

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

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

Claim No: BVIHCM2019/0135

IN THE MATTER OF MERIDIAN HOLDINGS LTD

AND IN THE MATTER OF THE BVI COMPANIES ACT 2014 (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] MERIDIAN INTERNATIONAL HOLDINGS LTD
[2] ELITE JADE INVESTMENT LTD**

Defendants

Appearances:

Miss Rosalind Nicholson and Ms. Rhonda Brown for the claimants
Ms. Allana-J Joseph for the first defendant
No appearance by the second defendant

2019: November 29;
December 4.

JUDGMENT

- [1] **JACK, J [Ag.]**: This is an application under section 43(1) of the Business Companies Act 2004 to rectify the register of members of Meridian Investment Holdings Ltd (“Meridian”). Meridian has seventy issued shares. The six claimants each seek an order that they be registered as the holders of ten shares each.
- [2] The seventy shares in Meridian are registered in the name of Elite Jade Investment Ltd (“Elite”). Elite is a BVI company, so no issue as to service of the fixed date claim form outside the jurisdiction arises. Elite has not responded to the claim form, apart from acknowledging service.
- [3] I take the facts from the affirmation of the first claimant (“Wanda”). The claimants are all brothers and sisters, the children of Walter Soon Fong (“Walter”). In addition, there was a further brother, Samuel Fong (“Samuel”). Samuel died on 22nd January 2018, leaving his widow, Alice Fong (“Alice”) and son, Jason Fong (“Jason”). Alice is the sole director of Elite. I shall refer to the *dramatis personae* by their first names without intending any disrespect.
- [4] Walter had extensive investments and property holdings in Hong Kong. Latterly these were held through Meridian. Walter died on 7th March 1990. His will provided for the creation of a trust, whereby in the events which have happened the Elite shareholding would be held on trust for his seven children, with Samuel’s portion now held for Alice and Jason. The trust was never formally set up, but there is no dispute that the Elite shareholding should be held by the siblings (or in Samuel’s case, his heirs), one seventh each.
- [5] In Samuel’s final years, he tried to formalize the arrangements for the shareholdings in Meridian. He caused Elite to issue a single undated share transfer form, giving the shares to the seven siblings. This unfortunately does not effect the intended transfer of ten shares to each and effect has never been given to it.

- [6] After Samuel's death, a dispute has arisen between Jason (as at least one of his father's heirs) and the surviving six siblings as to ownership of, what had been, Walter's United States businesses. This dispute does not touch on the claim to Elite's shares in Meridian. Wanda says that Jason was using his hold over Elite to put pressure on his uncles and aunts to agree favourable terms in respect of the US businesses.
- [7] By letter of 4th July 2019 Walkers, acting on behalf of the claimants, formally demanded that Elite execute transfers of the shares and cause them to be registered in the register of members. Elite did not comply with that demand.
- [8] Elite has not put in any evidence. The only evidence in answer is submitted on behalf of Meridian. It comprises an affirmation of Jason. He does not address any of the underlying facts and does not challenge the factual account given by his aunt, Wanda. Instead he takes what are effectively points of law, namely (1) that Meridian has not been provided with a written instrument of transfer signed on Elite's behalf; (2) that unless and until such an instrument of transfer is provided under the Articles of Meridian no transfer can be registered; and (3) that the dispute is between the claimants and Elite, not between the claimants and Meridian.
- [9] These three points are those relied upon by Ms Joseph, who appeared on behalf of Meridian. Although both Meridian and Elite are represented by Conyers and both have acknowledged service, Elite has deliberately chosen not to be represented before me.
- [10] Section 43 of the Business Companies Act 2004 provides:
- “(1) If
- (a) information that is required to be entered in the register of members under section 41 is omitted from the register or inaccurately entered in the register; or

(b) there is unreasonable delay in entering the information in the register;

a member of the company, or any person who is aggrieved by the omission, inaccuracy or delay, may apply to the Court for an order that the register be rectified, and the Court may either refuse the application, with or without costs to be paid by the applicant, or order the rectification of the register, and may direct the company to pay all costs of the application and any damages the applicant may have sustained.

(2) The Court may, in any proceedings under subsection (1), determine any question relating to the right of a person who is a party to the proceedings to have his name entered in or omitted from the register of members, whether the question arises between

(a) two or more members or alleged members; or

(b) between members or alleged members and the company;

and generally the Court may, in the proceedings, determine any question that may be necessary or expedient to be determined for the rectification of the register of members.”

[11] Ms. Nicholson submits that there is no dispute that Elite hold sixty shares in Meridian on bare trust for the claimants, ten each. They are entitled to have the shares transferred to them. Following Walkers’ letter of 4th July 2019, equity will treat that which ought to have been done as done, so that the claimants are entitled to rectification. It is no answer to say (as Meridian do) that the articles of association provide (as is standard) for transfers to be made by written instruments of transfer and for such transfer to have effect upon registration in the register of members.

[12] As to Meridian’s third point, she relied on the English Court of Appeal authority of **Re Diamond Rock Boring Co Ltd; Ex parte Shaw**¹. In that case, Shaw, the applicant, had approached a stockbroker, Smith, to purchase forty shares in the company. Smith had previously acted for Piers, who owned forty shares. A price was agreed and Shaw paid the money to Smith. Piers executed a stock transfer form, which he gave to Smith, who in turn gave it to Shaw for execution by him. Shaw returned the transfer form to Smith, so that Smith could register it. Instead,

¹ (1877) 2 QBD 463

Smith dishonestly told Piers that Shaw had not been able to pay. Smith cut out Piers signature from the stock transfer form and sent it back to him. Smith subsequently absconded. Shaw sought registration of his shareholding.

[13] The Court of Appeal expressly rejected the argument that, because the company had no interest in the dispute between Shaw and Piers about the shares, it was improper to seek rectification. The equivalent of section 43(2), it held, permitted freestanding issues between members and would-be members to be determined. Accordingly, I reject Meridian's third point.

[14] It is convenient to treat the first and second points together. Ms. Joseph submits that the claim against Meridian is "premature and misconceived". Unless and until the claimants obtain an order against Elite to execute share transfers, they have no claim against Meridian for rectification. She relies on the Privy Council decision, on appeal from this Territory, in **Nilon Ltd v Royal Westminster Investments SA**.²

[15] In that case, the claimants alleged that they had entered a joint venture agreement with Manmohan Varma, who resided in London. For the purposes of the joint venture he incorporated Nilon Ltd in the BVI. He became its sole shareholder. The claimants alleged that "Mr. Varma would procure and/or co-operate in the procuring the issue of voting shares in Nilon... in these proportions: Mr Varma would own 37.5% of the issued shares in Nilon; 5% would be allotted to a local Nigerian investor to be agreed between joint venture partners and the remaining 57.5% would be allotted [to the claimants]." The claimants sought rectification of the register of shareholders of Nilon on the basis that under the terms of the joint venture agreement they were entitled to have 57.5% of the shares issued to them.

² [2015] UKPC 2, [2015] 3 All ER 372

[16] In this Court, Bannister J struck out the proceedings. The Court of Appeal reversed him. Lord Collins, giving the advice of the Privy Council, said at para [23]:

“What divided them was whether proceedings for rectification are maintainable only if the register is presently inaccurate (as Bannister J found...), or whether it can be used to determine whether a defendant is in breach of a contract to procure that a company would issue shares (as the Court of Appeal found...).”

[17] The Privy Council upheld the view of Bannister J. Their Lordships concluded at para [51] that:

“proceedings for rectification can only be brought where the applicant has a right to registration by virtue of a valid transfer of legal title, and no merely prospective claim against the company dependent on the conversion of an equitable right to a legal title by an order of specific performance of a contract.”

[18] The current case is distinguishable in my judgment. Whereas a claim for specific performance is a discretionary remedy, a claim under a trust is made as of right. The claimants in **Nilon** had only a prospective right to be issued with shares. The claimants here have an actual pre-existing right to have Elite issue them with an instrument of transfer and to have their shares registered. Indeed, Elite as sole legal shareholder can under **Duomatic** principles³ direct the registration of the claimants' shares notwithstanding the requirements of the articles for production of instruments of transfer.

[19] Moreover, treating matters in this way is in accordance with the Overriding Objective of the Civil Procedure Rules. The undisputed evidence is that the claimants have a right to have ten shares transferred to each of them. It would in

³ See *Re Duomatic Ltd* [1969] 2 Ch 365 and *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258 at 280 (“a company is bound, in a matter which is intra vires and not fraudulent, by the unanimous agreement of its members”), approved by the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 506.

my judgment be strange if, on this undisputed evidence, the claimants were told to go away and issue fresh proceedings to claim their undisputed entitlements. By contrast, **Nilon** was a very different case, where the terms of the joint venture agreement were bristling with difficulties and specific performance was by no means a guaranteed remedy for the claimants.

[20] Section 43 and its counterparts in other jurisdictions are intended for straightforward cases. The current case is in my judgment straightforward. There is no reason to refuse the summary remedy under section 43 on the facts of this case.

[21] Accordingly, I shall order rectification of the register of shareholders as prayed. I am happy to hear counsel on costs. I am happy for counsel to agree that the matter be relisted for argument on costs at some convenient point, so that all issues of costs can be dealt with together. If such an agreement for adjournment of the costs issues can be reached, there is no need for counsel to attend at the handing down of this judgment, provided an agreed form of order is submitted.

Adrian Jack [Ag.]
Commercial Court Judge

By the Court

Registrar