

its right to acquire the other half of the shares in Newstock — and it was therefore only potential power — but it was nevertheless viewed by the court as sufficient for the purpose of the definition of the term 'subsidiary' in the Companies Act. Unisec's de facto control of Newstock was judged 'a consequence of some power' to appoint or remove the majority of Newstock's directors.¹⁵ Unisec accordingly failed to meet the first objective required for avoiding subsidiary status.

The first lesson for H Co from the *Sage v Unisec* case is, then, to be careful to avoid the possibility that a potential or an indirect power might be created to appoint directors to S Co's board. It would be extremely unwise to try to avoid subsidiary status by adding to the suggested special term in the memorandum that a fifth director will be the chairman of the board of the 'parent' company (the 'A' shareholders). Although the fifth director takes office in accordance with the articles and is not actually appointed by the 'A' shareholders, it could be argued that since the 'A' shareholder and its own directors and shareholders control the appointment of their own chairman they in

effect control (even though indirectly) the appointment of that person as the fifth director of the subsidiary.

And, in conclusion, the second lesson to be learned from this case is never to try to prescribe how nominee directors should vote or to deny any of them a proper and independent vote. Such a denial (although not seminal to the issue before the court) was criticized in the *Sage* matter as being 'foreign to the basic concepts of our law and subversive of the proper exercise of their fiduciary duties by those directors'.¹⁶

In the next article I shall conclude this explanation of the proposed method of avoiding subsidiary status and consider the principle of in fraudem legis and the rule against membership by a subsidiary of its holding company.

¹⁵ The *Sage v Unisec* case at 355.

¹⁶ At 354. The directors representing each of the two classes of shareholders were restricted to a collective vote.

WHO OWNS THE SOUL OF A PAINTING?

Two distinct forms of property

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The poets and the songwriters talk of possessing the female objects of their affection 'body and soul'. They make a distinction between the physical properties and characteristics of their lady loves and their intangible, spiritual or ethereal qualities. The law has the same approach to a painting, termed an 'artistic work' in the law of copyright. It distinguishes between the physical or corporeal object, being

a piece of canvas or like substance daubed with paint and usually surrounded by a frame made of wood, plastic, metal or some other substance, on one hand, and the intellectual property embodied in the painting, namely, the copyright, on the other.

Copyright is an item of incorporeal property, comprising, essentially, the right to control the use of the painting in activities that are com-

monly concerned in its commercial exploitation, such as reproduction or publication. The painting that hangs in the art gallery is therefore an article embodying two separate and distinct forms of property, and it is important to distinguish between them because they can be, and frequently are, owned by different persons and carry with them different and even conflicting claims on the article. The songwriter and poet's desire to possess a woman completely is not always capable of being matched by the art lover and the painting that is the object of his desires. He frequently possesses the body but not the soul of the painting.

The corporeal aspect of a painting — its body — is governed by the principles of the law of things, while the copyright in the painting — its soul — is governed by the law of copyright. Ownership of the body of the painting is transferred by the delivery, whether actual or constructive, of the painting by the owner to the acquirer with the intention on the part of both parties that ownership of it should pass to the acquirer. In practice a consideration is usually paid for the transfer of the ownership.

As the owner of the body of the painting, the acquirer is free to use it in any way compatible with his ownership of a corporeal article: he may hang it on his wall, put it in his desk drawer, give it to someone else or even destroy it. Ownership of the body of the painting does not, however, necessarily go hand in hand with the ownership of its soul. As far as the law is concerned, the soul of the painting is not an aspect of the body and the only real relationship between them is that they both reside in the same article. Under the Copyright Act, transfer of the ownership of the soul of a painting between living persons takes place by assignment; for assignment of copyright to be valid it must be reduced to writing and the written document signed by the owner or

assignor of the copyright. Ownership of the body and of the soul of the painting will pass to another simultaneously only in the event that delivery of the painting, with the requisite intention, is accompanied by an assignment of copyright entered into in writing by the person disposing of it (the copyright owner). The Copyright Act is adamant that no transfer of ownership of copyright, or assignment, has any effect unless it is embodied in a signed written document.

When you buy the painting of your desires you do not acquire the ownership of the copyright in it unless the current owner of that copyright (usually, initially, the artist) grants to you a written assignment of copyright. In practice artists do not frequently divest themselves of the ownership of the copyright in their paintings. By acquiring only the body of a painting, not its soul, you are precluded from performing any of the copyright-protected acts in relation to the painting that has now become your property unless those acts are authorized explicitly or impliedly by the artist, assuming that he is the copyright owner.

These so-called restricted acts which make up the copyright in a painting include the act of reproducing it in any manner or form, issuing copies of it to the public, using it in a television broadcast and making an adaptation of it. In the absence of an assignment of copyright these activities remain the exclusive preserve of the artist or other copyright owner.

This situation leads to a strange dichotomy, because the owner of the painting is free to do what he wants with the actual article but he cannot reproduce it or carry out any other activities that would normally amount to commercial exploitation of it, while the copyright owner, on the other hand, is entitled to undertake all these activities even though he has no control over the presence of and the physical state of the painting.

You, Mr Captain of Industry and Major Corporation, who buy a painting for your boardroom are therefore entitled to do little more than hang it on the wall. You cannot use it to illustrate your annual report or other company literature unless you either acquire the copyright in it by assignment or obtain the permission of the artist or copyright owner to make reproductions of it and publish or distribute them. The fact that you may have commissioned the painting does not alter the situation, unless it is a portrait.

As in life generally, the mere payment of a financial consideration may be sufficient to establish a claim to the body but it takes more than that to lay claim to the soul; and misappropriation of the soul can give rise to retribution by its custodian. The owner of a painting who seeks to trespass on the preserve of the copyright in his painting makes himself liable to a claim of copyright infringement at the instance of the copyright owner. The cost of abusing the soul can be high.

Justice in private

'As for the common law, there appears to be no authority supporting the general proposition that a person who is arraigned before a domestic tribunal on a disciplinary charge is entitled to have the inquiry heard in public. The relevant constitution, statute or regulations may provide, expressly or impliedly, for a public hearing in all instances or in some instances. In the absence of such a provision, however, the existing state of the law appears to be that there is no inherent right to a public hearing.'

— *per Comrie AJ in Hlaba v Director-General, Department of Education and Training 1990 (1) SA 492 (C) at 497A–C.*