

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
GRENADA**

Claim Number: GDAHCV2019/0100

Between :

**KENNETH GRIEP
BARRY KENNETH SKREPNEK
CLAIMANTS**

AND

**MARJORIE GRIEP
DEFENDANT**

Before:

The Hon. Mr. Justice Raulston L. A. Glasgow

High Court Judge

Appearances:

Crystal Braveboy Chetram of counsel for the claimants

Alban John for the defendant

2024: February 15

2025: May 26

JUDGMENT

[1] **GLASGOW, J.:** This ruling is in respect of an application filed by the defendant (Mrs. Griep) asking the court to strike out the claim filed by the claimants. The claimants filed their fixed date claim in which they requested, besides costs –

- (1) A Declaration against the Defendant that the First Claimant and the Second Claimant are each entitled to be entered into the records of the TROPICALTA (GRENADA) RESORTS LIMITED (“the Company”) as holders of 20,000 ordinary shares respectively in the Company.
- (2) An order directing the Defendant to issue to the First Claimant and the Second Claimant respectively 20,000 shares in the Company.
- (3) An order directing the Defendant to execute and deliver to the First Claimant and the Second Claimant a share certificate or such certificates to the First Claimant and the Second Claimant

respectively to evidence the First Claimant's and the Second Claimant's title to their respective 20,000 shares.

- [2] The fixed date claim form is supported by an affidavit the terms of which are not necessary to recite at this juncture. In essence though, the affidavit asserts that the claimants are each entitled to be issued with shares in the company (Tropicalta) and to be issued with share certificates reflecting the same. They contend that Mrs. Griep, who is Tropicalta's sole director, has failed to enter their names into Tropicalta's register of shareholders and issue them with a certificate indicating that they have been so registered. The right to be issued shares arise, they claim, by virtue of a resolution of Tropicalta's Board of Directors (BoD) dated 28th June 1996. The resolution reads –

“Minutes of an Extraordinary general meeting of Tropicalta (Grenada) Resorts Limited held at the company's registered office, Lucas Street, St. George's, Grenada on Twenty Eight June 1996 at 10.:00 am at which the following resolution was moved and passed.

Present – Benedict Griep – Director/Chairman

Lennox Purcell – Director

BE IT RESOLVED that Tropicalta (Grenada) Resorts Limited issue the undermentioned shares in the company's capital to the following persons:

1. De Rossi International Limited – 40,000 shares
2. Douglas Shrepnek/Barry Shrepnek – 20,000 shares
3. Kenneth Griep – 20,000 shares
4. Benedict Griep – 19,999 shares
5. Lennox Purcell – 1 share

Total – 100,000

Dated this 28th June 1996.”

[3] In an affidavit in response to the claimants' affidavit, Mrs. Griep denies that the claimants are entitled to the relief that they seek. The crux of her defence is that Tropicalta cannot issue the shares as requested since the company is enjoined from issuing shares for which no consideration has been paid or received. The resolution does not indicate the consideration paid or received for the shares and the claimants, Mrs. Griep states, have presented no evidence of the same.

[4] On 8th October 2024, Mrs. Griep applied to the court to strike out the claim. Her grounds for doing so are various –

- (1) A claim for rectification of a company's register is a summary procedure;
- (2) Rectification will not be ordered where there is a serious factual dispute which is undecided.
- (3) Rectification will not be granted in the absence of third parties whose rights will be affected by the rectification. Tropicalta's rights will be affected and it is not a party to this claim; and
- (4) An application for rectification must be made promptly

Rectification not suitable where substantial dispute of facts exist

[5] In respect of the first two grounds, Mrs. Griep, in written submissions makes the point that "*A claim for rectification is a summary procedure, not conducive to circumstances where there is a substantial factual dispute as to entitlement to shares yet to be resolved.*"¹ Mrs. Griep presents the Privy Council's decision in **Nilon Limited and anr v Royal Westminster Investments S.A. anr**² as authority for this proposition.

[6] Mrs. Griep complains that, in view of the law as stated in **Nilon**, the claimants cannot seek redress for their complaint by way of a claim for rectification because

¹ Ms.Griep's submissions filed on 8th October 2024 at paragraph 4

² [2015] UKPC 2

a rectification claim cannot be brought where there is substantial factual dispute about the underlying facts. Mrs. Griep explains the factual dispute in this manner –

“The share capital in the Company is \$2,000,000 divided into 100,000 shares at \$20.00 per share. The Claim is premised on a resolution to issue shares to the Claimants in the amount of 20,000 each, with no consideration having been stated on the face of the resolution or alleged to have been given by the Claimants. To be clear and specific, the Claimants rely entirely on the fact that a resolution was passed to issue shares to them, and do not allege or propose to show that the shares were paid for either in cash or property or past service to the Company. The Defendant/Applicant asserts as a fact that the shares have not been paid for. There is evidence to support her and in any event, this is an issue to be resolved before rectification can obtain.”³

[7] In this context, Mrs. Griep further argues that –

“Proceedings for rectification can only be brought where the applicant(s) has/have a right to rectification by virtue of a valid transfer of legal title... The claim or right to rectification must not be a prospective claim dependent on the conversion of an equitable right to a legal title by an order for specific performance of a contract. The Claim before the Court is essentially a claim for specific performance of what is implied in the resolution relied upon. But the resolution itself is just that, namely, a resolution to issue shares (the disputed shares) to the Claimants. The Claimants have no such present right, which could only arise after they had been successful in a primary Claim and only after the Company had been ordered to procure the issue and allotment of shares to them. The

³ Supra, note 1 at paragraph 7

Claimants, at present, have no arguable case to a present right to rectification and there is therefore no such claim presently to pursue, and certainly not against the Defendant.”⁴

The proper party is not before the court

[8] With respect to the third issue, Mrs. Griep reasons that, “*A court will not rectify the register of a company in the absence of third parties whose rights will be affected by the rectification...*”⁵ and “*...in any event the proper respondents to an application to rectify the register of a company are the company itself and the registered holder/holders of shares whose registration is in question...*”⁶ **Paragraph 798 Vol 7(1) of Halsbury’s Laws of England 4th ed; Greater Britain Insurance Corpn Ltd, Re, ex p Brockdorff⁷ and Morgan v Morgan Insurance Brokers Ltd et al⁸** are presented as authorities for these propositions.

[9] In **Morgan**, the majority shareholder sought to transfer one share in the company to his daughter and to have that share registered in the company’s register of shareholders. The directors refused the request for registration on the basis of advice of lawyers. That advice was incorrect. The parties settled the claim brought by Mr. Morgan but the question of who should pay the costs of the proceedings was unresolved. Mr. Morgan wished that the directors who refused the registration pay the costs. The directors sought to have the company pay the costs but this would have the implication that Mr. Morgan, the majority shareholder would, in essence, be sharing in paying those costs. The court agreed with Mr. Morgan and ordered the directors to pay the costs. One Mr. Green who was a shareholder and not a director was exempted from paying

⁴ Supra, note 1 at paragraph 16

⁵ Ibid at paragraph 11

⁶ Supra, note 1 at paragraph 12

⁷ (1920) 124 LT 194

⁸ Morgan v Morgan Insurance Brokers Ltd et al [1993] BCLC 676 at 678

those costs. Mrs. Griep relies on some of the pronouncements of Millet J in **Morgan** to the effect that –

“They were joined as members of the company, apparently on a reading of RSC Ord 102, r 3, and The Supreme Court Practice 1991, p 1479, where it is said that a notice of motion for rectification of the register should be served on the company and the registered holder of the shares or such of them as is not making the application. That sentence is not happily worded but in my judgment there is little doubt as to what it means. The proper respondents to an application to rectify the register are the company and the registered holder or holders of the shares whose registration is in question if not the applicant. It is not necessary to join other shareholders who are registered in respect of shares other than those in respect of which rectification is sought. Their interests are represented by the company. Mr Green, therefore, who holds 3% of the shares in the company and who is not a director, ought not to have been joined, for the application to rectify the register is not made in respect of the shares which he holds. Nor is it necessary to join the directors of the company where rectification of the register is sought unless, of course, an order for costs is sought against them.

In Re Keith Prowse & Co Ltd [1918] 1 Ch 487, [1918-19] All ER Rep 946, Peterson J held that where the board of directors refused to register and transfer without justification, they were not properly joined as respondents to an application for rectification. He said ([1918] 1 Ch 487 at 491, [1918-19] All ER Rep 946 at 948):

‘The directors are the agents of the company, and in law it is the company which is legally responsible for the unjustifiable acts of its agents, and the directors are not to my mind necessary or proper parties to an application of this kind. If an order on a company to rectify the register does operate, as in my view it does, as a rectification of the

register from the date when the order is made, then the only object of joining directors as respondents to the motion is that a punitive order may be obtained against them for payment of the costs. I do not think that on applications of this sort directors ought to be joined as respondents. Accordingly, he refused to direct the respondent directors to pay the costs of the motion. I accept that as a statement of general principle and agree that it is not appropriate to join the directors to an application for rectification of the register unless it is sought to make them liable for the costs.”⁹

Claim was not brought promptly

- [10] With respect to the fourth issue, Mrs. Griep is of the view that in any event, the claimants have delayed in bringing the claim for rectification. Her argument is that a claim for rectification ought to be brought promptly. For this posture, Mrs. Griep relies on the case of **In Re New Zealand Banking Corporation SEWELL’CASE**¹⁰. In that case, the applicant was a registered shareholder who sought to have his name removed from the register of shareholders with respect to shares issued to him on the grounds that the shares (or some of them) were not validly issued to him. The directors did take steps to regularize the issuance of the irregularly issued shares. But it took Mr. Sewell several years after the steps taken by the directors (of which he was aware) to initiate a claim to have his name removed from the register. Interestingly, his efforts to have the register rectified to remove his name were further to the assessment that he was liable to contribute to paying the company’s debt to the extent of his shareholding. Cairns J observed that –

“Mr. Sewell, according to the conclusion I have drawn from the fact, did know in the month of May, 1864, that regularly or irregularly, rightly or wrongly, under this authority, he had been put upon the list as a

⁹ [1993] BCLC 676

¹⁰ (1868) 3 Ch App 131

shareholder for twenty-three shares. If he had any doubt as to the manner in which the authority had been pursued, it was for him to have inquired whether he could have asserted any right against either Mr. Sichel, or Mr. Hankey, or the company, arising out of the mode in which the authority had been pursued. Whether he could have disclaimed the ownership of these twenty-three shares may be doubtful, but I assume in his favour that he might have had a case of that kind. It appears to me that not having done so, and being aware that he was held out to the public as the holder of twenty-three shares, it is too late for him months or years afterwards to enter into that question.”

The claimant’s position on the strike out application

- [11] The claimants strenuously oppose the strike out of their claim. Their position is set out below.

Strike out is not appropriate on this claim

- [12] The claimant’s first response is that the court’s power to strike out a claim is an extraordinary power which is draconian and should only be engaged where it is clear that the claim is bound to fail. If the claim contains “a scintilla of a cause of action”, the court should not strike it out. For this submission, the claimants rely on the cases of **Tawney Assets Ltd v East Pine Management Ltd et al**¹¹ and **Cedar Valley Springs Homeowners Association Incorporated v Kenneth Meade and Anr**¹².

- [13] The claimants then articulate how their claim is not one that should be struck out. In that regard they point out that the claim is brought pursuant to section 244 of

¹¹ BVI HCVAP 2012/007

¹² ANUHCVAP2016/0010

the Companies Act, Cap.58A of the laws of Grenada (the Act). Section 244 of the Act reads –

“244. Rectification of records

(1) If the name of a person is alleged to be or to have been wrongly entered or retained in, or wrongly deleted or omitted from, the registers or other records of a company, the company, a shareholder or debenture holder of the company, or any aggrieved person, may apply to the court for an order that the registers or records of the company be rectified.

(2) An applicant under this section shall give the Registrar notice of the application; and the Registrar is entitled to appear and be heard in person or by an attorney-at-law.

(3) In connection with an application under this section, the court may make any order it thinks fit including—

(a) an order requiring the registers or other records of the company to be rectified;

(b) an order restraining the company from calling or holding a meeting of shareholders, or paying a dividend before that rectification;

(c) an order determining the right of a party to the proceedings to have his or her name entered or retained in, or deleted or omitted from, the registers or records of the company, whether the issue arises between 2 or more shareholders or debenture holders or alleged shareholders or alleged debenture holders, or between the company and any shareholders or debenture holders, or alleged shareholders or alleged debenture holders; and

(d) an order compensating a party who has incurred a loss.”

[14] In light of section 244 of the Act, the claimants contend that –

“Section 244 of the Companies Act therefore provides a statutory basis and/or cause of action for a shareholder of a company and/or an

aggrieved person to apply to this Court for a rectification order. It is this statutory provision and/or cause of action that forms the basis of the Claimants Claim as the Claimants' complaint, *inter alia*, is that the Defendant has wrongfully omitted their names as shareholders from the records of the Company...**The Claimants rely on the resolution made at an Extraordinary Meeting of the Company on 28th June 1996 ("the Resolution") as providing them with a legal right to the shares in the Company.** It is the Resolution coupled with the statutory right and/or cause of action made available to the Claimants by virtue of section 244 of the Companies Act that provide the Claimants with good or reasonable grounds for bringing the Claim. The Claim therefore discloses the existence of the required '*scintilla*' of a cause of action, and the fact that the Claimants availed themselves of s.244 of the Companies Act in the factual circumstances of this case cannot or ought not to be construed as an abuse of process of the Court."¹³ (Bold emphasis mine).

[15] It is for these reasons that, on this issue the claimants conclude that –

“...the arguments raised by both the Claimants and the Defendant involve substantial points of law that do not admit of a plain and obvious answer. More particularly, the Claimants contend that the Defendant is bound by the Resolution wherein the shares, which are the subject of the Claim, were issued by the Company to the Claimants. On the other hand, the Defendant contends that the Resolution does not state the consideration given for the shares and that no payment having been given for the shares, the Resolution is not binding on the Company. Undoubtedly, given the contrasting position of the parties, the Court will have to hear substantial legal arguments at a trial in order to resolve

¹³ Claimant's submission filed on 15th November 2024 at paragraphs 12 and 13

these legal issues and to make an Order pursuant to section 244(3) of the Companies Act.”¹⁴

- [16] The claimants rely on **PIC Insurance Company Ltd. v Zona Barthley and Zorol Barthley**¹⁵, a claim for the rectification in which the applicant asserted that the company was obligated to issue shares due to the contributions made by the deceased. The claimants here contend that **PIC Insurance** ought to be applied in this case for a finding that “*shares in a company could be allotted without strict compliance by the directors with sections 29 and 30 of the Companies Act.*”¹⁶ The claimants argue that by virtue of sections 84 and 85 of the Act, the resolution is valid and imbued with certain legal implications on which they intend to rely. Sections 29, 30, 84 and 85 of the Act read –

“29. Share issues

(1) Subject to the articles, the By-laws, any unanimous shareholder agreement, and section 34, shares may be issued at such times, and to such persons, and for such consideration, as the directors may determine.

(2) No company may issue bearer shares or bearer share certificates.

30. Consideration

(1) A share shall not be issued until it is fully paid—

(a) in money; or

(b) in property or past service that is the fair equivalent of the money that the company would have received if the share had been issued for money.

(2) In determining whether property or past service is the fair equivalent of a money consideration, the directors may take into account reasonable charges and expenses of organization and re-organization,

¹⁴ Supra, note 13 at paragraph 14

¹⁵ ANUHCVP2019/0003

¹⁶ Supra, note 13 at paragraph 15

and payments for property and past services reasonably expected to benefit the company.

(3) For the purposes of this section, “property” does not include a promissory note or a promise to pay.

84. Resolution in writing

(1) When a resolution in writing is signed by all the directors entitled to vote on that resolution at a meeting of directors or committee of directors—

(a) the resolution is as valid as if it had been passed at a meeting of directors or a committee of directors; and

(b) the resolution satisfies all the requirements of this Act relating to meetings of directors or committees of directors.

(2) A copy of every resolution referred to in subsection (1) shall be kept with the minutes of the proceedings of the directors or committee of directors.

85. Liability for share issue

Directors of a company who vote for or consent to a resolution authorizing the issue of a share under section 29 for a consideration other than money are jointly and severally liable to the company to make good any amount by which the consideration received is less than the fair equivalent of the money that the company would have received if the share had been issued for money on the date of the resolution.

[17] The claimants then sought to distinguish **Nilon**. In this context the claimants argue that –

“... the decision of the Privy Council in **Nilon** was based on a finding by the Board that the Appellants had a prospective right or claim against the company which was dependent on the conversion of an equitable right to a legal title by an order for specific performance of a joint venture agreement for the transfer of shares to them, and that whether this right existed must have first been determined before a rectification claim

could be made. Notably, the Privy Council suggested that once the Appellants obtained an order against the Respondent requiring him to procure the transfer of shares to them or where they had a right to registration by virtue of a valid transfer of legal title, then a rectification claim would be suitable and could be brought.”¹⁷

[18] On their claim, the claimants state –

“...the reliefs sought by the Claimants are not based on a contractual right or an ancillary or other agreement for the transfer of shares nor a prospective right or claim dependent on the conversion of an equitable right to a legal title by an order for specific performance but, rather, on the Resolution whereby shares were issued by the Company to the Claimants. There is therefore no prospective or equitable right which must first be determined prior to the bringing of the Claim. **The Claimants rely on a legal right to the shares or to the issuance of the shares.**”¹⁸ (Bold emphasis mine)

[19] The claimants go on to point out that, in any event, the strike out order made in **Nilon** was confined to the unique circumstances of that case where at paragraph 53, their Lordships stated that -

“Although in general it is not objectionable to bring a viable claim against D1, who is within the jurisdiction, with the principal object of joining D2, who is outside the jurisdiction, as a necessary/proper party, **the combination of the motive and the artificiality of the rectification proceedings, and the fact that they are dependant on a trial of the underlying facts**, means that the appropriate order in these

¹⁷ Supra, note 13 at paragraph 17

¹⁸ Ibid at paragraph 19

circumstances is not to stay or adjourn the rectification application, but to strike it out.”

- [20] The claimants urge the court to find that **Nilon** does not propose that a rectification claim should not always be struck out where there are underlying issues to be predetermined. The claimants further urge that, in the event that the court disagrees with them on the argument that this is a proper claim for rectification, the court ought to adopt the approach of the court in **Anjie Investments Limited and Tian Li Holdings Limited v Cheng nga Yee**¹⁹, where even though the court found that the claim was not properly a rectification claim, it stayed the proceedings pending the outcome of the substantive dispute about the registration of shares in a company.

The claimants’ response to the delay point

- [21] The claimants deny that there has been any delay or “*insufficient promptitude*” in bringing the rectification claim. In this regard they explain the course of their actions –

“The Claimants first received notification that their alien land-holding licenses to hold shares in the Company were granted by letters dated 4th September 2015 and 11th August 2017... Prior to this, the Claimants could not lawfully hold the shares which had been issued to them by the Resolution. Between the period 28th June 2017 and 3rd August 2018, there were several pre-litigation correspondences passing between the Claimants, the Defendant, the Claimants’ legal representative and the Defendant’s legal representative aimed at resolving the dispute between the parties. When these proved unsuccessful, the Claim was instituted on 8th March 2019. The Claimants therefore acted promptly and state that, in any event, there is no time limit imposed by the Companies Act for the bringing of the Claim.”²⁰

- [22] With further regard to the delay point, the claimants submit that Mrs. Griep’s reliance on **Sewell** is misplaced. The claimants’ position is that **Sewell** did not

¹⁹ BVIHC(COM) 2015/0060

²⁰ Supra, note 13 at paragraph 23

outline a universal principle and that **Sewell** ought to be restricted to its unique facts. Specifically, the claimants explain that in the peculiar circumstances of Mr. Sewell's case, in particular his lack of promptitude in applying for rectification coupled with the fact that for quite a number of years he was held out to the public as holding a certain number of shares, formed a sufficient basis for the court to find that delay was a relevant fact in arriving at its decision to refuse the rectification request.

The claimants' answer to the proper party question

- [23] Firstly, the claimants argue, section 244 of the Act permits the court to “...*make such orders as it think fit including orders to resolve issues arising between 2 or more shareholders or debenture holders or alleged shareholders or alleged debenture holders, or between the company and any shareholders or debenture holders, or alleged shareholders or alleged debenture holders*”²¹. This statutory articulation, the claimants posit, “...*suggests that claims or applications made pursuant to section 244 of the Companies Act may, in some instances, be brought to resolve issues between persons not including the company.*”²²
- [24] Secondly, the claimants continue, section 244 does not require that the company is joined in a rectification claim. Rather, section 244(2) stipulates that the claim ought to be served on the Registrar. This, the claimants assert, they have done since by filing the claim in the Registrar's office, the Registrar is deemed to be properly served.
- [25] Thirdly, the claimants plead that in any event, the case of **Morgan** relied on by Mrs. Griep was concerned with interpreting and applying rules of court that are not present in the Act. As such that case and its findings are not relevant to the disposition of the present proceedings. In this claim, the claimants assert, it is

²¹ Supra, note 13 at paragraph 25

²² Ibid

not Tropicalta that refuses to issue the share certificates to the claimants. It is Mrs. Griep who so refuses. It is therefore she who must be joined to the claim and answer it, not Tropicalta. In addition, the claimants highlight the relief on their fixed date claim seeking costs orders against Mrs. Griep. Accordingly, they maintain, Mrs. Griep is properly joined as defendant and not Tropicalta.

- [26] In closing, the claimants submit that even if the court finds that Tropicalta should have been added as a defendant, the court can exercise its case management powers pursuant to CPR 26.1(2) (y) and 26.9 and the general overriding objective of dealing with cases justly (CPR1.1) to require the claimants to add Tropicalta as a defendant and to set out in their pleadings the basis on which Tropicalta is added.

Analysis and conclusions

- [27] Before embarking on a discussion of the issues on this application, I note that the parties did file further submissions and authorities in compliance with the order of this court. Notwithstanding the erudition of those submissions, I do not believe that they add much to the outcome that I have considered appropriate to these circumstances.

Whether the claimants can bring a rectification claim

- [28] This is the main complaint made by Mrs. Griep on her application. She relies on the learning recited in such cases as **Nilon** to argue that rectification claims are only permitted where the applicant for rectification can show that they possess a present and not prospective right to the requested rectification. In this case, Mrs. Griep argues, the claimants have not demonstrated a present legal right to be issued the shares in Tropicalta and as such, cannot be permitted to proceed by way of a rectification claim to have Tropicalta's register reflect them as shareholders and for them to be issued the requisite certificates. At best, Mrs. Griep submits, the claimants may have a prospective claim to be issued shares

so long as they can show that they have paid consideration for those shares. For to do otherwise would fly in the face of the provisions of the Act which sets out how shares are to be issued. In particular, Mrs. Griep maintains, Section 30 of the Act enjoins the directors from issuing shares where money or consideration in property or past services that is fair value equivalent to money has not been received.

[29] On the other hand, the claimants assert the opposite. They say that the resolution declares what it is intended; the directors have authorised the issuance of shares to them in Tropicalta. This means that they have a present legal right, without more, and must be issued with the shares.

[30] It seems to me that both sides agree on the law, that is to say, that for a rectification claim to proceed, the applicant must show that he or she possesses a present and not prospective right to the requested rectification. As stated above, they differ on whether or not, the claimants possess a present legal right.

[31] What then is the law? In **Nilon**, the Privy Council observed that –

“There are two points which emerge from the cases. The first is that from the earliest days of the legislation, the courts have made it clear that **the summary nature of the jurisdiction makes it an unsuitable vehicle if there is a substantial factual question in dispute...**”²³
(Bold emphasis mine)

[32] Their Lordships extracted and recited the following-

“Re Hoicrest Ltd [2000] 1 WLR 414, at 420, citing Re Greater Britain Products Development Corporation Ltd (1924) 40 TLR 488, where it was said (at 489)

“Where it was clear that there was something to be answered and something to be investigated, the ordinary course, as far back as

²³ Nilon Limited and anr v Royal Westminster Investments S.A. anr [2015] UKPC 2 at paragraph 37

the court had been able to trace, had been for the judge to dismiss the summons or motion, but to leave it open to the party to bring his action”²⁴(Bold emphasis mine).

[33] Their Lordship concluded that –

“In the view of the Board, proceedings for rectification can only be brought where the applicant has a right to registration by virtue of a valid transfer of legal title, and not merely a prospective claim against the company dependant on the conversion of an equitable right to a legal title by an order for specific performance of a contract.”²⁵

[34] The question then remains, do the claimants have a present right to registration as shareholders as opposed to a prospective claim to be so registered? For the reasons to follow, I do not believe that they do.

[35] For their proposition that they possess a present right to be registered as shareholders of the company, the claimants present sections 29, 84 and 85 of the Act. These provisions have been set out above. But I do believe that the claimants have not presented the full picture. Section 29 of the Act does give the directors the authority, (subject to the articles, the By-laws, any unanimous shareholder agreement, and section 34), to issue shares for such consideration as the directors may determine. This the directors have purportedly done by passing the June 1996 resolution.

[36] I do not believe that sections 84 and 85 carry the claimants’ arguments much further. Those sections seem to have very little to do with whether the claimants are entitled to have Tropicalta’s records rectified to reflect them as shareholders

²⁴ Nilon Limited and anr v Royal Westminster Investments S.A. anr [2015] UKPC 2 at paragraph 37

²⁵ Ibid at paragraph 51

and for share certificates to be issued to them in that regard. Section 84 is in my view a deeming provision that, as it declares, deems resolutions signed by all the directors entitled to sign at a directors meeting to be as valid as if that resolution had been passed at a meeting of directors or committee of directors. The section also deems such a resolution as being one that *“satisfies all the requirements of this Act relating to meetings of directors or committees of directors...”* Such a provision may, for instance, deem a resolution signed via a “round robin” vote by the directors entitled to vote a director’s meeting, a valid resolution. Other than to say that for all intents and purposes, the resolution in this case meets the criteria for a valid resolution as stipulated in section 84, it does not otherwise conclusively determine the question of whether the claimants possess a present right to be issued the shares.

- [37] Similar conclusions may attend the claimants’ invocation of section 85 of the Act. That section is, in my view and as it declares in its caption, a liability section. By that section, where directors authorise the issuance of shares for a consideration other than money, they are jointly and severally liable *“to the company to make good any amount by which the consideration received is less than the fair equivalent of the money that the company would have received if the share had been issued for money on the date of the resolution.”* There is no quarrel in this case about the issuance of shares for a consideration other than money as appears to be the mischief addressed in section 85 of the Act. The contention in this case is that no consideration at all has been shown to have been received. And this is the crux of the matter. For the directors are bound to act in accordance with the provisions of the law. The law in this regard does not only incorporate section 29 which permits the directors to issue shares for such consideration as they determine. The law also incorporates section 30 which directly enjoins the directors from issuing shares *“...until it is fully paid (a) in money; or (b) in property or past service that is the fair equivalent of the money that the company would have received if the share had been issued for money.”* It should follow logically that before a person asserts that he or she is entitled to be registered as

shareholder that these statutory requisites should not only be said to have been complied with but must also be shown to have been so met.

- [38] The converse of the foregoing reasoning would likely produce instances where the statutory imperatives could be avoided or circumnavigated by directors. Avoiding or ignoring section 30 may, for instance, have serious implications for persons such as creditors dealing with the company who rely on the true reflection of the capital status of the company so as to order their affairs and conduct their business with the company.
- [39] I am prepared though to find that in view of what section 29 in particular articulates, that there may appear situations in which the mere presentation of the resolution of the directors might suffice to meet the case for rectification. This may arise, for instance, where there is no challenge to the exercise of the power to authorise the issuance of the shares or where, as in **PIC Insurance**, the material before the court is demonstrably dispositive of the question. But this is not such a case. In this case, there is, as was stated in **Nilon**, “a substantial factual question in dispute”, that is to say, the parties are squarely at odds as to whether the section 30 imperative has been met. And Mrs. Griep is correct that, at this point in the proceedings, the claimants’ pleadings or otherwise do not expose any material on which this court could summarily conclude that the section 30 imperative has been met. I would contrast this state of affairs with **PIC Insurance Company Ltd. v Zona Barthley and Zorol Barthley**²⁶ where it was quite apparent on the material before the court that Dr. Barthley had made considerable and valuable contributions to the company which the shareholders had credited to him as valuable consideration for the issuance of shares in the company. Any contestation to the contrary on the rectification claim could be easily and summarily dispensed with and was so dispensed with by the learned trial judge. In a word, the legal right to the shares was readily apparent.

²⁶ ANUHCVP2019

[40] I would also contrast the facts in these proceedings with the facts in **Intellimedia Technologies Ltd v Richards and another; Intellimedia Systems Ltd v Doyle**²⁷, relied on by the claimants, where the claimant company (ITL) requested a rectification of a company, (ISL's) register. In that case it was alleged that R, the incorporator, sole director and sole shareholder of ISL had signed a share transfer of ISL's shares to S, who then, with the full knowledge and consent of R, signed a share transfer to ITL. ITL contended that notwithstanding the transfer of ISL's shares to ITL, ISL's register in July 2011 still reflected R as ISL's sole shareholder. The evidence before the court indicated undoubtedly that ISL's shares were transferred to ITL with R's full knowledge and consent and that it was therefore not proper for him to remove ITL's name from ISL's register as the holder of the shares and place his name thereon as the holder of ISL's shares. ITL was accordingly entitled to a rectification of the register to reflect the true state of affairs. These clear facts in **Intellimedia** are not present in these proceedings.

[41] Indeed the Privy Council decided in **Nilon** restated the law definitively; a rectification claim could only proceed under section 244 of the Act where the allegations or claims to the rectification relief are susceptible to summary disposition and not where substantial divergence and disputations about the facts are not easily disposed of. A present right must be apparent. To reiterate, the facts are vigorously disputed and there is hardly any material before the court on which it can conclude, in a summary fashion, that the right asserted by the claimants subsists as claimed. In view of what the Act requires in section 30, the disputed facts about the consideration and the paucity of material before the court, I do not agree with the claimants that they have established a present legal right to the relief that they seek on the rectification claim. That right can only be asserted after the court determines the underlying disagreement about the consideration in their favor.

²⁷ [2015] All ER (D) 58

- [42] The foregoing means that the rectification claim cannot proceed at this juncture. But should it be struck out? I will return to this question after examining whether Tropicalta should have been joined and whether the rectification application was filed with promptitude.

Whether Tropicalta should have been joined?

- [43] I should think that this ought to be a matter without great controversy. It is Tropicalta's shares that will be affected by any ruling in this case and thus it is Tropicalta that ought properly to be heard on the rectification and any other claims affecting its interest.
- [44] Mrs. Griep relies on **Morgan**, as set out above, to reiterate the point more emphatically. The claimants state in response that in view of the fact that the court in **Morgan** deliberated on procedural rules that do not reside in the Act, that what was stated in **Morgan** ought not to apply to this case. The court in **Morgan** considered the UK's RSC Ord 103, r 3 and The Supreme Court Practice 1991 which required that a "*notice of motion for rectification of the register should be served on the company and the registered holder of the shares or such of them as is not making the application.*"²⁸
- [45] In this case, the claimants insist that section 244 permits the court to examine contentions about rectification "*between 2 or more shareholders or debenture holders or alleged shareholders or alleged debenture holders, or between the company and any shareholders or debenture holders, or alleged shareholders or alleged debenture holders.*" (Section 244(3) (c). The claimants also rely on section 244(2) which requires service on the Registrar which requirement is met, they claim, by filing these proceedings in the court office. The combination of section 244(2) and (3)(c), the claimants argue, is sufficient to answer the charge

²⁸ Morgan v Morgan Insurance Brokers Ltd et al [1993] BCLC 676 at 678

that Tropicalta ought to be joined. They add that it is Mrs. Griep, who is the sole director, who refuses to rectify Tropicalta's register and to issue the requisite share certificate and as such she is the only person to be joined. She is also joined, as stated in **Morgan** and the other cases, for cost purposes.

- [46] With respect, much of the answer by the claimants on this issue overlooks well settled principles of law and indeed the statement of the principle of law in **Morgan** itself about the approach that should be adopted when an applicant wishes to bring a claim requesting the rectification of a company's register. On the general statement of law about the separate legal status of a company, I can do no more than recite the elucidation given by her Ladyship Dame Janice Pereira in **Sergey Taruta V JSC VTB Bank**²⁹ –

*“The authorities make it absolutely clear that a company is an entity separate and distinct from its shareholders and directors. From the date of a company's incorporation under the relevant Companies legislation, a metaphorical veil is drawn between the company and its incorporators and it becomes its own legal person. This corporate veil protects the shareholders and directors from incurring liability for the debts of the company, and likewise, the company cannot be called upon to satisfy debts of its shareholders and directors, incurred in their personal capacities. **A crucial element of a company's separate legal personality is that the property and assets of the company belong to the company and not the shareholders or directors.** This position remains the same even where a company is, for all intents and purposes, a one-man company. This doctrine forms the cornerstone upon which modern company and commercial law are built and it has been jealously guarded by the courts since it was established by the House of Lords in 1897.”* (bold emphasis mine).

- [47] **Morgan** recites the law about the joinder of the company in these specific circumstances that confront us on this application thusly –

²⁹ Sergey Taruta V JSC VTB Bank BVIHCMAP2021/0043 at paragraph 39

"In Re Keith Prowse & Co Ltd [1918] 1 Ch 487, [1918-19] All ER Rep 946, Peterson J held that where the board of directors refused to register a transfer without justification, they were not properly joined as respondents to an application for rectification. He said

'The directors are the agents of the company, and in law it is the company which is legally responsible for the unjustifiable acts of its agents, and the directors are not to my mind necessary or proper parties to an application of this kind. If an order on a company to rectify the register does operate, as in my view it does, as a rectification of the register from the date when the order is made, then the only object of joining directors as respondents to the motion is that a punitive order may be obtained against them for payment of the costs. I do not think that on applications of this sort directors ought to be joined as respondents ...'

*Accordingly, he refused to direct the respondent directors to pay the costs of the motion. **I accept that as a statement of general principle and agree that it is not appropriate to join the directors to an application for rectification of the register unless it is sought to make them liable for the costs.**"³⁰ (Bold emphasis and underline mine)*

- [48] For these reasons, I am of the view that the claimants ought to have joined Tropicalta as a defendant. Mrs. Griep (any other shareholder or director for that matter) could be joined as a party to the claim if it is sought to make costs orders against her or that shareholder or that director.

Promptitude of bringing the rectification application

- [49] This point may be addressed shortly. The claimants are correct that there is no provision in the Act or the procedural rules that requires that the rectification

³⁰ Morgan v Morgan Insurance Brokers Ltd et al [1993] BCLC 676 at 678

application ought to be brought within a stipulated time frame. I would agree with Mrs. Griep however that promptitude ought to obtain in these cases as in any other claim. The dilatory party runs the risk, like in **Sewell**, of having the court, in its case management powers, refusing relief for, among other things, the effect of delay on other affected parties. It seems clear that this is what transpired in **Sewell**. For a number of years, Mr. Sewell did not object to his registration as holding certain shares even though he was aware of the state of his shareholding. The public and those who dealt with the company over those years were certainly notified that Mr. Sewell was the holder of the shares in question. He was present through a proxy at shareholder meetings and received dividends on those shares. He sought to object at the point that he was called upon to make certain contributions by the liquidator of the company. The court refused his efforts to have the register rectified and his name removed as shareholder of those shares.

[50] Mrs. Griep points out, quite correctly, that the directors' resolution in this case was in place since June 1996. The claimants, however respond that they started taking action in 2015 when they were made aware by letters dated 4th September 2015 (identified on the pleadings as "K12") and 11th August 2017 (identified on the pleadings as "K16") of their rights as shareholders. I note that "K12" is addressed to lawyers Wilkinson and Wilkinson from the office of the Prime Minister of Grenada and K16 is addressed to lawyer Leslie Ann Seon both letters regarding the grant of aliens' licences to the claimants to, among other things, hold shares in Tropicalta.

[51] My perusal of both letters suggests that the claimants would have been aware of the existence of the resolution sometime prior to the grant of the aliens' licences. This is what prompted them to apply for the aliens' licences to hold the shares. However, they do not disclose on their pleadings or at all when, before the applications for alien's licences, they became aware of the resolution and why there was a delay. As matter rest though, the question of the length of the

delay is not very clear cut. I am prepared to find that it is not apparent that the claimants were aware as far back as June 1996 that the resolution had been issued but were cognizant of its existence sometime thereafter. I am also prepared to find, however, that there was some delay in bringing this rectification application. Nonetheless, unlike in **Sewell**, there is no evidence that suggests the delay causes or may cause any serious prejudice to creditors or other persons dealing with the company. I am mindful of Mrs. Griep's concern that she is the only surviving director and that she was not so situated at the time of the passing of the June 1996 resolution. I am also mindful of her concern that she may not be in a position to show whether the capital of the company was adjusted by the requisite consideration before the resolution authorizing the issuance of shares was passed in June 1996. But the latter concern should not unduly trouble her. For, it is the claimants who have approached the court asserting a legal right to Tropicalta's property. It is not for Mrs. Griep to establish that they are so entitled. It is for them to do so. They have maintained that their legal right has been established by the production of the resolution. I have discussed and found on these facts and the terms of the Act that they are incorrect in that assertion. It still remains then for them to prove their case. All in all, notwithstanding the delay, I do not find that the delay alone in this case, without more, serves as a bar to the claimant pursuing the claim for rectification.

Strike out or not?

- [52] The cases on this issue are all agreed that striking out a party's case is a drastic measure that ought to be sparingly adopted. Courts exist to facilitate the just resolution of the concerns brought before them by parties and should not turn away litigants from their doors without sound reasons. However, while the process is designed to accommodate the complaints raised by litigants, the court is equally concerned with ensuring that its resources are deployed solely to address meritorious concerns and not frivolous and baseless claims. As much as litigants are entitled to "have their day in court", those against whom they bring claims are equally entitled not to be troubled by claims that have no or little

chance of succeeding. Thus, the court retains the power to strike out those claims that are patently unsustainable and unquestionably incapable of succeeding.

- [53] These powers to strike out a claim are to be exercised, as I have noted above, with considered caution and thus the case law explains the rationale for the power to strike out and the approach to be engaged by the court in its utilisation

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*“[22] The striking out of a party’s statement of case, or most of it, is a drastic step which is only to be taken in exceptional cases. The reason for proceeding cautiously has frequently been explained as that the exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. The court must therefore be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial. The proper approach to be taken in striking out a statement of case as disclosing no facts upon which the court can proceed has been described by Pereira CJ [Ag.], in her judgment in the interlocutory appeal in **Ian Peters v Robert George Spencer**, where she found that a statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be determined by hearing oral evidence. In that case she set aside the master’s order striking out the claimant’s claim as containing no allegations of fact which supported the claim.*

*[23] Even under our old rules, the striking out of a claim was a jurisdiction which was to be exercised sparingly. In the words of Sir Dennis Byron in **Baldwin Spencer v The Attorney-General of Antigua and Barbuda et al**,*

This summary procedure should only be used in clear and obvious cases, when it can clearly be seen, on the face of it, that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court. There is no reason to believe that this is not still good guidance under the new CPR.”³¹

[54] The procedural rules of our courts recite the power to strike out where it states in CPR 26.3 (1) that –

“(1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that (a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings;

(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;

(c) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or

(d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.”

[55] Having considered the claim brought by the claimants, I do not agree that it is so incurably bad or lacking in merit that it ought to be struck out. The claim evidently seeks rectification before the right to rectification has been established. But there can be no doubt that there is a resolution of Tropicalta’s directors, the validity of which resolution is not being impugned. The question for the court will be directed to whether either party is correct in their positions regarding the consideration for the shares. Additionally, I am reminded that the mere assertion that the legal right has not been established before the rectification is sought does not, by itself, render the rectification claim one that ought to be dismissed. **Halsbury’s Laws**

³¹ Tawney Assets Ltd v East Pine Management Ltd et al BVI HCVAP 2012/007

of England ³²relied on by Mrs. Griep makes the very point when it observes that

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*“The jurisdiction of the court is summary in nature with affidavit evidence and ought not to be invoked where there is a substantial dispute as to fact; **in such a case, the court will look to actively manage the dispute by making appropriate directions rather than simply striking out the application for rectification.**”* (Bold emphasis mine)

[56] It seems to me also, that as argued by the claimants, the Privy Council ruled that the rectification claim in **Nilon** ought to be struck out for a number of reasons as skilfully recited by the claimants and not simply for the fact that the applicants in that case did not have a present legal right to the rectification and should have proceeded otherwise to have their right established first.

[57] It seems obvious on the facts of this claim, as was stated in **Tawney Assets Ltd v East Pine Management Ltd et al**, that the claimants, if given an opportunity to put their house in order may be able to establish that proper and full consideration was indeed given for the shares before the June 1996 directors' authorization to issue same was made. Accordingly, it would appear that a just outcome on this matter would be to stay the present claim for rectification pending the filing and resolution of a claim made against Tropicalta for the registration of the claimants as shareholders and the issuance of the requested share certificates. If a claim is not filed by the claimants within a stipulated period, the claim for rectification will then stand as struck out.

[58] The resolution of this matter is therefore that the application to strike out the claim is partially granted on the terms that the claim for rectification is stayed pending the claimants' filing a claim against Tropicalta within 7 days of this ruling which

³² Halsbury's Laws 4th edn. Vol 7(1) at paragraph 798

claim is with respect to the contentions regarding the claimants' alleged right to be issued with shares in Tropicalta. If the claimants fail to file a claim against Tropicalta within 7 days of this ruling, the claim for rectification will stand as struck out. With respect to costs on this application, Mrs. Griep is partially successful. She has shown that the claimants ought to have proceeded to have their alleged right to Tropicalta's shares established before proceeding on a rectification claim. Mrs. Griep has also shown that Tropicalta should have been added as a defendant since it is that entity's property which forms the subject of the claimants' action. Mrs. Griep has not succeeded on the delay point. Mrs. Griep is thus entitled to costs on this application which I assess in the sum of \$3500.00.

[59] The order is as follows -

- (1) The claim for rectification is stayed pending the claimants' filing a claim against Tropicalta within 7 days of this ruling which claim is with respect to the contentions regarding the claimants' alleged right to be issued with shares in Tropicalta;
- (2) If the claimants fail to file a claim against Tropicalta within 7 days of this ruling, the claim for rectification will stand as struck out without further order of this court;
- (3) Mrs. Griep is awarded costs on this strike out application in the sum of \$3500.00

[60] I thank counsel for their thorough research and presentations.

Raultston Glasgow
High Court Judge

BY THE COURT