

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM NO. BVIHC (COM) 2021/0210

BETWEEN:-

CHEN ZHUANGRONG

Claimant

-v-

NAM TAI PROPERTY INC

Defendant

Appearances:

Mr. Andrew Emery of Emery Cooke for the Claimant

Mr. Edward Davies QC, with him Mr. Nicholas Burkill of Ogier for the Defendant

2021 December 30

JUDGMENT

[1] **JACK, J [Ag.]:** By a claim form issued on 30th November 2021 with a statement of claim of the same date, the claimant sought declarations that the special general meeting of the defendant held on 30th November 2021 was held in breach of section 83(1) of the **Business Companies Act 2004**¹ and that the resolutions passed at that meeting, which in fact had the effect of changing the board, were invalid. By an application made 24th December 2021 the defendant applies to strike out the statement of claim pursuant to CPR 26.3(1)(c), which provides:

“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 –

¹ No 16 of 2004, Laws of the Territory of the Virgin Islands.

...(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...”

The defendant also seeks a wasted costs order against the claimant’s legal representatives, Mr. Gerard Clarke and Emery Cooke.

- [2] Before hearing the defendant’s application, Mr. Emery applied under CPR 63.6 for his firm to come off the record as acting on behalf of the claimant. There have been discussions between Mr. Emery and his client. As a result, when I heard his application, I adjourned the application with liberty to apply on the basis that matters between his firm and his client were likely to be resolved amicably.
- [3] Mr. Davies QC’s application was issued on 24th December 2021. Notice of the hearing today was given after close of business on 24th December. The hearing today is thus technically on only one clear day’s notice. For reasons which I set out below this application is urgent. The appropriate course, and one with which Mr. Davies was in agreement, was to treat this as an application heard *ex parte* on notice. This gives Mr. Chen the right to apply under CPR 11.16 to vary or discharge the order. Normally Mr. Chen would have fourteen days within which to do so, but in the circumstances of this case, where the issues were already ventilated in correspondence prior to the issue of the application on 24th December, it appropriate in my judgment to reduce that period to one of seven days.
- [4] The background to this matter is a hard-fought shareholder dispute. Shareholders, including IsZo Capital LP, had served a requisition on the defendant to hold a special meeting of the shareholders of the defendant for the purpose of replacing most of the directors of the board. The board of the defendant responded by issuing new shares under a PIPE. It did not hold the requisitioned meeting. The aggrieved shareholder issued proceedings: **IsZo Capital LP v Nam Tai Property Inc and others**.² I held an expedited trial and gave judgment on 3rd March 2021, setting aside the PIPE and ordering the holding

² BVIHC (COM) 2020/0165.

of the special meeting of shareholders.³ The defendant was listed on the New York Stock Exchange. I ordered that the record date for the meeting be 15th March 2021, so that only shareholders registered on that date were entitled to vote at the special meeting which I ordered.

[5] The current defendant and another defendant to the **IsZo** action, Greater Sail Ltd, appealed. On 4th October 2021, the Court of Appeal dismissed the appeal against my order.⁴ It ordered that the special meeting be held on 30th November 2021. Crucially it also ordered that the record date fixed by me of 15th March 2021 remain in force. On 8th November 2021 the Court of Appeal gave conditional leave to appeal to the Privy Council, but refused a stay of execution on 8th November 2021.⁵ The meeting was accordingly held on 30th November 2021 with the record date of 15th March 2021.

[6] These facts were fully known to Mr. Clarke of counsel and his instructing firm, Emery Cooke, because they acted for Greater Sail Ltd in the **IsZo** action and appeared before the Court of Appeal when that Court fixed the record date.

[7] The statement of claim in the current action pleads in para 3:

“As at 16 November 2021, Mr. Chen has acquired and is the legal and beneficial owner of 1,348,888 shares in NTP. Mr. Chen holds 3.435957% of the issued shares in NTP. His name appears as a member in the register of member of NTP.”

[8] This pleading does not show that the claimant was entitled to vote at the meeting on 30th November 2021. In order to be entitled to do that, he had to have been a shareholder on 15th March 2021.

[9] The Court of Appeal in refusing a stay of the meeting due to be held on 30th November 2021 held:

³ [2021] ECSCJ No 478.

⁴ [2021] ECSCJ No 714, BVIHCMAP 2021/0010.

⁵ [2021] ECSCJ No 754.

“43. ...[T]he new shareholders [i.e. those acquiring their shares after the record date] would have acquired their shares knowing that the record date for the meeting had been set by the Court. The settled practice of the Company and other companies listed on the New York Stock Exchange is that the record date for a meeting is published and brokers advise their clients of the date. This was done in this case and the majority of shareholders lodged proxies with their custodians with their votes on the resolutions. Mr. Cricenti’s evidence is that proxies representing more than 60% of the shares in NTP have been lodged with the custodians. Of this amount, 69% are votes in favour of the resolutions. Mr. Cricenti also made the point that if the votes cast by GSL are taken out of the calculation, more than 96% of the proxy votes are in favour of the resolutions. If the record date is changed a significant amount of these votes would not be counted. The evidence of Mr. John Ferguson, a proxy solicitor who gave evidence on behalf of IsZo, is to the same effect as Mr. Cricenti’s.

44. The Court also noted that the unchallenged evidence is that persons who buy shares in the Company have access to detailed information about the Company and its activities and business, including full details of the ongoing litigation in the Virgin Islands. Any investor acquiring shares after the record date would have been aware, either directly or through their broker, that the shares that they were acquiring would not be eligible to vote at the court-ordered shareholders’ meeting. Mr. Ferguson’s evidence confirms that this is the practice regarding companies listed on the New York Stock Exchange. He deposed that – ‘It is therefore incontrovertible that shareholders who acquire shares after a given record date are not able to vote at the corresponding meeting and should have no expectation of being entitled to vote at such meeting.’

45. This conclusion appears to be completely logical and was accepted by the Court.”

[10] The defendant argues that as a member of Nam Tai the claimant is bound by the **IsZo** litigation. I would want to hear further argument on that point. It is a complicated point as to whether *res judicata* applies either under the principle of **House of Spring Gardens Ltd v Waite**,⁶ as applied by me in **Re Lenux Group Ltd**⁷ and **Briefline Assets Ltd v Nikolay Anatoyevich Falin and another**⁸ or under any principle (if such exists) that a shareholder is bound by the result of litigation by others with the company concerning internal corporate matters. Mr. Davies QC relied on two cases for this latter proposition, but neither seems directly on point. In **Gleeson v J Wippell & Co Ltd**, Megarry V-C held that

⁶ [1991] 1 QB 241.

⁷ JSC Mezhdunarodniy Promyshlenniy Bank v Lenux Group Ltd [2021] ECSCJ No 445.

⁸ [2021] ECSCJ No 598.

bringing a claim against a second company for breach of copyright in a drawing of clergyman's collar-attached shirt was not barred by the failure of an earlier action against another company. The House of Lords decision in **Johnson v Gore Wood (A Firm)**,⁹ whilst more relevant, concerned a claim by a majority shareholder. Bringing a separate claim from that of the company was held to be an abuse.

- [11] Nonetheless, the claimant's claim is in my judgment completely hopeless. The Court of Appeal fixed the record date for the special meeting of shareholders of the defendant. There is no basis on which the claimant can go behind that. The Court of Appeal was entitled to fix the record date: see sections 83(4) and 86(1)(b) and (3) of the 2004 Act. The claimant was not entitled to vote his shares at the meeting of 30th November 2021.
- [12] I accept the defendant's submission that the claim is brought for a collateral — and illegitimate — purpose. The claimant issued the proceedings in this Court, but did not serve them on the defendant. I had to give a direction on 17th December 2021 to allow the defendant's legal representatives to have access to the Court file in these proceedings.
- [13] Instead of serving the current proceedings, the claimant issued a writ in Hong Kong against the defendant in these proceedings and various wholly-owned subsidiaries of the defendant, seven incorporated in Hong Kong and ten incorporated in the People's Republic of China. The object is to prevent the replacement of the directors of the various subsidiaries. This will cause obvious damage to the business conducted by the subsidiaries. In particular, there are monies about to be received by one of the subsidiaries and it is important that the new directors of the defendant have control of those monies. The statement of claim in the Hong Kong proceedings relies on the existence of the current action before this Court to give legitimacy to the claims in Hong Kong. Again the claimant did not serve this writ. Instead the existence of the Hong Kong proceedings, and therefore also the proceedings in this Court, only came to the defendant's attention when it was approached by Bloomberg for its comments. The issue of the Hong Kong proceedings is in my judgment plainly for an illegitimate purpose.

⁹ [2000] UKHL 68, [2002] 2 AC1.

[14] In my judgment the bringing of the current proceedings in this Court is an abuse of process. The appropriate course in my judgment is to strike the claim out.

[15] It is a matter of concern that the legal practitioners acting for the claimant saw fit to put their names to the pleadings in this matter, notwithstanding that they were aware of all the facts which make the current action an abuse of process. However, there is less urgency to determining the application for wasted costs against them. I shall adjourn this part of the application in order that Mr. Clarke and Emery Cooke can be represented and file evidence on their own behalves. Since the matter may become academic, I shall formally adjourn this part of the application but with liberty to apply.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar