EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)

CLAIM NO. BVIHC (COM) 2020/0188

IN THE MATTER OF LENUX GROUP LIMITED
AND IN THE MATTER OF THE BUSINESS COMPANIES ACT, 2004 (AS AMENDED)

BETWEEN:

(1) JSC MEZHDUNARODNIY PROMYSHLENNIY BANK
(2) STATE CORPORATION "DEPOSIT INSURANCE AGENCY"
Claimants/ Respondents

AND

(1) LENUX GROUP LIMITED
Defendant

(2) MIHARO LIMITED
Defendant/ Applicant

(3) SERGEI PUGACHEV
Applicant

Appearances:
Mr. Murray Laing for the Claimants
The Defendant did not appear
Ms. Natalia Dozortseva, a director, sought to appear on behalf of Miharo Ltd
Mr. Sergei Viktorovich Pugachev did not appear

2021 June 23
June 28

JUDGMENT

[1] **JACK, J [Ag.]**: On 14th January 2021 I heard an application by the claimants for rectification of the register of members of the defendant ("Lenux"), a BVI company, and consequential relief. By a judgment of 19th January 2021 I granted the

application. I directed that my order be served on Miharo Ltd ("Miharo"), a New Zealand company, which was the registered owner of the shares in Lenux. I gave Miharo 35 days from the date of service to apply to vary or discharge the substantive order I made.

[2] I have set out the background in my earlier judgment. The rectification application was made in order to give effect to orders made by Birss J, as he then was, the English High Court in long-running litigation between the claimants and Sergei Viktorovich Pugachev ("Mr. Pugachev"). The main new information provided by Natalia Dozortseva ("Ms. Dozortseva") at the hearing of this matter is that the arbitrators in the Paris arbitration determined that they had no jurisdiction to determine the issues between Mr. Pugachev and the Russian Federation. That decision is under appeal in Madrid, which apparently is the seat of the arbitration. This development is not relevant to the issues before me.

[3] Pursuant to the liberty to apply which I granted, Miharo on 25th February 2021 applied to set aside the order which I made. On 1st March 2021 Mr. Pugachev applied for the same relief.

[4] Mr. Pugachev in his evidence said that he was indeed the beneficial owner of Lenux. His objection to the order which I made was that the claimants had not, he said, followed the directions for valuation of the Lenux shares in the order of Birss J which was the basis of the claimants' application. Miharo took the same point and disputed that it had "sat back" in the English proceedings. It said I erred in applying **House of Spring Gardens Ltd v Waite**[1] to the facts of this case.

[5] When this matter was called on on 23rd June as a virtual hearing, Mr. Pugachev did not appear, although he had been informed of the application and given the details of the Zoom meeting. The claimants had arranged for an independent Russian interpreter, Ms. Dina Hennessey, to attend, in case Mr. Pugachev had language difficulties. In the event her services were not needed. Ms. Dozortseva, a director

[1] [1991] 1 QB 241.

of Miharo, appeared, or purported to appear on behalf of Miharo, which was otherwise not represented.

[6] Both applications were technically defective. The evidence from Miharo was in the form of an unsworn affidavit from Ms. Dozortseva. Likewise, Mr. Pugachev's affidavit was unsworn. Both said that due to Covid restrictions in France, where both resided, they were unable to swear the affidavits before a local notary. Mr. Laing disputed that there was, or was any longer, any difficulty swearing affidavits in France. If it had been otherwise relevant, I would have given Miharo and Mr. Pugachev time to rectify these defects.

[7] Neither Miharo nor Mr. Pugachev gave an address for service within the jurisdiction. This is something which must be remedied before any further step is taken by either of them in the action.

[8] Further neither Miharo nor Mr. Pugachev applied to become parties. Again that was a matter capable of correction. There was no purpose adding Mr. Pugachev as a party, since his beneficial interest in the shares was completely represented by Miharo as the legal shareholder. However, I did add Miharo as a party.

Representation in court by a director

[9] As I have said, Ms. Dozortseva appeared on behalf of Miharo. The general rule in CPR 22.3 is that a duly authorised director may conduct proceedings on behalf of a company, but that a company may only appear though a legal practitioner at a hearing in open court "unless the court permits it to be represented by a duly authorised director or other officer". However, CPR 69B.4(4) disapplies CPR 22.3 in the Commercial Court. CPR 69B.4(4) provides that "bodies corporate must be represented by a legal practitioner in all commercial matters."

[10] This appears to give the Court no discretion. Ms. Dozortseva is a lawyer qualified in Russia, but is not admitted to practise here in the BVI. She says that Miharo has no monies with which to pay lawyers, however, the English freezing order granted

against Miharo contains the usual permission for the defendant to spend monies on legal fees providing the source of the money is first disclosed to the claimants. Her unsworn affidavit gives no details of what assets Miharo had and what has become of them. Nor does the evidence explain, even perfunctorily, why Miharo does not have access to funding from other sources. Given that the minor beneficiaries were represented by leading counsel in the English litigation, it behooves Miharo to explain how the children could be funded but not Miharo: see **MV Yorke Motors (A Firm) v Edwards**.[2].

[11] It may be that the CPR gives some scope for relaxation where there is a necessity for a director to appear on behalf of a company without legal presentation, for example, to ask for an adjournment when no legal practitioner is available to represent the company: see the wide "break glass in case of emergency" provision in CPR 26.9. As long ago as 1472, Littleton J in the Court of Common Pleas (where serjeants-at-law had exclusive rights of audience) said (with the concurrence of Bryan CJ) in **Paston v Geney**:[3]

> "If all the serjeants were dead, we could hear the apprentices [i.e. the barristers] to plead here by necessity, and in ease of the people."

[12] At common law there was some power to extend rights of audience: see **In the Matter of the Serjeants-at-Law,**[4] where the Court of Common Pleas allowed barristers in specified circumstances a limited right of audience.[5] The **Practice Note (Prerogative Writs)**[6] allowed litigants in person to move for prerogative writs (now prerogative orders) in the Queen's Bench Divisional Court. See most recently **Abse**

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[2] [1982] 1 WLR 444 at pp 449-450 (Lord Diplock), approving Brandon LJ's holding in the Court of Appeal that "[t]he fact that the man has no capital of his own does not mean that he cannot raise any capital; he may have friends, he may have business associates, he may have relatives, all of whom can help him in his hour of need."

[3] YB Trin 11 Ed IV, fo. 2, pl. 4.

[4] (1840) 6 Bing (NC) 232.

[5] According to Bingham's second footnote in his report of the Serjeants' Case, in an echo of Matthew 27.51, Mark 15.38 and Luke 23.45, "[d]uring the delivery of the [judgment], a furious tempest of wind prevailed, which seemed to shake the fabric of Westminster Hall, and nearly burst open the windows and doors of the Court of Common Pleas."

[6] [1947] WN 218.

v Smith.[7] However, it is doubtful whether any common law power to relax the rules on rights of audience has survived the CPR and the **Legal Practitioners Act 2015**.[8] See also Ventose J's comments in **Adam J Bilzerian and others v Terence V Byron and others**.[9]

[13] In any event, Ms. Dozortseva has not in my judgment shown a sufficient case of necessity.

[14] There is a further objection to her appearing on behalf of Miharo. Sections 13 and 18 of the **2015 Act** prohibit non-BVI-admitted legal practitioners from "practising law". This is defined in section 2 as meaning "to practise as a legal practitioner or to undertake or perform the functions of a legal practitioner." At first instance in **Yao Juan v Kwok Kin Kwok**,[10] I held that this involved a capacity test. What was the capacity in which the person doing the work was acting? Thus I held that the two Hong Kong admitted lawyers whose fees were in issue were not purporting to act as BVI legal practitioners, but instead were acting as employees of a BVI law firm. Therefore, they were not "practising [BVI] law". The Court of Appeal disagreed.[11] It held the issue was a functional question. What was the nature of the work the person doing the work was performing? If it was the type of work done by a BVI legal practitioner, then the work constituted "practising law" which must be done by a BVI legal practitioner.

[15] Oral advocacy in court is a quintessential function of a legal practitioner. It is highly arguable in my judgment that the director of a company who appears in court on behalf her company is "practising law". The fact that she does so in her capacity as a director is, on the Court of Appeal's reasoning, irrelevant. Likewise, the recognition in the CPR of circumstances in which a director can represent a

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[7] [1986] QB 536.
[8] No 13 of 2015, Laws of the Territory of the Virgin Islands.
[9] [2019] ECSCJ No 337 (19th October 2019) at para [53].
[10] [2020] ECSCJ No 148, BVIHC (COM) 162 of 2013 (delivered 23rd April 2020).
[11] [2021] ECSCJ No 577, BVIHCMAP2018/0042 (delivered 1st June 2021).

company does not have the effect of overruling the restrictions in the 2015 Act. Rights of audience are governed by BVI legislation, not the CPR.

[16] Since I have held Ms. Dozortseva is barred by CPR 69B.4(4) from appearing for Miharo, I do not have to determine this issue. Nor do I have to consider whether a Russian lawyer in France who appears virtually in a case in this Territory is practising BVI law in this Territory without being enrolled (which is a crime) or is practising BVI law outside this Territory without being enrolled (which is not a crime). I shall therefore determine neither issue.

The substantive grounds

[17] I turn then to the substantive grounds relied upon to vary or discharge my January order. Here I can rely on the terms of the applications and supporting (unsworn) affidavits, notwithstanding Ms. Dozortseva's lack of rights of audience. Mr. Pugachev says that the claimants have not complied with the terms of order of Birss J of 30th January 2018. Under this, the claimants had to provide him with a valuation of the shares, which he could then challenge if he thought the valuation was too low. He complains that this has not been done.

[18] There are two answers to this. The first is that the valuation procedure fixed by Birss J was only to start after the transfer of the shares. In the current case, the rectification was ordered to take place only 35 days after service of my judgment of 19th January and will in fact only be affected from 23rd June 2021. Mr. Pugachev issued his application before the valuation procedure was due to commence. The rectification of the register has not yet taken place. There is no breach of Birss J's order as yet and thus none which could give rise to any ground for attacking my order. The second is that, if Mr. Pugachev considers that the claimants have breached Birss J's order, his remedy is to complain in the English court, not complain to me. I accept that there is a practical difficulty in Mr. Pugachev doing this in that he is a contemnor of the English court who fled that jurisdiction and is currently subject to a term of imprisonment which he had not yet served. He has not purged or attempted to purge his contempt of the English court. However, the

remedy lies in his hands. In the worst case he has merely to serve his time (and will receive half off in any event for good behaviour). In the best case he may be able to purge his contempt.

[19] Miharo, in its application, denies that it should be treated as estopped *per rem judicatam*. Nothing in its application, however, convinces me that my earlier judgment was wrong. No adequate grounds are shown to vary or discharge my earlier order.

[20] Accordingly, as I indicated on 23rd June 2021 I add Miharo as a party to the action, but refuse its and Mr. Pugachev's applications to vary or discharge my order. These are the reasons for that decision.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar