

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM NO. BVIHC (COM) 2019/0171

**IN THE ESTATE OF FRESCO DOUGLAS CHARLES STEWART
AND IN THE MATTER OF SECTION 43 OF THE BVI BUSINESS COMPANIES ACT
2004**

BETWEEN:

**JOAN LEA BRINGS
(Suing as Administrator of the Estate of
Fresco Douglas Charles Stewart, deceased)**

Claimant

and

**[1] GOLDEN CENTURY INDUSTRIAL LTD
[2] COMMONWEALTH TRUST LTD**

Defendants

Appearances:

Mr. Daniel Davies of counsel, with him Ms. Philippa O'Sullivan of AMS Law Ltd for
the claimant

No appearances for the defendants

2020: March 5, 30;
April 9.

JUDGMENT

[1] **JACK, J [Ag.]**: Fresco Douglas Charles Stuart, also known as Douglas Charles Fresco, died intestate on 1st January 2016. He died in the United States of America but was domiciled in Hong Kong. He left a widow (the Claimant "Mrs.

Brings”) and three daughters. The four together are under Hong Kong law entitled to the whole of the estate on the deceased’s intestacy.

- [2] On 12th October 2018 the BVI Probate Registry granted Mrs. Brings letters of administration of her late husband’s estate in this Territory. The only asset in this Territory is a 100 per cent shareholding in the first defendant (“Golden Century”). The second defendant (“Commonwealth”) is the registered agent of Golden Century.
- [3] On 28th November 2019 Mrs. Brings, through her legal representatives, AMS Law Ltd (“AMS”), submitted through the electronic filing system a fixed date claim form seeking rectification of the register of members of Golden Century to show Mrs. Brings as the holder of the shares. Since it was filed after the Registry was closed, the technical date of issue is 29th November.¹ The fixed dated claim form was issued without any return date on the claim. This is a feature of the Electronic Litigation Portal (“ELP”), because form of the claim form is as submitted by the claimant, without input from the Court.
- [4] AMS shortly afterwards served the claim form (a) on Golden Century by service on the registered agent, Commonwealth, and (b) on Commonwealth at the same time and place as it served Golden Century.
- [5] On 30th January 2020, over two months after the fixed date claim was issued, the Registry issued a notice of hearing giving a return date on the fixed date claim of 5th March 2020. The Registry sent a copy of the notice to AMS, but, because neither Golden Century nor Commonwealth had entered an appearance, they did not send a copy of the notice to either defendant. When the matter came before me on 5th March, I asked for evidence that they were aware of the hearing. Mr. Davies of counsel, who appeared on that occasion as on the current hearing, could not adduce that evidence. Accordingly, I adjourned the matter until 30th

¹ Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules, 2018 (as amended by the Eastern Caribbean Supreme Court (Electronic Litigation Filing and service Procedure) (Amendment) Rules 2019, rules 9(4) and 13(10).

March 2020, so that such evidence could be provided. AMS have now produced an email from Commonwealth, who confirm that neither defendant disputes the relief sought. Insofar as there were defects of service, I can therefore waive them and give judgment pursuant to CPR 14.1(1) and 14.4(2).

[6] In these circumstances in my judgment it is right to grant the relief sought. Mrs. Brings, as the personal representative, is entitled to be substituted as the only shareholder of Golden Century. I grant the order sought.

[7] I should, however, mention one point of practice. The current claim was issued, and was submitted perfectly properly by AMS, as a fixed date action. However, the date, time and place of the fixed date hearing was not entered on Form 2 claim form. In **PT Ventures SGPS SA v Vidatel Ltd**² I dealt with an argument relating the availability or otherwise of summary judgment on a fixed date claim form to the effect that:

“although the recognition action was commenced by way [of] a Form 2 appropriate for a fixed date claim, no return date was actually given on the claim form when it was issued, so it is not in truth a fixed date claim. It appears that shortly before issuing the recognition action, there were discussions between legal representatives about when counsel for both PTV and Vidatel might be available. PTV prevailed on the Court office to issue the claim without affixing a fixed date to it, pending counsel’s availability being determined. CPR 2.4 defines ‘fixed date claim form’ as ‘a claim form in Form 2 upon which there is stated a date, time and place for the first hearing of the claim.’ I do not accept that the omission of the date, time and place turns a fixed date claim form into an ordinary Part 8 claim. It seems to me that it is at most an irregularity which was corrected by the Court subsequently giving a return date for the claim: see CPR 26.9(2) and (3).”

[8] What occurred in the current case is thus an irregularity. The consequence of issuing the claim form without the requisite details can be seen from the current case. Because there is no obligation on a defendant to a fixed date claim to enter an appearance, the Registry had no address for service of the notice fixing the

² BVIHC (COM) 2015/0117 and 2019/0067 (delivered 16th March 2020) at para [21].

fixed date. The claimant has no obligation to serve the notice either. The CPR and the ELP Rules simply have a blank as to how the defendant ought to be informed of the date of the hearing. The CPR have a blank, because it is not envisaged that this will happen; the ELP Rules do not deal with the problem.

- [9] A defendant must be served with the access code for the ELP. The access code would allow a defendant to check itself what notice of hearing has been issued. The difficulty is that a defendant, even in the Commercial Division, may not already have legal representation when first served with a claim form. The **Guidelines**³ expressly recognize that special arrangements are needed for litigants in person. A defendant, unassisted, may well be unaware that it needs to look for the notice of hearing on the ELP. Knowledge of the timeline for the case is important for a litigant in person to organize legal representation.
- [10] With foreign defendants there may also be issues about translating the notice of hearing. It is not for the Registry to translate any documents, but neither is there an obligation in the Rules on the claimant to translate and serve the notice of hearing. Moreover, on the facts of the current case, the defendant would not have been able to find the notice of hearing on the ELP any time soon after service, because the notice of hearing was only issued two months later. In practice, where both parties are represented by local legal practitioners these difficulties rarely arise, but there may be cases where it presents a real difficulty.
- [11] There seem two potential remedies. First, the Registry could provide an online stencil with the available return dates for fixed date actions. A party issuing a fixed date claim could chose a suitable return date from the stencil and endorse it on the Form 2. Second, the Registry could issue a notice of hearing when it is next open, so that the claimant can serve both the clam form and the notice of hearing together. It is probable that neither of these steps would require any changes to the Rules. The third possibility of the claimant serving the fixed date claim form

³ Guidelines for Electronic Filing Using the ESCS Electronic Litigation Portal (Practice Guide 1 of 2019) para 16.

without a hearing date but with a promise to serve a notice of hearing in due course would probably require a change in the Rules.

- [12] The Rules Committee or those with responsibility for drafting the ELP Rules may wish to consider the problem.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar