

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS
(COMMERCIAL DIVISION)
Claim No: BVIHCM 135 of 2019

IN THE MATTER OF MERIDIAN HOLDINGS LTD
AND IN THE MATTER OF THE BVI COMPANIES ACT 2004 (AS
AMENDED)

BETWEEN:

(1) WANDA FONG JERRIT
(2) ANNA FONG
(3) PEGGY FONG
(4) ARTHUR FONG
(5) JERRY FONG
(6) FRANKLIN FONG

Claimants

and

(1) INTERNATIONAL HOLDINGS LTD
(2) ELITE JADE INVESTMENT LTD

Defendants

Decided on submissions:

Ms. Rosalind Nicholson and Ms. Rhonda Brown for the claimants

No submissions by the first defendant

No appearance by the second defendant

2020: June 4

SECOND JUDGMENT

- [1] **JACK, J [Ag.]:** On 4th December 2019 I gave judgment in favour of the claimants. I shall use the same shortened names in this second judgment. The order giving effect to that judgment was sealed on 13th December 2019.
- [2] The facts were simple. The seventy shares in Meridian were registered in the name of Elite, a BVI company. The six claimants were entitled to 10 shares each. I ordered pursuant to section 43(1) of the Business Companies Act 2004 rectification of the register of Meridian, so as to show each of the claimants as registered holder of ten shares.
- [3] After obtaining the order, the claimants served it on Vistra (BVI) Ltd (“Vistra”), the registered agents of Meridian. They subsequently provided Vistra with the “know-your-client” documentation required for registration. Vistra, however, only held a copy of the register of shareholders. The original was held by a firm of Hong Kong solicitors, Robertsons. Despite Vistra being satisfied with the KYC documentation, Robertsons refused to update the register. Vistra’s position was that, since the original of the register was in Hong Kong, they could not themselves effect the rectification of the register.
- [4] In consequence on 4th May 2020, the claimants applied for an order that:
- “[Vistra] be permitted and directed to treat the copy register of members of Meridian... (the ‘Company’) in their possession as the register of members of the Company so that the same shall be from the date of this Order the Register of Members of the Company in place of and in substitution for any other document or documents so described.”
- They also sought a liberty to apply in respect of costs.
- [5] The application was to be determined on paper. On reading the bundle, I raised a query as to the power to make such an order.

[6] Ms. Nicholson in a detailed email made the following submissions:

“The Claimants say that the Court has jurisdiction to make the order which they request under section 43 of the **Business Companies Act [2004]**¹, alternatively under the inherent jurisdiction of the Court to secure compliance with its own orders alternatively under section 25 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**.²

A BVI company is obliged to keep its register of members or a copy of its register of members at the office of its registered agent (s. 96(1) [of the 2004 Act]). In the present case, as in many other cases, the original register is not therefore within the Territory and the persons in possession of that register not themselves within the jurisdiction of the BVI Court.

Where the Court has made an order that the register be rectified, and the original register is kept outside of the BVI, and the company continues to fail to rectify the register in compliance with the order, the Claimants contend that it is implicit in the power conferred on the Court by section 43 that the Court can order that a new register be created complying with the Order and the provisions of section 41. Alternatively, that it is a power which exists within the inherent jurisdiction of the Court to secure compliance with its own orders.

It is clear that the power of the Court under section 43 is a broad one. For example, the Court may order that a new register may be created where the register itself has been lost or cannot be located: see **Re Data Express Ltd**³ *per* Vinelott J as referred to and adopted in **Montalto v Popat**⁴.

In **Sempacher Foundation v Lark Services**,⁵ this Court ordered (inter alia) that the company's Registered Agents be ordered and directed to rectify the Register of members.

The claimants contend that the power under section 43 is broad enough to allow the Court to give directions such as that sought in the present application. It cannot be the case, or have been the intention of the legislature, that simply by removing the register from the jurisdiction, a BVI company can avoid an order of the Court requiring that it rectify the register to record persons as the legal owner of shares and to defeat the

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

² Cap 80, Revised Laws of the Virgin Islands.

³ (1987) The Times, 27 April.

⁴ [2016] EWHC 810 (Ch) *per* Malcolm Davis QC sitting as a deputy judge of the Chancery Division at para [18].

⁵ BVIHC(COM) 2018/0027 (decided 17th January 2020) *per* Farara J at para [342], subpara 3.

property interests of such persons. Were that the case, then the jurisdiction under section 43 is rendered toothless in all cases where the register is kept outside the BVI.

That this must be the case is apparent because otherwise the aggrieved shareholder has no effective remedy in respect of his right to have his name entered on the register and the Court has no means of ensuring that its orders are carried into effect. An action for contempt against the company is unlikely to secure compliance with the order and any alternative remedy, for example a fine against the company, damages the interest of the applicant shareholder as much as it does the company without in itself securing compliance. In addition, the fact that the officers of the company are outside the jurisdiction, notwithstanding that permission might be granted to serve them outside the jurisdiction, means that there is no practical means of ensuring their compliance with the Court's Order.

Further or alternatively, section 25 of the **[Supreme Court Act]** provides that

'Where a person neglects or refuses to comply with a judgment or order directing him to execute any conveyance, contract or other document or to endorse any negotiable instrument, the High Court may, on such terms and conditions as may be just, order that the conveyance, contract or other document shall be executed or that the negotiable instrument shall be endorsed by such person as the High Court may nominate for that purpose and a conveyance, contract, document or instrument so executed or endorsed shall operate and be for all purposes available as if it had been executed or endorsed by the persons originally directed to execute or endorse it..'

In the present case, the claimants contend that the Court has jurisdiction under section 25 to appoint the company's BVI Registered Agent to draw up the register in accordance with the Court's order and for that register to stand as the register of members of the company.

The Court may take comfort from the fact that the Order sought in this application is one which it is understood the BVI Commercial Court has been prepared to make in the past, although we have been unable to locate a reported case in which such an order has been made in the BVI."

- [7] I have read the authorities to which Ms. Nicholson refers me. I respectfully agree with all of her submissions. Since I cannot improve on her language, I gratefully adopt them as my reasons for granting the order sought, as set out in para [4] above.
- [8] Ms. Nicholson, as I have said, also seeks an order giving the claimants liberty to apply as regards costs. At the same time as seeking further submissions on the substantive order sought, I also asked for further submissions on the costs order sought. This is because it is generally bad practice to leave matters such as costs outstanding without having some end date when the Court file can be closed.
- [9] Ms. Nicholson said that the claimants might seek an order against Alice and Jason personally.

“The difficulty which presents itself to the claimants in this respect, however, is that BVI authority (**Halliwell Assets Inc v Hornbeam Corporation**⁶) suggests that the procedure under CPR 64.10 requires both joinder of the relevant costs defendants and service on, as opposed to mere notice to, the costs defendants. Clearly, the procedure is cumbersome and likely to involve considerable expense to the Claimants which they are reluctant to incur at the present time. However, they would wish to reserve their right to apply for such an order when circumstances allow.”

- [10] I am not sure that I understand the need to add Alice and Jason in order to obtain a costs order. Once the rectification of Meridian’s share register takes place, the ultimate beneficial owners of the remaining ten shares held by Elite will be Alice and Jason. Making a costs order against Elite, on its face, would be straightforward, since Elite is already a party. In any event, in the light of my judgment in **Starr Investments Cayman II Inc v Ou Wen Lin and another**⁷, the difficulties and delays associated with effecting service under the **Hague**

⁶ BVIHCMAP 2015/0001 (decided 12th October 2015) *per* Pereira CJ.

⁷ BVIHC (COM) 2018/0225 (to be handed down).

Convention⁸ on defendants domiciled abroad may in appropriate company law cases be reduced.

[11] I will hear the parties on costs when I hand this judgment down.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar

⁸ Convention of 15th November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.