Ltd ("The Rafaella")* [1985] 2 Lloyd's Rep 36, 41, per Browne-Wilkinson LJ.

43. A representation which creates apparent or ostensible authority will commonly arise from conduct, that is to say, by the principal permitting the agent to enter into contracts of a particular kind on his behalf. In this way the principal may represent to anyone who becomes aware that the agent is so acting that the agent has authority to enter into contracts of that kind: see, for example, *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1986] AC 717, 777, per Lord Keith at p 777A-C; *Freeman & Lockyer* [1964] 2 QB 480, 505, per Diplock LJ.

44. The trial judge decided that Mr Joenoes had ostensible authority to enter into the HOA on behalf of EACL on 27 February 2015. In reaching this conclusion he relied upon the fact that PT Satria's staff spoke to Mr Joenoes and Mr Hata and reviewed the corporate documents of BEL and EACL. In that way, he continued, PT Satria established that Mr Joenoes and Mr Hata were directors of both companies; that the board of EACL had authority to enter into a contract with PT Satria for the sale and purchase of EACL's shares in BEL; and that the board of BEL had authority to register the share transfer.

45. The Court of Appeal did not agree. Clarke JA, with whom Kawaley AJA and Baker P agreed on this issue, identified a series of factors which militated against Mr Joenoes having ostensible authority to enter into the HOA. The most important were these. First, Mr Suhardono gave evidence that PT Satria had conducted detailed financial and legal due diligence, and part of this involved the inspection of EACL's bye-laws. Having carried out this exercise, PT Satria was satisfied that the board, as opposed to any individual director, had authority to transact the business of the company. Further, the bye-laws revealed that individual directors in the position of Mr Joenoes and Mr Hata had no authority to bind EACL in respect of the sale of its

shareholding in BEL, its only asset, absent a delegation to them by the board of EACL either by resolution or at a quorate board meeting. No relevant resolution or board minute was produced or available to PT Satria and, absent such a resolution or board minute, PT Satria was not entitled to assume that such a delegation had taken place.

46. Secondly, Mr Suhardono accepted in the course of his evidence that he had never seen any document authorising Mr Joenoes to sell EACL's shareholding in BEL, and that he did not check with anyone to see if Mr Joenoes had the necessary authority to do so. Indeed, he also accepted that Mr Joenoes and Mr Hata told him that they had the relevant authority to act on behalf of EACL and BEL and he believed what they said.

47. Thirdly, section 97 of the 1981 Act and the bye-laws of EACL required a declaration of interest by Mr Joenoes and Mr Hata at a meeting of the directors or by writing to the directors and there was no evidence that any such declaration had been made.

48. Fourthly, the negotiations with PT Satria in 2011 and 2012 told PT Satria nothing about the authority of Mr Joenoes to act on behalf of EACL in relation to the actual sale of its shareholding in BEL because no contract was made and no heads of agreement were entered into at that time. Further, the fact that Mr Joenoes and Mr Hata entered into the MOUs with PBS in 2012 and 2013 took the matter no further because Mr Suhardono did not see those memoranda and did not suggest that he had ever relied on them.

49. Fifthly, it could not be said that the making of an HOA of this kind fell within the usual authority of a single director such as Mr Joenoes. The subject matter of the HOA was the sale of the sole asset of EACL for a consideration which might never materialise and, if it did, would be payable at some time in the future. The power to make such an agreement would not ordinarily be exercisable by a single director; and in any event the bye-laws made plain that a decision of the board was required.

50. Clarke JA summed up the position in these terms [2016] CA (Bda) 20 (Civ), para 122:

> "On the facts of the present case, I do not regard it as established that Joenoes was held out *by EACL* as having authority to communicate to PT Satria that the board had authorised him to contract on behalf of EACL or delegated to him the ability to decide to enter into the HOA on its behalf. The HOA was not akin to a credit facility offered in the ordinary course of business of a bank by a manager whose function it was to negotiate such arrangements, but a one-off disposition of EACL's only asset,

> which, as PT Satria knew from the bye-laws, required the assent of the board either by resolution or at a board meeting. It seems to me far from clear that PT Satria could in the ordinary course expect that communication of the necessary board approval of a contract of this nature, of which Joenoes and Hata would be principal beneficiaries, and under which the consideration payable by EACL was a distant prospect, would be given by a single director, or even a single director acting with another director, without production of a board resolution or board minute or any explanation as to ow approval had been given ie whether it was by resolution or decision at a board meeting (and whether the decision of the board was to contract or to delegate that decision to Joenoes). Production of such evidence would be neither difficult, expensive or time consuming. If the board had made a unanimous resolution, a copy could be produced; if it had met, there would be minutes."

51. Upon this further appeal, Mr Michael Todd QC, for PT Satria, has launched a sustained attack on this reasoning. He submits that, in reaching the conclusions it did, the Court of Appeal lost sight of the legal principles the Board has summarised and that had it applied these principles to the facts of this case, it would or ought to have upheld the finding of the trial judge that Mr Joenoes was acting within the scope of his ostensible authority when he entered into the HOA on behalf of EACL.

52. The particular facts and matters upon which Mr Todd relies may be summarised as follows:

i) Mr Joenoes and Mr Hata were the only executive directors of EACL and BEL and for a long time were the only persons responsible for running the businesses of those companies.

ii) Mr Joenoes and Mr Hata had titles which indicated their executive responsibility, whereas the other directors of EACL and BEL (Mr Yamaura in the case of EACL; and Mr Yamaura, Ms Masaya Matsumoto and Mr Yoshinori Matsumoto in the case of BEL) did not.

iii) There was no evidence that Mr Yamaura, Ms Masaya Matsumoto or Mr Yoshinori Matsumoto played any part in the affairs of EACL, in the potential sale of BEL, or in the fundraising for either EACL or BEL.

iv) From late 2008 until the execution of the HOA in 2015, BEL was in financial difficulty and needed investment. Indeed, its financial statements for the year ending 31 December 2008 referred to its negative working capital, its

accumulated deficit, its recurring losses and its negative cash flows and contained other doubts about its ability to continue as a going concern.

v) Mr Joenoes and Mr Hata conducted the negotiations on behalf of EACL and BEL to raise funds or find an investor, and were responsible for the negotiations with PT Satria in 2011 and 2012.

vi) In 2012 and 2013 the MOUs were signed by Mr Joenoes and Mr Hata on behalf of EACL and BEL, but these came to nothing.

vii) BEL issued cash calls to its only shareholder, EACL, which in turn issued cash calls to AOL, but the cash calls went unanswered; and by the end of 2014 BEL had a pressing need for funding.

viii) Mr Joenoes and Mr Hata conducted all of the negotiations on behalf of EACL and BEL to raise funds or find an investor and were responsible for the negotiations with PT Satria in 2011, 2012 and in late 2014; and were the only directors with whom PT Satria had ever dealt.

ix) In December 2014 PT Satria contacted BEL to discuss reopening talks, having heard that PBS had withdrawn. Negotiations began in earnest on 16 January 2015 and closing negotiations began on 16 February 2015, by which time BEL was effectively insolvent.

53. Mr Todd argues that these facts amply justify the conclusion that EACL clothed Mr Joenoes and Mr Hata with ostensible authority by allowing them to act on its behalf as its only executive directors over an extended period of time, and by permitting them to attempt to raise funds or find a buyer for BEL and to conduct EACL's negotiations for that purpose with third parties. At no stage was any restriction or limitation on the ability of Mr Joenoes or Mr Hata to act on behalf of, and bind, EACL ever communicated to any third party. In this way, Mr Todd continues, EACL represented to those dealing with it, including PT Satria, that Mr Joenoes and Mr Hata were authorised to act on its behalf. He also contends that PT Satria reasonably relied upon this representation when entering into the HOA. It is to be noted and Mr Todd has made clear that it forms no part of PT Satria's case that Mr Joenoes and Mr Hata clothed themselves with ostensible authority or that it was their conduct alone which amounted to a representation by EACL that they were authorised to enter into the HOA on its behalf.

54. Mr Todd turns next to the reasoning of the Court of Appeal and contends that Clarke JA failed to give any or any sufficient consideration to whether, on these facts,

EACL represented to PT Satria that Mr Joenoes was authorised to act on its behalf in negotiating and entering into the HOA and whether it is estopped from denying Mr Joenoes' authority. Mr Todd also submits that the absence of evidence that Mr Joenoes and Mr Hata declared an interest as required by EACL's bye-laws in relation to the HOA is neither here nor there because there is no evidence that PT Satria had any knowledge of any such failure; and PT Satria is in any event entitled to rely on the indoor management rule as explained in *Royal British Bank v Turquand* [1843-1860] All ER 435; (1856) 6 E & B 327; (1856) 25 LJQB 317.

55. The Board cannot accept these submissions. The starting point is to consider whether EACL ever represented to PT Satria that Mr Joenoes or Mr Hata had authority to act on its behalf in connection with the sale of its only asset, the shares in BEL. It is common ground that no express representation to this effect was ever made, so the question is whether EACL made such a representation impliedly or by conduct. Here the Board finds the reasoning of the Court of Appeal entirely convincing. In this regard the Board emphasises the following matters.

56. First, PT Satria had carried out financial and legal due diligence and, as part of that exercise, examined the company documents. It was well aware of the bye-laws of EACL and knew that only the board had authority to transact the business of the company. Indeed, it was Mr Suhardono's own evidence that the bye-laws firmly placed the running of the company in the board's hands. It also knew that EACL had three directors, Mr Joenoes, Mr Hata and Mr Yamaura; that all three were ordinary directors; and that, although Mr Joenoes was styled as Chief of General Affairs and Mr Hata as Chief Executive Officer of BEL, neither had been appointed to the position of chief executive officer or managing director of EACL.

57. Secondly, this was by any measure a highly unusual transaction. EACL was effectively a holding company for AOL and was not itself insolvent and yet, by entering into the HOA, it was agreeing to sell its only asset, its shareholding in BEL. Whilst it was true to say that BEL needed a substantial injection of funds, it still owned the right to develop the geothermal site in Bedugul and had the benefit of the energy sales contract under which, once the power plant was built, PLN, the Indonesian State power company, would buy its electricity.

58. Thirdly, the Board recognises that Mr Joenoes and Mr Hata carried on the day-to-day business of EACL and BEL, that they conducted the search for a potential investor in or purchaser of BEL, and that they acted on behalf of EACL in the negotiations with PT Satria in 2011 and 2012. But none of this implies that either of them had authority to enter into an agreement to sell EACL's only asset on the terms of the HOA; and that was particularly so in light of the fact that the HOA was, as Clarke JA put it, manifestly to the benefit of both of them because, by virtue of it, over US$500,000 said to be owed to them by BEL, of which, absent the HOA, they had

practically no hope of recovery, would be paid within three months. The action of entering into this HOA was fundamentally different from any activity they had previously conducted on behalf of EACL.

59. Fourthly, the Board accepts that EACL and BEL entered into the two MOUs with PBS, and that Mr Hata signed them on behalf of EACL and Mr Joenoes did so on behalf of BEL. But, as Clarke JA explained, Mr Koji Matsumoto, the beneficial owner of EACL until 2013, was also party to the 2012 MOU, and AOL, EACL's new owner, was party to the 2013 MOU. So in neither case were Mr Hata and Mr Joenoes acting entirely independently. Moreover, there was no evidence that PT Satria had seen either of these MOUs before 27 February 2015 or relied upon them as showing that Mr Joenoes had authority to enter into the HOA on behalf of EACL on that day.

60. Fifthly, it is indeed relevant that PT Satria was unable to point to any resolution or board minute suggesting that Mr Joenoes was properly authorised to enter into the HOA on behalf of EACL. So too, it is relevant that PT Satria was unable to identify any declaration of interest by Mr Joenoes and Mr Hata as required by section 97 the 1981 Act and EACL's bye-laws. The absence of any such resolution, minute or declaration in the context of this case means that PT Satria is driven to rely on the activities of Mr Joenoes and Mr Hata as amounting to a representation by EACL that Mr Joenoes had authority to act on its behalf in connection with the HOA. But these cannot avail PT Satria because Mr Joenoes and Mr Hata could not expand the scope of their authority as agents for EACL by representing that they had it, as the Board will now explain.

61. Judges have rightly resisted the notion that an agent can clothe himself with authority. Rare and unusual circumstances can arise in which an agent who is known to have no general authority to enter into transactions of a certain type can by reason of circumstances created by the principal reasonably be believed to have specific authority to enter into a particular transaction of that type: *Armagas Ltd v Mundogas SA* [1986] AC 717, 777D-F per Lord Keith. Similarly, there may be situations in which an agent who would have no authority to enter into transactions of a particular type is held out by the employer as the person who is permitted to communicate to outsiders that such a transaction has been approved by the principal or that some agent has been duly authorised to approve it: *Kelly v Fraser* [2012] UKPC 25; [2013] 1 AC 450, per Lord Sumption at paras 11-15. But this is not such a case, and in any event, Mr Todd has made plain that he is not advancing any argument to the effect that it is.

62. The Board therefore turns to the indoor management rule. In *Morris v Kanssen* [1946] AC 459, 474, Lord Simonds approved this statement of the rule in *Halsbury's Laws of England* 2nd ed, vol V, at p 423:

> "… persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular."

63. Lord Simonds went on, at p 475, to explain the purpose of the rule is to allow the wheels of business to "go smoothly round". However, Mr Todd did not question the following well-known passage in the judgment of Sargant LJ in *Houghton & Co v Nothard, Lowe & Wills Ltd* [1927] 1 KB 246, 266 in which he explained that the rule does not permit a third party to circumvent the normal rules of agency:

> "But even if Mr Dart, and through him the plaintiffs, had been aware of the power of delegation in the articles of the defendant company, this would not in my judgment have entitled him or them to assume that this power had been exercised in favour of a director, secretary or other officer of the company so as to validate the contract now in question. The learned judge, indeed, has said that this follows from a well recognized line of cases, refers as an example to the case of *In re Fireproof Doors Ltd* [1916] 2 Ch 142, and holds that the plaintiffs were entitled to assume that anything necessary to delegate any of the functions of the board to one director or two directors had been done as a matter of internal management. But, in my opinion, this is to carry the doctrine of presumed power far beyond anything that has hitherto been decided, and to place limited companies, without any sufficient reason for so doing, at the mercy of any servant or agent who should purport to contract on their behalf. On this view, not only a director of a limited company with articles founded on Table A, but a secretary or any subordinate officer might be treated by a third party acting in good faith as capable of binding the company by any sort of contract, however exceptional, on the ground that a power of making such a contract might conceivably have been entrusted to him."

64. This limitation on the scope of the indoor management rule was also described by Dawson J in *Northside Developments Pty Ltd v Registrar General* [1990] 170 CLR 146; [1993] ALR 385 in the following passage of his judgment which was cited with approval by Lord Neuberger of Abbotsbury NPJ in the Court of Final Appeal of Hong Kong in *Akai Holdings Ltd v Kasikornbank Public Co Ltd* [2010] HKCFA 64; [2011] 1 HKC 357, para 59:

> "The correct view is that the indoor management rule cannot be used to create authority where none otherwise exists; it merely

> entitles an outsider, in the absence of anything putting him upon inquiry, to presume regularity in the internal affairs of a company when confronted by a person apparently acting with the authority of the company. The existence of an article under which authority might be conferred, if it is known to the outsider, is a circumstance to be taken into account in determining whether that person is being held out as possessing that authority. … In other words, the indoor management rule only has scope for operation if it can be established independently that the person purporting to represent the company had actual or ostensible authority to enter into the transaction. The rule is thus dependent upon the operation of normal agency principles; it operates only where on ordinary principles the person purporting to act on behalf of the company is acting within the scope of his actual or ostensible authority."

Mr Todd did not question this statement of principle either.

65. It follows that the indoor management rule could not, without more, allow PT Satria to assume that the power of delegation had been exercised and, in the circumstances of this case, there was nothing more to be found. It could not be established independently that EACL had made any representation as to the scope of Mr Joenoes' authority to agree a sale of its only asset.

66. For all of these reasons, the Board is satisfied that no representation was made by EACL by words or in any other way to PT Satria that Mr Joenoes or, indeed, Mr Hata had authority to enter into the HOA on its behalf. The Court of Appeal was right so to hold.

67. PT Satria's case on this issue also fails for another reason, however. It did not establish that it relied on any such representation. Indeed, such evidence as there was pointed to the opposite conclusion. As has been mentioned, Mr Suhardono was familiar with the bye-laws of EACL and appreciated that only the board had authority to conduct the business of the company and agree to sell its interest in BEL to PT Satria. He also accepted at the trial that he had never seen a document authorising Mr Joenoes to sell that interest, the only asset of the company; that he had not taken steps to check whether Mr Joenoes had such authority; that Mr Hata and Mr Joenoes told PT Satria that they had authority to act on behalf of EACL and BEL and had provided a written assurance to that effect in the HOA; and that the reason that he proceeded in the way that he did in relation to the HOA was that he trusted Mr Joenoes.

68. This evidence makes it perfectly clear that neither Mr Suhardono nor PT Satria relied on any representation, whether express or implied, made by EACL. They relied

on the representations and assurances given to them by Mr Joenoes. The Board accepts the submission made by Mr Mark Howard QC, for EACL, that this is fatal to this aspect of PT Satria's appeal.

69. It follows that the Court of Appeal was right to find that Mr Joenoes did not have ostensible authority to enter into the HOA on behalf of EACL.

Was PT Satria put on inquiry as to Mr Joenoes' lack of actual authority?

70. EACL argued before the Court of Appeal that PT Satria was put on inquiry as to whether Mr Joenoes had authority to contract on behalf of EACL and, having failed to make any adequate inquiries, it could not rely on the indoor management rule or upon any ostensible authority of Mr Joenoes.

71. This contention gave rise to two questions. The first was concerned with the state of mind of a person alleging apparent authority. EACL contended that a third party could not rely upon the apparent authority of an agent if it failed to make the inquiries that a reasonable person would have made in all the circumstances in order to verify the agent had that authority. PT Satria contended that a third party could rely upon the apparent authority of an agent unless it knew of the agent's lack of actual authority, was dishonest or irrational, or was reckless as to its belief or turned a blind eye.

72. The second question before the Court of Appeal was whether, upon the application of the correct test, PT Satria was not entitled to rely upon any apparent authority of Mr Joenoes.

73. The Court of Appeal declined to answer the first question on the basis that, having found that Mr Joenoes did not have ostensible authority, it was not necessary to go further. However, perhaps anticipating a further appeal, it did answer the second question and it did so on each basis. It found that if the correct test was that for which EACL contended then PT Satria could not rely upon any ostensible authority of Mr Joenoes because it was put on inquiry. If, however, the test was that contended for by PT Satria, then it could rely upon any ostensible authority of Mr Joenoes because it did not know of Mr Joenoes' lack of actual authority, and it was not dishonest or irrational or reckless in its belief, and it had not turned a blind eye to the issue.

74. It will be appreciated that in light of the Board's conclusion on the question of ostensible authority it is not strictly necessary to address this issue in order to resolve this appeal. Nevertheless, since it is before the Board and we heard argument upon it, it may be helpful to state our view.

75. As the Board has explained, ostensible authority is a relationship between a principal and a third party created by a representation made by the principal, which the third party can and does reasonably rely upon, that the agent of the principal has the necessary authority to enter into a contract on its behalf: *The Raffaella* [1985] 22 Lloyd's Rep 36, para 41. This may be thought to lead naturally to the conclusion that if the third party has reason to believe that the agent does not have actual authority and fails to make the inquiries that a reasonable person would have made in the circumstances to verify that the agent has authority, then the estoppel cannot arise, for in such a case reliance on the representation would hardly be reasonable.

76. Certainly, this was the conventional view and it is reflected in a long line of authority. For example, *AL Underwood Ltd v Bank of Liverpool* [1924] 1 KB 775 concerned a director of a company who took cheques belonging to the company, some crossed and some uncrossed, drawn in favour of the company, indorsed them, and paid them into his own account with the defendant bank. The bank, sued for conversion by the company, sought to rely upon the ostensible authority of the director and, in respect of the cheques which were crossed, the protection afforded by section 82 of the Bills of Exchange Act 1882. Bankes LJ explained at pp 785, 788-789 that the conduct of the bank established not only negligence but also such an absence of ordinary inquiry as to disentitle it from relying upon the director's ostensible authority, and that was so in respect of all of the cheques; it also removed the protection given by section 82 in respect of the crossed cheques. Scrutton LJ reasoned at pp 792-793 that the defence of ostensible authority failed because the director was acting and purporting to act for himself as principal; and the defence under section 82 failed because it was negligent. Atkin LJ held at pp 797-798 that the defence of ostensible authority failed because the director was doing something unusual which ought to have attracted the attention of the bank's employees; and the defence under section 82 failed because the bank was negligent.

77. The *Houghton* case [1927] 1 KB 246 involved a dispute between the parties as to whether the defendants were bound by an agreement said to have been entered into on their behalf by one of their directors. One of the key issues was what the plaintiff's representative, Mr Dart, thought and did. As appears from the passage of his judgment cited at para 63 above, Sargant LJ, with whom Atkin LJ agreed, held that it could not be assumed, as a matter of internal management, that the director's actions had been authorised. However, Bankes LJ explained at pp 260-262 that the claim failed because Mr Dart had not relied upon the ostensible authority for which he had contended and because he had been put on inquiry as to the extent of any authority which the director possessed.

78. In *Morris v Kanssen* [1946] AC 459, 475, Lord Simonds described the limits of the indoor management rule and explained that the principle of ostensible authority cannot be invoked by a person who is put on inquiry:

> "An ostensible agent cannot bind his principal to that which the principal cannot lawfully do. The directors or acting directors or other officers of a company cannot bind it to a transaction which is ultra vires. Nor is this the only limit to its application. It is a rule designed for the protection of those who are entitled to assume, just because they cannot know, that the person with whom they deal has the authority which he claims. This is clearly shown by the fact that the rule cannot be invoked if the condition is no longer satisfied, that is, if he who would invoke it is put upon his inquiry. He cannot presume in his own favour that things are rightly done if inquiry that he ought to make would tell him that they were wrongly done."

79. In *Rolled Steel Products (Holdings) Ltd v British Steel Corpn* [1986] Ch 246, 284-285, Slade LJ said that the nature of a proposed transaction may put a third party on inquiry as to the authority of the directors of a company to effect it. Further, Browne-Wilkinson LJ, at p 304, provided this helpful exposition of the limits of the principle of ostensible authority and the indoor management rule:

> "As an artificial person, a company can only act by duly authorised agents. Apart from questions of ostensible authority, directors like any other agents can only bind the company by acts done in accordance with the formal requirements of their agency, eg, by resolution of the board at a properly constituted meeting. Acts done otherwise than in accordance with these formal requirements will not be the acts of the company. However, the principles of ostensible authority apply to the acts of directors acting as agents of the company and the rule in *Turquand's* case, 6 E & B 327 establishes that a third party dealing in good faith with directors is entitled to assume that the internal steps requisite for the formal validity of the directors' acts have been duly carried through. If, however, the third party has actual or constructive notice that such steps had not been taken, he will not be able to rely on any ostensible authority of the directors and their acts, being in excess of their actual authority, will not be the acts of the company."

80. The *Armagas* case [1986] AC 717 concerned the sale of a ship by the defendants to the claimants and a three-year charter back to the defendants. One of the issues before the court was whether a senior employee of the defendants had ostensible authority to enter into the charter on their behalf. The Court of Appeal, in a decision upheld on further appeal to the House of Lords, held that he did not. Robert Goff LJ made clear in the course of his judgment at p 734 that various extraordinary features of the charter were such as to put the claimants on inquiry as to the employee's lack of authority, and

he cited in this regard the passage in the judgment of Bankes LJ in the *Houghton* case at [1927] 1 KB 246, 260-262 to which the Board has referred.

81. In *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28; [2004] 1 WLR 1846, para 31, Lord Scott reiterated that apparent authority can only be relied upon by a person who does not know that the agent has no actual authority. But, he continued, if a person dealing with an agent knows or has reason to believe that the transaction is contrary to the commercial interests of the agent's principal, it is likely to be very difficult for that person to assert with any credibility that he believed that the agent had apparent authority, and lack of such a belief would be fatal to a claim that he did.

82. Finally, in *Wrexham Association Football Club Ltd v Crucialmove Ltd* [2006] EWCA Civ 237; [2008] 1 BCLC 508 an issue arose as to whether the claimant football club, acting by a director and its secretary, had executed as a deed a declaration of trust which said that the club held the freehold of the club ground as trustee for the defendant. Sir Peter Gibson, giving the lead judgment, explained at paras 45 and 46 that the defendant was put on notice that the director was entering into the transaction for an improper purpose and in breach of his fiduciary duty and so could not rely upon his ostensible authority.

83. The orthodox view represented by this consistent line of authority was challenged in the *Akai* case [2011] 1 HKC 357, however. One of the questions before the court was whether a Mr Ting, Akai's Chief Executive Officer, had apparent authority to commit Akai to a particular transaction, termed the Switch Transaction, with the respondent bank. It was argued for the bank that unless it had actual knowledge of Mr Ting's lack of authority or that its belief that Mr Ting had authority was dishonest or irrational, then its state of mind would suffice for the purpose of showing ostensible authority; although it accepted that if it was reckless in its belief or turned a blind eye then this would amount to irrationality or dishonesty in this context. Counsel for Akai argued that this set too low a standard on the bank, as a third party seeking to establish apparent authority, and that such authority could not be relied upon if the bank had failed to make the inquiries that a reasonable person in the circumstances would have made to verify Mr Ting's authority.

84. Lord Neuberger, with whom the other members of the court agreed, expressed doubt as to the extent to which there would, in practice, be much difference in outcome between the application of the rival tests, a doubt which was perhaps rather too sanguine, as the present appeal shows. However, he proceeded to decide the issue, and he did so in favour of the bank. His essential reasoning ran as follows. As a matter of practicality, at least in the context of normal commercial transactions, the application of the concept of constructive notice has been deprecated, and, he continued, it is easy to understand why. In a commercial context and absent dishonesty or irrationality, a

person should be entitled to rely on what he is told, for this enables people in business to know where they stand. Further, apparent authority is a species of estoppel by representation and, in the field of misrepresentation, it is no defence to an action for rescission that the representee might have discovered the falsity of the representation by exercising reasonable care. This decision has since been followed in a number of cases in England and Wales. See, for example, *Quinn v CC Automotive Group Ltd (trading as Carcraft)* [2010] EWCA Civ 1412; [2011] 2 All ER (Comm) 584; *Newcastle International Airport Ltd v Eversheds LLP* [2012] EWHC 2648 (Ch); [2013] PNLR 66 (reversed on appeal on other points: [2013] EWCA Civ 1514; [2014] 1 WLR 3073); *Gaydamak v Leviev* [2012] EWHC 1740 (Ch); *Acute Property Developments Ltd v Apostolou* [2013] EWHC 200 (Ch); *LNOC Ltd v Watford Association Football Club Ltd* [2013] EWHC 3615 (Comm) and *PEC Ltd v Asia Golden Rice Co Ltd* [2014] EWHC 1583 (Comm).

85. The reasoning in the *Akai* case has been the subject of strong criticism, however: *Bowstead & Reynolds on Agency* 21st ed (2017) paras 8-49 - 8-50; P Watts, "Some Wear and Tear on Armagas v Mundogas - The Tension between Having and Wanting in the Law of Agency" (2015) 1 LMCLQ 36, 48-56. In the Board's respectful view, much of that criticism has considerable force.

86. The Board would readily accept that if party A agrees to buy goods from party B, in ignorance of the fact that party B is no more than agent for a third party and in the honest belief that he is a principal, it will generally not avail the third party, when claiming for the price, to say that party A was negligent in entertaining his honest belief. This is a principle of long standing and was applied in *Greer v Downs Supply Co* [1927] 2 KB 28, an authority to which Lord Neuberger referred. The commercial imperative which underpins it was explained by Lindley LJ in *Manchester Trust v Furness* [1895] 2 QB 539, 545:

> "In dealing with estates in land title is everything, and it can be leisurely investigated; in commercial transactions possession is everything, and there is no time to investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions we should be doing infinite mischief and paralyzing the trade of the country."

87. The present case is very different, however, for EACL does not contend it entered into a binding agreement with PT Satria. To the contrary, it is PT Satria that advances that contention. It says that a series of facts and matters justify the conclusion that EACL held Mr Joenoes out as its properly authorised agent to enter into the HOA on its behalf; and it is the opinion of the Board that to ask in this context how those facts and matters would reasonably be understood and whether PT Satria reasonably relied upon them seems entirely appropriate. On a more general level, it is also important to

keep in mind that the issue of whether two parties intended to contract, and, if they did, the terms of their contract is to be determined objectively and from the perspective of the reasonable person. The relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

88. Turning to Lord Neuberger's second point, it is true that apparent authority may be seen as a species of estoppel by representation, as is apparent from the authorities to which the Board has referred at paras 41 to 43 above. It is also true that in the field of misrepresentation, it is no defence to an action for rescission to say that the representee might have discovered the falsity of the representation by the exercise of reasonable care. If an unequivocal statement is made by one party to another of a particular fact, it is no answer for the person who made the statement to say that if the person to whom he made it had reflected and thought about it he would have come to see that it could not be true. The very person who makes a statement of that sort has put the other party off making further inquiry: *Bloomenthal v Ford* [1897] AC 156, 161-162, 168, per Lord Halsbury LC and Lord Herschell, respectively.

89. Once again, however, the present case is very different. PT Satria is not contending that it is entitled to rescind an agreement with EACL. Further, there was no unequivocal representation by EACL, and it cannot be said that EACL intended PT Satria to understand from its actions that Mr Joenoes had authority to enter into the HOA on its behalf. In cases of estoppel by representation, at least absent fraud, an unequivocal meaning or an intention that one particular meaning be relied upon, it is appropriate to consider whether the representee reasonably understood that the representor intended he should act on the representation, and whether the manner in which he then acted was reasonable.

90. The authorities to which the Board has referred at paras 76 to 82 above are entirely consistent with this approach. Nevertheless, in *Akai* [2011] 1 HKC 357, Lord Neuberger distinguished them. He addressed, first, at para 57, the *Underwood* case [1924] 1 KB 775 and reasoned that the references to "negligence" and being put on inquiry in the judgments of Bankes and Scrutton LJJ were concerned with the bank's defence under section 82 of the Bills of Exchange Act 1882, and that Atkin LJ's judgment also had to be seen in that context. The Board respectfully disagrees. This decision has been considered at para 76 above and whilst it is true to say that the bank did raise a defence under the section 82 of the Bills of Exchange Act 1882, it was relevant to only some of the cheques in issue. The defence of ostensible authority, on the other hand, applied to all of the cheques and was dealt with in the manner the Board has summarised.

91. Lord Neuberger, at para 58, addressed the *Houghton* case [1927] 1 KB 246, and, at para 60, *Morris v Kanssen* [1946] AC 459 and the *Rolled Steel* case [1986] Ch 246.

In his view, these were all cases involving the indoor management rule as explained in *Turquand's* case (1856) 6 E & B 327, which was decided at a time when a person dealing with a company was deemed to know the terms of its articles of association. Lord Neuberger continued, at para 61, that it was therefore unsurprising that the courts developed the principle that one could only rely on the rule if one took reasonable steps to ascertain the relevant facts, but that there was no obvious reason why the same principle should apply to cases of ostensible authority.

92. Again, the Board finds itself in respectful disagreement with this analysis. As Lord Simonds explained in *Morris v Kanssen* [1946] AC 459, 475, both the indoor management rule and the doctrine of ostensible authority allow the smooth operation of business by protecting those who are entitled to assume that the person with whom they are dealing has the authority which he claims. But this general principle cannot be invoked if he who would invoke it is put upon inquiry. He cannot presume in his favour that things are rightly done if the inquiry that he ought to make would tell him that they were wrongly done. Similarly, *Houghton* [1927] 1 KB 246 and *Rolled Steel* [1986] Ch 246 involved an attempt by a third party to rely on the indoor management rule. The attempt failed in both cases because, among other things, the principle of ostensible authority applied to acts of a director acting as an agent of the company and, if the third party had actual or constructive notice that the steps necessary for the formal validity of the acts of the director had not been taken, the third party could not rely upon the principle.

93. The Board therefore concludes that PT Satria could not rely upon the apparent authority of Mr Joenoes to enter into the HOA on behalf of EACL if it failed to make the inquiries that a reasonable person would have made in all the circumstances in order to verify that he had that authority.

94. Mr Todd submitted that the Court of Appeal fell into error in finding that PT Satria was put on inquiry, but the Board found this submission wholly unpersuasive. There were ample grounds for the Court of Appeal's conclusion. In brief, PT Satria knew that only the board of EACL had authority to approve a contract such as the HOA but did not seek or obtain any evidence that such approval had been given. PT Satria also knew that Mr Joenoes was not the managing director or chief executive officer of EACL and knew that he and Mr Hata were not the only directors of EACL. In addition, there were many highly unusual features of the transaction, namely that EACL was selling its only asset; that EACL was simply an intermediate holding company for AOL and Mr Watabe and no contact had been made with either; and that Mr Joenoes and Mr Hata had a financial interest in the transaction. Finally, instead of providing confirmation, by way, for example, of a certified board resolution that Mr Joenoes had authority, Mr Joenoes and Mr Hata personally undertook to indemnify PT Satria against any claims in connection with any breach of any representation, including the representation that they had obtained all the necessary approvals needed to sign the

HOA. This was highly unusual given that neither Mr Joenoes nor Mr Hata had any equity in EACL or BEL.

95. The Board therefore finds in favour of EACL on the second issue.

Was the HOA avoidable by EACL?

96. PT Satria contends that (i) irrespective of whether Mr Joenoes had apparent authority (or actual authority) to enter into the HOA on behalf of EACL, on 1 March 2015 there was a validly convened board meeting of EACL at which the HOA was ratified and the Share Transfer was approved; (ii) shortly afterwards, there was a validly convened board meeting of BEL at which the Share Transfer was approved; and (iii) that any deficiency in the meetings, the ratification of the HOA or the approval of the Share Transfer was a matter of internal management of EACL and BEL and so it was and remains entitled to rely on the indoor management rule. Accordingly, so it is said, EACL could not subsequently avoid the HOA.

97. The Court of Appeal did not accept the first or second of these contentions; nor does the Board. Our reasons may be summarised quite shortly. Mr Joenoes and Mr Hata, as directors of EACL and BEL, owed each company a fiduciary duty not to put themselves into a position where their personal interests might conflict with those of the company. In addition, section 97 of the 1981 Act imposed on them a duty to act honestly and in good faith with a view to the best interests of the company, and to disclose at the first opportunity their interest in any material contract. Under the bye-laws of each company, if they had a direct or indirect interest in a contract or proposed contract with the company then they were obliged to disclose it. By necessary implication, if either of them did not disclose his interest, his vote could not count in the quorum.

98. Mr Joenoes and Mr Hata had a personal interest in the HOA. Under its terms they would be paid within three months over US$500,000 which they claimed was owed to them by BEL, and which otherwise they had little prospect of recovering. From EACL's perspective, the agreement would mean the loss of its only asset for a consideration which might never be paid. This situation created a risk that Mr Joenoes and Mr Hata would take their personal interests into account in performing their duties to EACL and to BEL. They therefore had a duty to disclose their interests in the HOA to EACL and to BEL as fiduciaries, pursuant to section 97 of the 1981 Act and under the bye-laws of each company. The rule these provisions embody is one of long standing and, as Lord Herschell explained in *Bray v Ford* [1896] AC 44, 51, it is based upon the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than duty.

99. Mr Todd, for PT Satria, argues that there was no conflict of interest because Mr Joenoes, Mr Hata, EACL and BEL had a common interest in ensuring that BEL's liabilities were paid. Further, he continues, the HOA was self-evidently in the interests of EACL and of BEL, and that was so because BEL was insolvent, and the HOA enabled it to meet its liabilities, including its liability for the sums properly due to Mr Joenoes and Mr Hata.

100. The Board accepts that if a company is insolvent or approaching insolvency, the directors, in performing their duties, are obliged to take the interests of the creditors into account. Nevertheless, as Clarke JA explained, the key issue here is whether there was a conflict of interest between Mr Joenoes and Mr Hata, on the one hand, and EACL, which was not itself insolvent, on the other. There plainly was because, under the terms of the HOA, Mr Joenoes and Mr Hata stood to recover the sum of more than US$500,000 which they claimed was due to them and which was otherwise most unlikely to be paid. This interest might influence the way they voted.

101. Mr Joenoes and Mr Hata were therefore under an obligation to make full disclosure to EACL and BEL of all the material circumstances relating to the HOA, and their failure to do so meant that they were in breach of the duties which they owed to both companies. Further, it meant that Mr Joenoes and Mr Hata were disqualified from voting at the EACL board meeting on 1 March 2015 and the meeting was inquorate. This in turn meant that there was no valid approval of the HOA or the Share Transfer, and the purported ratification of the HOA was without legal effect, as Clarke JA correctly held. As for BEL, Mr Joenoes and Mr Hata were also disqualified from voting at its board meeting on 1 March 2015 and that meeting too was inquorate. This meant that the decision of the board to approve the Share Transfer was of no legal effect, as Clarke JA again correctly held.

102. It only remains to consider PT Satria's further contention, namely that it is entitled to rely upon the indoor management rule. Mr Todd submitted on its behalf that irrespective of whether the board meetings of EACL and BEL were quorate in respect of the particular matters in issue in these proceedings, they were validly convened. Further, PT Satria dealt with EACL and BEL in good faith throughout and it was therefore entitled to assume that acts within the respective constitutions and powers of EACL and BEL, which the power to ratify the HOA and approve the Share Transfer undoubtedly were, had been properly and duly performed on 1 March 2015, and that it was not bound to inquire whether the acts of internal management which purportedly took place on that day were regular.

103. The Board does not agree with this analysis. The indoor management rule is a rule that a person dealing with a company in good faith may assume that acts within its constitution and powers have been properly and duly performed. Here it is said, in summary, that PT Satria was entitled to assume that the HOA had been properly ratified

and the Share Transfer approved at the board meeting of EACL, and that it was also entitled to assume that the Share Transfer had been approved at the board meeting of BEL. But there was no evidence before the court that PT Satria was informed that the HOA had been ratified and the Share Transfer approved on 1 March 2015 before it was put on notice the following day that AOL objected to both of them and maintained that each was ineffective and invalid. In these circumstances there was no scope for the indoor management rule to operate so as to entitle PT Satria to rely on the regularity of those purported acts, because there was no point in time at which it could possibly have done so without having been put on inquiry.

104. Further, PT Satria was in any event not entitled to assume that any acts of internal management concerning the ratification of the HOA or the approval of the Share Transfer were regular because it had been put on inquiry as to their irregularity both by reason of all the facts and matters to which the Board has summarised at para 94 above and by the further fact that there was nothing to indicate to PT Satria that Mr Joenoes and Mr Hata had disclosed their interest in the HOA to EACL or obtained its formal consent to proceed in the way that they did. PT Satria is in no better position in relation to the ratification of the HOA than it was in relation to the making of it.

105. The Court of Appeal was therefore right to find that the HOA and the Share Transfer purportedly made pursuant to it were avoidable.

Did the BEL board refuse to register the share transfer within three months?

106. Section 50 of the 1981 Act provides that if a company refuses to register a transfer of any shares, the company shall within three months of the date upon which the transfer was lodged with the company, send to the transferor and the transferee notice of the refusal.

107. EACL contended and the Court of Appeal accepted that BEL refused to register the Share Transfer by the resolution of its board on 7 May 2015. For this purpose, the Court of Appeal admitted that resolution into evidence. The Court of Appeal also found that, since it was exhibited to an affidavit in the proceedings, that of Mr Takeyama dated 8 May 2015, PT Satria was notified of the refusal within the period of three months beginning no earlier than 1 March 2015.

108. PT Satria now contends that the making of the resolution was not proved; that the proper composition of the board as at that date was not clear; that some of the directors did not attend to give evidence and did not attest to the resolution; and that the admission of the resolution into evidence did not satisfy the test in *Ladd v Marshall* [1954] 1 WLR 1489.

109. The Board is not persuaded by any of these arguments. As the Court of Appeal pointed out, there was affidavit evidence before the court that the resolution was executed on 1 May 2015; and there was no reason to suppose that it was not executed on that day. Further, it was executed by Mr Takeyama and Mr Kitamoto who were directors of BEL. Moreover, the Court of Appeal had a wide discretion to admit the evidence under section 8 of the Court of Appeal Act 1964 and section 14(5) of the Civil Appeals Act 1971. It exercised that discretion by choosing to allow the evidence to be admitted. No proper basis for interfering with that exercise of discretion has been shown. Indeed, the Board has no doubt that the Court of Appeal exercised its discretion entirely correctly. It was entitled to find as it did that BEL refused to register the Share Transfer and notified PT Satria within the period of three months of the date upon which the transfer was lodged with it.

Overall conclusion

110. The issues which the Board has addressed are dispositive of the appeal. The Board will therefore humbly advise Her Majesty that the appeal should be dismissed.

111. The parties should make any written submissions on costs within 21 days of this judgment.