Neutral Citation Number: [2020] EWCA Civ 980

Case No: A3/2019/2750

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
COMPANIES COURT (ChD)
HHJ Hodge QC
[2019] EWHC 3590 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2020

Before :

LORD JUSTICE FLOYD
LADY JUSTICE ASPLIN
and
LORD JUSTICE COULSON

- -

Between :

HOULDSWORTH VILLAGE MANAGEMENT COMPANY LIMITED	**Appellant**
- and -	
KEITH BARTON	**Respondent**

- -
- -

Justin Bates and **Alice Richardson** (instructed by **PM Legal Services**) for the **Appellant**
Robert Sterling (instructed by **Public Access**) for the **Respondent**

Hearing date: 21 July 2020

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Approved Judgment

Lord Justice Floyd:

1. This appeal is concerned with the right of members of a company to inspect the current register of members under section 116 of the Companies Act 2006 ("the Act"). The respondent ("Mr Barton") owns the long lease of an apartment in a building known as Victoria Mill in Reddish, Stockport. He made a section 116 request to the appellant ("Houldsworth"), which is the management company of Victoria Mill. In his request he stated that the reason that he wished to inspect the register of members was to seek a general meeting of members of Houldsworth with a view to removing the current directors and also the current managing agent of Victoria Mill appointed by the board. Houldsworth applied to the court for a direction (under section 117 of the Act) that it did not have to comply with the request, because the grounds on which it was made were not "proper" ones. By an order dated 10 October 2019 HHJ Hodge QC, sitting as a judge of the High Court ("the judge"), accepted an undertaking by Mr Barton to contact his fellow members only for the purpose stated in his request, but otherwise declined to make the order sought by Houldsworth. Instead, the judge directed Houldsworth, pursuant to section 117(5) of the Act, immediately to comply with the request. He did, however, grant a stay of execution so as to allow Houldsworth to make an application for permission to appeal to this court. Permission to appeal was granted by Newey LJ on 17 February 2020.

2. Victoria Mill is described as an apartment complex made up of 180 residential flats which are held on long leases. The three parties to the leases are the landlord, the leaseholder and Houldsworth, which is a leaseholder-owned management company. Mr Barton owns the lease of Apartment 93 and is a member of Houldsworth.

3. Houldsworth is a company limited by guarantee. Its purposes are set out in clause 3.1.1 of its memorandum of association:

> "To acquire, hold, manage and administer the freehold or leasehold of the three apartment buildings located or to be located on the west side of Houldsworth Street and Harrogate Road, Reddish, Stockport including without limitation to the generality of the foregoing any common area, roads, accessways, footpaths, parking areas, drains, sewers, lighting, security and associated facilities … either on its own account or as trustee, nominee or agent of any company or person."

4. Given that Houldsworth did not, as sometimes occurs, acquire any freehold or leasehold interests, the relevant object of Houldsworth is, in practical terms, "to … manage and administer the freehold or leasehold" including, without limitation, any common area, roads, accessways, footpaths, parking areas, drains, sewers, lighting, security and associated facilities. In the usual way, Houldsworth provides these services to the leaseholders in return for service charges. Houldsworth does not provide these services itself, but appoints a managing agent to do so. The current managing agent, appointed in August 2012, is Living City Asset Management Limited.

5. On 3 May 2019 Mr Barton sent a written request to Houldsworth under section 116 of the Act to inspect the current register of members including the following statement of purpose:

> "I wish to contact my fellow members with a view to seeking a general meeting of members and proposing resolutions to remove and replace the existing directors and the managing agent. The information will not be disclosed to any other person"

6. Houldsworth took the view that Mr Barton's request was not made for a proper purpose and applied to the court on 14 May 2019 in order to seek a direction not to comply with the request under section 117(3)(a) of the Act.

7. Houldsworth's Part 8 claim was supported by three witness statements of Ian Macdonald, a director of Houldsworth. In his first witness statement Mr Macdonald explained that Houldsworth's responsibilities to manage the building arose under the terms of the lease. He recognised that Houldsworth was also a company limited by guarantee, that its affairs as a corporate entity were separately governed by its articles of association and by company legislation, and that the occupational leaseholders (including Mr Barton) were members of the company.

8. Mr Macdonald went on to say that he did not consider Mr Barton's purpose to be a proper purpose because his concerns were centred on matters relating to Houldsworth and its roles and responsibilities under the tripartite leases, "*rather than … the conduct of corporate affairs*". He explained that Living City was engaged as managing agent for Victoria Mill to undertake the day-to-day performance on behalf of Houldsworth "*in relation to the management functions [Houldsworth] holds regarding Victoria Mill*". He expressed the view that Mr Barton's actions were motivated "*by the desire to interfere with matters relating to the management of the building, as opposed to company matters (to which section 116 relates)"*.

9. Mr Macdonald expanded on these views in his second witness statement, where he expressed the view that Mr Barton's purpose was not a proper one, for two separate reasons. The first, narrow reason was that, according to Mr Macdonald, Mr Barton's stated purpose of calling a general meeting to remove the directors and the managing agent was, in itself, improper because there were other, more appropriate methods to achieve this result. In support of this ground he asserted that the appointment of managing agents *"is not a decision for members to make"* and that *"therefore provision of the register of members would do nothing to aid [Mr Barton's] desires in that regard."* He continued that "*The true purpose behind [Mr Barton's] request is to exercise greater control over [Houldsworth's] management responsibilities at Victoria Mill, which arises under the terms of the occupational leases and is not linked to [Houldsworth's] corporate affairs*."

10. The second, broader reason advanced by Mr Macdonald was that Mr Barton's "real motive" was to remove the current directors in order to further his own interests and cause disruption at Victoria Mill. He said that this was supported by what he described as a "*long history of non-payment of service charges, unjustified litigation with no merit and a strong desire to take over the management functions at various developments in which he owns leasehold properties*." His second witness statement went on to recount details of previous litigation between Mr Barton and Houldsworth, and to refer to a previous case involving the management company of a different building, Pandongate House, which had resulted in a direction under section 117(3) of

the Act that that management company should not comply with a request by Mr Barton.

11. Houldsworth's application under section 117 was also supported by a witness statement from Mr Damiano Rea, a director of the managing agent appointed by the management company of Pandongate House, recounting the history of the engagement between the Pandongate House management company and Mr Barton. As reliance is placed by Houldsworth on the decision of HHJ Kramer in that case, it will be necessary to return to it later in this judgment.

12. Mr Barton, in his evidence, joined issue with Mr Macdonald and Mr Rea. He pointed out that he had achieved a measure of success for himself and other leaseholders in the only litigation involving Houldsworth, and had benefited leaseholders in other ways.

Statutory framework

13. The rights to inspect and take copies of the register are set out in section 116 of the Act:

> "(1) The register and the index of members' names must be open to the inspection - (a) of any member of the company without charge, and (b) of any person on payment of such fee as may be prescribed.
>
> (2) Any person may require a copy of a company's register of members, or of any part of it, on payment of such fee as may be prescribed.
>
> (3) A person seeking to exercise either of the rights conferred by this section must make a request to the company to that effect.
>
> (4) The request must contain the following information – (a) in the case of an individual, his name and address; (b) in the case of an organisation, the name and address of an individual responsible for making the request on behalf of the organisation; (c) the purpose for which the information is to be used; and (d) whether the information will be disclosed to any other person, and if so-
>
> (i) where that person is an individual, his name and address,
>
> (ii) where that person is an organisation, the name and address of an individual responsible for receiving the information on its behalf, and
>
> (iii) the purpose for which the information is to be used by that person."

14. The rights and obligations of a company on receipt of a request under section 116 are contained in section 117 of the Act:

> "(1) Where a company receives a request under section 116 (register of members: right to inspect and require copy), it must within five working days either-
>
> (a) comply with the request, or
>
> (b) apply to the court
>
> (2) If it applies to the court it must notify the person making the request.
>
> (3) If on an application under this section the court is satisfied that the inspection or copy is not sought for a proper purpose-
>
> (a) it shall direct the company not to comply with the request, and
>
> (b) it may further order that the company's costs (in Scotland, expenses) on the application be paid in whole or in part by the person who made the request, even if he is not a party to the application.
>
> (4) If the court makes such a direction and it appears to the court that the company is or may be subject to other requests made for a similar purpose (whether made by the same person or different persons), it may direct that the company is not to comply with any such request. The order must contain such provision as appears to the court appropriate to identify the requests to which it applies.
>
> (5) If on an application under this section the court does not direct the company not to comply with the request, the company must comply with the request immediately upon the court giving its decision or, as the case may be, the proceedings being discontinued."

15. A refusal or failure to permit inspection or provide a copy as required under section 116, otherwise than in accordance with an order under section 117, is an offence on the part of the company and every officer in default: section 118(1). Additionally, by section 118(3), the court may by order compel an immediate inspection or direct that the required copy be provided. Section 119 creates two further offences. First, it is an offence for a person knowingly or recklessly to make in a request under section 116 a statement that is misleading, false or deceptive in a material particular: section 119(1). Secondly, it is an offence for a person in possession of information obtained by the exercise of the rights conferred by section 116 to do anything that results in the information being disclosed to another person or to fail to do anything with the result that the information is disclosed to another person, knowing or having reason to

suspect that person may use the information for a purpose that is not a proper purpose: section 119(2).

Approach to "proper purpose"

16. The approach to what amounts to a proper purpose under section 117 has been considered by this court in two relatively recent cases: *In re Burry & Knight Ltd* [2014] EWCA Civ 604; [2014] 1 W.L.R. 4046 ("*Burry*") and *Burberry Group plc v Fox-Davies* [2017] EWCA Civ 1129; [2018] Bus. L.R. 332 ("*Fox-Davies*"). The effect of these cases was summarised at paragraph 24 of a judgment of Mr Terence Mowschenson QC, sitting as a deputy judge of the High Court, in *The Hut Group Limited v Zedra Trust Company (Jersey) Limited* (unreported) which neither side criticised:

> "(a) The criminal penalties imposed by section 118 of the Act emphasise the importance the legislature attached to the right of access to the share register: *Burry* para 24.
>
> (b) The expression "proper purpose" in section 117 (3) ought to be given its ordinary and natural meaning: *Burry* para 18.
>
> (c) The purpose should first be identified. That will normally be described in the request but the court is not restricted to the purpose in the request: *Burry* para 21 and *Fox-Davies* para 34. The court will determine the purpose of the request on the balance of probabilities on the evidence before it.
>
> (d) After the purpose is established, the court will consider whether it is proper. The test whether a purpose is proper is an objective one made by the court on the basis of the evidence before it and will often depend on the precise facts and circumstances: *Fox-Davies* paras 35 and 47.
>
> (e) The court may have regard to a guidance note issued by the Institute of Chartered Secretaries and Administrators ("the ICSA Guidance") which might provide useful guidance in a particular case: *Burry* para 19.
>
> (f) The test for whether a purpose is proper does not depend on whether it is in the interests of shareholders: *Fox-Davies* paras 48 and 50. The person (whether a shareholder or not) making the request may have his own interests in making the request.
>
> (g) The onus is on the claimant company to satisfy the court on the balance of probabilities that the request is improper: *Burry* para 22.
>
> (h) If the court is in any doubt it should not make a no-access order: *Burry* para 25.

> (i) It is for the person making the request, rather than the court, to consider whether access will be of value to that person: *Burry* para 25."

17. In *Burry* at [18] Arden LJ considered that, in the case of a request by a member, a proper purpose ought generally to relate to the member's interest in that capacity and/or to the exercise of shareholder's rights. I do not think Arden LJ was seeking to lay down anything in the nature of a rigid requirement which must be satisfied before a request by a member can be proper. In *Fox-Davies* at [49] David Richards LJ said that section 116 applies the same purpose test to all requests, whether they are made by members of the company or not. That would not be a correct statement if there was some special requirement for members. To my mind, Arden LJ's observation is no more than a reflection of the fact that members are in general likely to be interested, and properly so, in the proper running of the company.

18. At [24] in *Burry* Arden LJ explained that the discretion to make a "no access" order should be exercised sparingly because, if members cannot communicate with other members, the board is put in a strong position and "*corporate governance is accordingly weakened*". She considered that a strong case was required to prevent access, otherwise the relationship between the board and the shareholders would not operate as it was intended to operate "*with the shareholders monitoring the activities of the directors*". I would add, therefore, that a shareholder who is seeking to communicate with other shareholders in order to make a challenge in good faith to the way the company is being run, should normally be regarded as having a proper purpose.

19. The court in *Burry* and in *Fox-Davies* gave some examples of purposes which would normally be proper. One example of a proper purpose given by Arden LJ in *Burry* at [8] was if a member needed the information in the register because he or she wanted to obtain support from fellow members to requisition a general meeting of the company. Likewise in *Fox-Davies* at [36] David Richards LJ said that a member who wanted to obtain support to requisition a general meeting "*will generally have a proper purpose, except on unusual facts such as those in [Burry] itself"*. In *Burry* the court was able to conclude that the request was made to pursue stale and unsubstantiated allegations against the directors which it was "very difficult to conceive" that he could ever prove, and accordingly it was right to refuse access.

Pandongate

20. The decision of HHJ Kramer in *Pandongate House Management Co Ltd v Barton* [2019] L & TR 23 was founded on a request by Mr Barton to inspect the register of members "*to seek their views on several matters relating to Pandongate House Management Company Limited*". This gave rise to an argument that the request was not a proper notice under section 116. HHJ Kramer resolved this issue in favour of Mr Barton, and then went on to consider two further contentions, which have parallels in the contentions of Houldsworth in the present case. The first, narrow contention was whether the purpose was not a proper one because it did not relate to Mr Barton's interests as a member of the company, or the exercise of shareholders' rights, or the interests of the other members as members. The second, broader contention was that the true purpose was to disrupt the proper working of the company and to harass its members.

21. HHJ Kramer held that Mr Barton's purpose in that case was (see paragraph 43) "*to contact other leaseholders in order to invite their support to challenge the service charge and to remove HPBM as managing agents, and ultimately to support Mr Barton when the case next comes before a tribunal, either on his application, or as a result of a reference to the First Tier Tribunal on the claimant's civil claim to recover the outstanding service charge.*"

22. HHJ Kramer then went on to consider, specifically, whether contacting leaseholders for the purpose of supporting challenges to the service charges and retention of the managing agents was a proper purpose. He considered it important to distinguish between Mr Barton's rights in his capacity as a member of a company and his rights in his capacity as a leaseholder. The former arose under the articles of association of the company, whereas the latter arose under the lease. He accepted a submission on behalf of the management company (see paragraph 47) that a request which seeks to gain names and addresses to contact leaseholders in order to consult or persuade them to use the rights they have in that capacity was "*entirely distinct from a request to contact them about matters relating to the company, their shareholding or the related exercise of their rights*." He gave an example of a retailing company where a member sought to inspect the list of members in order to communicate to them their dissatisfaction with a shirt purchased from the retailer which had shrunk in the wash. These considerations satisfied HHJ Kramer that the request in that case was not for a proper purpose, "*because it was nothing to do with the interests of a member as member*". He considered (see paragraph 48) that that conclusion "*struck a proper balance between the conflicting considerations of shareholder democracy and public interest in knowing the identity of the owners of a company*".

23. HHJ Kramer turned, finally (see paragraphs 49 and 50) to what he described as "the vexatious litigant point". Particularly in the light of evidence which had passed unanswered by Mr Barton, he concluded on the facts that the further purpose alleged by the management company was made out. This therefore formed a second basis for the decision.

24. Mr Barton sought permission to appeal to this court from that decision. The application came before Rose LJ on the papers, who said this in refusing permission to appeal:

> "The Appellant raises four grounds of appeal. The first three challenge the basis of Judge Kramer's decision to grant the Respondent company an order under Section 117 directing that it need not comply with his request to inspect the company's register of members. That basis was his conclusion that the purpose for which Mr Barton was seeking the list was to further his interests as a leaseholder in the block of flats of which the Respondent is the management company and had nothing to do with his interests as a member of that company. If that had been the sole basis for the Judge's decision, I might have considered that the challenge had a real prospect of success. However, he also decided the application on a second basis; that Mr Barton's wish to obtain the information was in order to harass the company or harm its members. That conclusion was based on his findings arising from detailed evidence put in by the

> Respondent as to Mr Barton's previous behaviour, both in relation to the block of flats at Pandongate House and other properties. I consider that ground 4 of the Appellant's grounds of appeal against that decision has no prospect of success and, therefore, the appeal as a whole, even if Mr Barton were to succeed on his first three grounds, would not result in a different order."

The judgment of HHJ Hodge QC

25. Much reliance was placed by Houldsworth before the judge on the adverse decision against Mr Barton arrived at by HHJ Kramer in *Pandongate*. The judge directed himself that he was required to decide the present case by reference to the evidence adduced before him, and not by reference to evidence given on some different occasion. At [25] of his judgment the judge said that he found HHJ Kramer's decision in *Pandongate* to be "of little assistance to the court in the present case". At [34] he noted what Rose LJ had said in refusing permission to appeal in that case.

26. It was common ground before the judge that an intention to call a meeting to remove directors was not, in itself, an improper purpose. It was, however, contended that an intention to remove the managing agents was improper. It was submitted that this distinction was justified because, as cases such as *Morshead Mansions Ltd v Di Marco* [2008] EWCA Civ 1371; [2009] H.L.R. 33 showed, there was a fundamental distinction between the rights of a member as member of a company and the rights of a leaseholder against the landlord. The judge rejected this contention. At [42] to [43] the judge concluded that Mr Barton's stated purpose was, in the light of Houldsworth's objects set out in its memorandum of association, an entirely proper one.

27. Turning to the wider basis of the application, the judge held that he was not satisfied that Houldsworth had discharged the burden of showing that Mr Barton "has any purpose other than that which he has stated in his request for seeking inspection of the register". To the extent that Mr Barton's past conduct might give rise to any cause for concern, this could be dealt with by means of an undertaking to use the information solely for the stated purpose. The judge therefore dismissed Houldsworth's application.

The appeal

28. On this appeal Mr Justin Bates who appeared with Ms Alice Richardson for Houldsworth does not challenge Judge Hodge's rejection of the wider basis of the application based on Mr Barton's conduct. He submitted, however, that the judge had been wrong to reject the narrow basis and hold that Mr Barton's stated purpose was a proper one for the purposes of section 117 of the Act. It was essential to differentiate between the two different capacities of Mr Barton. These were his capacity as a party to the long-term lease which provides for a range of services to be provided by Houldsworth, and his capacity as a member of Houldsworth as a company. The appointment and removal of managing agents was relevant to the first capacity but not the second. The judge had fallen into error by equating the management and governance of the company with the discharge of covenants for services under the lease. Section 116 was only concerned with matters relating to corporate governance.

A request which had as its purpose the enforcement of the covenants under the lease was not a proper request. It could not be right, for example, that a complaint about the quality of the painting of the common parts carried out by the managing agents should be enforced by the corporate, as opposed to the leaseholder route. He relied on *Pandongate* to support these contentions.

29. Mr Bates declined to be pinned down in argument about the limits of the notion of corporate governance in the case of a management company whose main object was the management of a building. He was prepared to accept that matters such as the appointment and removal of directors, and ensuring proper filing of accounts and other administrative matters came within that rubric, but was not prepared to be drawn further. He submitted that wherever the line was to be drawn, the appointment and removal of managing agents lay on the wrong side of it.

30. Mr Bates also had a point about the evidence. He said that Mr Macdonald had made it clear that the managing agents had been appointed to discharge the obligations of Houldsworth under the lease, and that the failure of Mr Barton to answer this evidence led to the conclusion that their appointment and removal had to be challenged by Mr Barton in his capacity as a leaseholder, rather than as a member of the company.

Discussion

31. It is right to point out at the outset that there is indeed a clear distinction between the rights of a leaseholder in that capacity and the rights of a member of a company conferred on the member in that different capacity. If authority is needed, it is to be found in the judgment of Mummery LJ in *Morshead Mansions v Di Marco* (cited above). In that case, the management company of a block of flats had obtained approval at a general meeting to require shareholder contributions in order to set up a "recovery fund" for fees, costs and other expenses incurred in the implementation of the company's objects. The defendant declined to make his contribution to the fund, contending that the sums were service charges under section 18 of the Landlord and Tenant Act 1985, and that the company was not entitled to decide summarily to collect service charges which could be recovered, if reasonable, under the terms of the lease. Mummery LJ (with whom Ward and Toulson LJJ agreed) said this at [30]-[31]:

> "30. In my judgment, Mr Di Marco's contentions, which were forcefully made, pay insufficient regard to the crucial legal distinction between the liability of a tenant to the landlord under a lease containing service charge provisions, and the liability of the member of a company, in which all the tenants are shareholders, to the company under separate contracts made in and pursuant to the Articles to establish and recover contributions to a Recovery Fund. The two kinds of legal relationship can co-exist between the same parties, but they are different relationships incurred in different capacities and they give rise to different enforceable legal obligations. A defence to one of the claims is not necessarily available as a defence to the other legally separate claim.

> 31. This appeal is concerned only with the question of law whether Morshead is entitled under Article 16 and pursuant to the resolutions to be paid the money which it claims from Mr Di Marco as a member of the company. The judge did not decide and was not asked to decide whether section 18 applied to Mr Di Marco as a tenant. He was not deciding whether Morshead could avoid altogether the statutory protection which Mr Di Marco might enjoy as tenant if he were sued under the provisions of the lease or if he invoked the terms of the lease and the statutory provisions in his capacity as tenant."

32. The fact that two sets of rights are distinct does not, however, mean that the content of those rights is mutually exclusive. Generally speaking, and as *Morshead Mansions* shows, if a person has a number of rights which afford that person a remedy, the person is able to choose which right to exercise in order to achieve his goal. There may be exceptions to that principle, for example where it would amount to abuse of one right to seek to rely on it, rather than on the alternative right, but nothing of that nature is alleged here.

33. It does not follow, therefore, from the fact that Mr Barton's rights as a leaseholder and his rights as a shareholder are distinct that his attempt to exercise his rights as a member and shareholder through a general meeting is improper, even if the ultimate remedy he is seeking, removal of the directors and appointment of new managing agents, could be achieved by another route.

34. I think that the flaws in Mr Bates' argument lie in the attempts to draw a sharp dividing line between enforcement of the covenants under the lease and corporate governance, and to give to corporate governance in the present context a restricted and artificial meaning.

35. First, it is clear that it is impossible in the present case to draw a sharp dividing line between the covenants under the lease and the affairs of the company. Houldsworth's sole relevant purpose under its constitution was the management of Victoria Mill. So, a complaint which relates to the appointment of agents to carry out the day-to-day management of Victoria Mill is central to the objects of the company and to the way in which the company is run. Such a complaint, as it seems to me, is a matter concerning the affairs of the company which it is legitimate to seek to raise at a general meeting. It therefore lies within the area of overlap between the two sets of rights, those of shareholder and those of leaseholder. The example of an individual complaint about inadequate painting and HHJ Kramer's example in *Pandongate* of a shirt bought from a retailer which shrank in the wash seem to me to be inapt because they do not necessarily reflect on the way in which the company is being run by the directors.

36. I asked Mr Bates whether the company in general meeting could properly pass a resolution, at the instigation of a shareholder such as Mr Barton, for the removal of the managing agents. He accepted that it could. In those circumstances, it seems to me to be difficult if not impossible to suggest that Mr Barton has an improper purpose in seeking to obtain support for such a meeting at which such a resolution could be passed, whatever his rights may be under the terms of his lease or under the landlord and tenant legislation.

37. Secondly, I do not think that corporate governance, at least in this context, has the narrow meaning for which Mr Bates contended. When Arden LJ in *Burry* referred to the importance of section 116 for ensuring proper corporate governance, I do not think that she had in mind such a narrow concept. In my judgment, so much is clear from her inclusion within the notion of corporate governance of "*the shareholders monitoring the activities of the directors*", and her unqualified acceptance that the desire to obtain support for the requisitioning of a general meeting was a proper purpose. Similarly, I doubt that David Richards LJ in *Fox-Davies* would have said that it would require unusual facts to prevent inspection by a member seeking to requisition a meeting if there was a restriction of the kind contended for, namely that the general meeting must not be one which is to consider matters which relate to the business undertaken by the company.

38. *Pandongate* was, of course, of no relevance to the issue which the judge had to decide insofar as it was a decision on the evidence in that case. The judge was bound to decide this case on the basis of the evidence called before him. Mr Bates nevertheless submitted that *Pandongate* supported Houldsworth's case as a matter of principle, insofar as Judge Kramer held that the desire to challenge service charges and appoint a manager had "*nothing to do with the interests of the member as member*", and was consequently not a proper purpose.

39. I think that Judge Kramer fell into error in this part of his judgment in *Pandongate*. He appears to have treated Arden LJ's observation in *Burry* as a rigid requirement, such that a request which is not made by "a member as member" is necessarily not made for a proper purpose. I have already explained why I consider that that is not a proper reading of Arden LJ's judgment, not least because it applies, inconsistently with *Fox-Davies,* a different test to members and non-members. In reasoning in the manner in which he did I think that Judge Kramer lost sight of the requirement to ask whether, on the facts and in the circumstances of the individual case, the request is a proper one. That requires a focus on the facts and circumstances of the case, and cannot be answered simply by reference to the capacity in which the request is made. Nevertheless, as Rose LJ has already pointed out when refusing permission to appeal in *Pandongate*, that error would not have affected the outcome in that case.

40. That brings me to Mr Bates' point about the evidence. Once it is accepted, as I do, that Mr Barton's purpose was one which lay properly within his rights as a leaseholder as well as his rights as a shareholder, I do not see how the evidence on which Mr Bates seeks to rely assists him. It is not for Houldsworth to determine in which capacity Mr Barton may choose to challenge the appointment of the managing agents. The fact that Houldsworth may regard the appointment of managing agents as falling within their duties under the lease does not assist.

41. For those reasons, I would dismiss this appeal.

Lady Justice Asplin:

42. I agree.

Lord Justice Coulson:

43. I also agree.