

**THE EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

Claim No: BVIHC (COM) 150 OF 2019

**IN THE MATTER OF CONTAINER HOMES LTD
AND IN THE MATTER OF THE BUSINESS COMPANIES ACT 2004, SECTION 43(1)**

BETWEEN:

LAUREN SCHULZ

Claimant

and

[1] CONTAINER HOMES LTD

[2] EQUITY TRUST (BVI) LTD

Defendants

Appearances:

Ms. Hazelann Hannaway Boreland of Harney Westwood & Riegels for the claimant

Ms. Olga Osadchaya of Carey Olsen for the second defendant

No appearance by the first defendant

2019: December 2;
December 10.

JUDGMENT

[1] **JACK, J [Ag.]**: This is an application to rectify the register of members of Container Homes Ltd (“the Company”). The claimant, Lauren Schutz, seeks to have herself registered as the sole shareholder. She says that she is the sole trustee the Schultz Family Trust, which is the beneficial owner of all the shares in the Company. I shall refer to members of the family by their first names without intending any disrespect.

- [2] The application is supported by an affirmation from Lauren. She says the Company was incorporated in this Territory on 2nd May 1979. Its only assets are two parcels of land on Virgin Gorda and she exhibits copies of the land register. She is shown as the sole director of the Company and she exhibits the register of directors. Originally, when the Company was formed, she and her brother, Christopher Robert Schultz (“Christopher”), owned all the shares, half each.
- [3] She says that on 16th September 2002 she executed an instrument of transfer of her shares to her parents, Joseph Frank Schultz (“Joseph”) and Claire Mercedes Schultz (“Claire”). The following day, Christopher, executed a similar instrument of transfer to Joseph and Claire. These instruments of transfer were, she says, never registered in the register of members. She exhibits what purport to be the two instruments of transfer, but it may be doubtful if they are effective, because the instruments do not mention the name of the company, the shares of which the instruments purport to transfer. At any rate the transfers of shares were never registered.
- [4] On 27th December 2002 Joseph and Claire made a declaration of trust, which created the Schultz Family Trust (“the Trust”). It is a standard form of discretionary trust. The “trust fund” is defined as the “the property specified in the Second Schedule” (clause 1(a)(i)). This property is the sum of \$100. There is provision for additional property to be given to the trustees as additions to the trust fund (clauses 1(a)(ii) and 3), but there is no reference within the deed itself to any intention that the shares in the Company should form part of the trust assets.
- [5] Lauren Schultz deposes that her “parents then transferred the shares in the Company into the Trust.” There are problems with this bald assertion, which I discuss below. I shall first set out the remaining facts.

- [6] By a deed made 21st August 2003 by Joseph and Claire, Claire retired as a trustee of the Schultz Family Trust and Lauren was appointed in her stead. This deed is in evidence.
- [7] Claire died on 13th June 2004. Joseph died on 2nd November 2005. Both death certificates are exhibited. Lauren thereafter became the sole trustee of the Trust. There is no evidence as to whether either Claire or Joseph left a will. Nor is there any evidence as to whether probate or letters of administration were granted to either of their estates.
- [8] Christopher died on 10th October 2017. Again, there is no evidence as to whether probate or letters of administration have been granted. He was married. His widow is Elizabeth A Rowles. It is not clear whether he had children or who his heirs might be. This question may be governed by the law of New Jersey, where he appears to have lived.
- [9] Joseph and Claire had one further child, Joseph John Schultz. By a declaration of 26th September 2019 he has indicated that he had no objection to his sister's application to rectify the register of members.
- [10] It can be seen that for the claimant's claim to rectification to succeed, she must show that the beneficial ownership of the shares passed first to her parents and then by way of a beneficial assignment from the parents to the Trust. There are three problems with this. Firstly, the parents did not have legal ownership of the shares, because they had not been registered as the legal owners. They could not therefore transfer the legal ownership of the shares to the Trust.
- [11] Secondly, it is doubtful if they had an equitable interest in the shares. Lauren does not say that any consideration was paid for the transfers from her and Christopher. The instruments of transfer expressly say that the consideration is nil. In these circumstances, the transfer of the shares would have been a gift. In general equity will not perfect a gift of legal title, where the formalities of the

transfer of legal title have not been complied with: **Snell on Equity**¹ at para 24-10ff; **Re Williams; Williams v Ball** ².

[12] Thirdly, even if the parents had beneficial title to the shares, there is no good evidence of any act of transfer of the beneficial title from the parents to the trust. In England, such a transfer would require writing: see section 53(1)(c) of the Law of Property Act 1925 (UK). I have not discovered whether there is a similar provision in this Territory. Even if there is not, there is in my judgment still no adequate evidence adduced as yet of any act taken by the parents to transfer the beneficial title to the Trust. I bear in mind that the legal title was never transferred to them. It seems improbable, given this lack of care, that they made any *express* decision to transfer such equitable title as they had.

[13] I do not, as presently advised, see how there could have been some *implied* assignment of their equitable title. Ms. Boreland argues that on 28th November 2005 Lauren and Christopher made a written shareholders' resolution which recites that "the Company holds real property in the BVI", so that only a person licensed to hold land under the Non-belongers Land Holding Regulation Act (such as Lauren) could be appointed as director, but this says nothing about whether the shares in the Company were held on trust.

[14] These points are not necessarily fatal to the rectification claim. However, at present all the relevant parties are not before the Court. The claimant needs potentially to show who the personal representatives and the beneficiaries of the estates of each of Joseph, Claire and Christopher are. The Court can then consider whether such persons need to be added as parties. Insofar as they are minors (as children of Christopher potentially might be), consideration will need to be given to how their interests are to be protected.

¹ (33rd Ed, 2018)

² [1917] 1 Ch 1

[15] Applications for rectification of registers of members under section 43(1) of the Business Companies Act 2004 are supposed to be summary in nature. Thus, it would be open to me simply to dismiss the application. However, it may be that further evidence about the three estates can be come by comparatively easily. Further it may well be that the beneficiaries of the estates of Joseph, Claire and Christopher are few in number (possibly just the two surviving siblings and Christopher's widow). If that is the case, then the parties may well agree that the share register should be rectified. I shall therefore adjourn this matter generally with liberty to apply.

Adrian Jack (Ag.)
Commercial Court Judge

By the Court

Registrar