

THE EASTERN CARIBBEAN SUPREME COURT

THE TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

(COMMERCIAL DIVISION)

CLAIM NO. BVIHC (COM) 2018/0090

SOLOMON LEW

Claimant/Applicant

And

Querencia Limited  
Quo Vadis Investments Limited

Defendants/Respondents

**Appearances:**

John McCarroll SC and Stuart Cullen of Harneys Westwood and Riegels for the Defendants  
Adrian Francis and John MacDonald of Maples and Calder for the Claimant

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2018: September 29

2019: February 12

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**JUDGMENT**

[1] **Adderley, J** Ag.: This was the return date hearing on an ex parte injunction granted to the Claimant by Wallbank J, on 6 June 2018 at an urgent ex parte on notice telephone hearing.

[2] Prior to the hearing, the shares of the First Defendant, Querencia Limited, a British Virgin Islands ("BVI") company ("Querencia"), was subject to a stop notice obtained by the Claimant on 29

November 2017 which the Defendants had without success sought to have discharged before Chivers, J Ag on 13 March 2018.

[3] The application for the injunction was prompted by the service by the Defendants on 23 May 2016 of a notice to the Claimant that Querencia intended after 14 days to issue 49,998 shares and to transfer 10,551 shares in the capital of Querencia to a United States company named Lamballe LLC. At that time Mr Lew was claiming a 100% beneficial interest in Querencia by virtue of an oral contract for sale and the proposed issue would dilute his interest to 0.00004%.

[4] Mr Lew commenced proceedings in Singapore (Case No. HC/S 585/2018) on 5 June 2018 for breach of contract/trust claiming an interest in the shares. He joined as Defendants Mr and Mrs Nargolwala, Quo Vadis Investments Limited ("Quo Vadis"), Mr Larpin, a director of Querencia and Querencia. His claim is for:

- i. specific performance of the oral agreement;
- ii. a declaration that Quo Vadis and/or Mr Larpin hold the shares on trust for Mr Lew;  
and/or
- iii. an order that the shares be transferred to Mr Lew.

[5] According to Mr Lew's Singapore counsel the earliest date for a trial of the action is some point in the second half of 2019.

[6] The applications that were before me were:

- (a) Continuation of an interim injunction granted by Wallbank J on 6 June 2018, by which the Defendants were restrained from dealing with shares in Querencia pending determination of proceedings in Singapore to establish the Claimant's beneficial entitlement to those shares;
- (b) Permission to serve the claim form out of the jurisdiction on the Second Defendant, Quo Vadis, a Hong Kong company; and

- (c) Permission to use in these proceedings evidence and documents produced in the previous BVI stop notice proceedings BVIHCSTP2017/0040 between the same parties.

### **The facts**

- [7] The First Defendant, Querencia is a BVI incorporated company. Quo Vadis is a company incorporated in Hong Kong.
- [8] Querencia owns 26 shares in Andara Properties Investment Ltd, a BVI incorporated company, which owns all the shares in Andamandara Co Ltd, a company incorporated in Thailand. Andamandara owns, among other things, villa No 29 at the Andara Project in Phuket, Thailand, and granted Querencia a long lease of the villa in 2007. Pursuant to a Reservation Agreement dated 8 November and a sale and purchase agreement dated 14 November 2017, Mr and Mrs Nargolwala transferred 100% of the shares in Querencia to Quo Vadis on 16 November 2016. Mr Christian Larpin, a director of Quo Vadis, also became a director of Querencia.
- [9] The claim is that Mr Lew entered an oral contract with Mr and Mrs Nargolwala to purchase the shares in Querencia for US\$5.25 million ("the oral agreement"). It was concluded through the Nargolwalas' ostensible agent Daniel Meury who allegedly accepted the offer on 11 October 2017. The evidence adduced to prove the agency was that on that date Mr Meury delivered to Mr Lew: (1) the package of documents pertaining to the property, (2) the contract details of the Nargolwalas' lawyers, and (3) a document setting out bank details for paying the commission to Mr Meury upon completion of the sale. Before that contract closed the Nargolwalas transferred the shares to Quo Vadis, Mr Christian Larpin's company, pursuant to a written reservation agreement entered into on 8 November 2011. Mr Lew is now suing in Singapore as outlined above. The Defendants deny the oral agreement or that Mr Meury was acting as agent for Mr and Mrs Nargolwala.

## Discussion

- [10] In deciding whether to continue the injunction I must exercise my discretion *de novo* and satisfy myself that in all the circumstances it is just and convenient to do so.
- [11] Section 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act 1969 confers on the court the jurisdiction to grant an injunction in all cases where it appears to the court to be just and convenient. CPR 17.1(b) identifies an interim injunction as one of the interim remedies that the court may grant.
- [12] This jurisdiction here in the BVI also has a common law jurisdiction to grant a 'Black Swan' injunction in support of foreign proceedings where the foreign judgment obtained in those foreign proceedings could be enforced in the BVI against local assets owned or controlled by the Defendant.
- [13] The Court of Appeal in **Yukos Cis Investments Limited v Yukos Hydrocarbons Investments Limited**<sup>1</sup> which affirmed the existence of the jurisdiction has set out that in exercising its discretion one would ordinarily expect that an attempt should have been made to obtain an injunction first in the jurisdiction of the main litigation before seeking the remedy in the BVI since these are satellite proceedings. However, the Claimant has not sought an injunction in Singapore because none of the companies are incorporated in Singapore, or have shares there, and the BVI is the natural forum to seek interim injunctive relief in relation to the shares of Querencia.
- [14] The **American Cyanamid**<sup>2</sup> test for qualifying for the grant of an injunction is well known:
- (1) There must be a serious issue to be tried;
  - (2) the balance of convenience must favour the applicant; and
  - (3) in all the circumstances it must be just and convenient to do so.

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<sup>1</sup> BVIHCVA 2010 No 28

<sup>2</sup> American Cyanamid Co v Ethicon Ltd (1975) AC 396

- [15] In most cases it is necessary to show a risk of dissipation of the assets but this does not apply to proprietary injunctions, which is the category in which this application falls, because the Claimant is claiming beneficial ownership of shares.<sup>3</sup>
- [16] At the hearing before Chivers J he was not satisfied with the evidence in support of the claim by the Defendants. Additional evidence has been forthcoming. In the Plaintiff's action in Singapore for pre-action discovery Judge Nel found that the defendants' argument failed in so far as it maintained that the Plaintiff's intended claim for breach of agreement is legally unsustainable.
- [17] In my judgment there is a serious issue to be tried and a good arguable case. There is evidence that Quo Vadis was entered on the Register of Members of Querencia on 16 November but the notice was received on 15 November. According to **Wigg v Wigg** (139) 1 ATK 382 at 384, the purchaser must have had notice at the time he gave his consideration for the conveyance. Therefore, it is contended that if the notice was received before the money was paid even after the conveyance was signed the purchaser would still be subject to the notice and could not qualify as a *bona fide* purchaser for value without notice. There is evidence on which it may be found that Quo Vadis may not be a bona fide purchaser for value of the shares without notice before closing on 16 November 2017, and that it learned of a contractual claim to the shares on 15 November.
- [18] However, there is also evidence that there may be no oral contract at all. Counsel for the Defendants argues that even on the Plaintiff's own case the oral agreement had ended on its own terms. It provided that the completion of the transfer of the shares in Querencia had to take place 14 days after the entering of the contract on 11 October 2017. This would have been 25 October, 2017. From the Claimant's own evidence as of the 27 October no steps had been taken by the Claimant to make any payment to Mr and Mrs Nargolwala in furtherance of the sale. It was not until about 8 November 2017 that a reservation agreement was entered into between Quo Vadis and Mr and Mrs Nargolwala. By that time the oral agreement would have lapsed.
- [19] In support of this the Defendants relied on the English Court of Appeal case of **Hare v Nicoll** [1966] 2 WLR 441 where it agreed with a quote from Halsbury's Laws of England: "*An option for*

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<sup>3</sup> Gee on Commercial Injunctions, 6<sup>th</sup> Ed., para 2-023

*the renewal of a lease, or the purchase or re-purchase of property, must in all cases be exercised within the time limited for the purpose, otherwise it will lapse* This authority does not assist the Defendants because the oral agreement is not alleged to be an option. In a case of an oral contract the agreement will not automatically lapse unless an unreasonable time has elapsed after entering into the agreement or time is made of the essence by a party. That did not happen in this case. His conclusion on this basis that the claim must fail is therefore flawed.

- [20] He also argued that the oral contract was too vague as to its terms used in the 11 October 2017 Whatsapp message to Meury read as follows:

“I am prepared today to split the difference on a walk in walk out basis (everything stays) presume take over the company on a 14 day settlement for USA \$5,250,000. I need an answer today as I will delay the potential other purchase”.

- [21] On this issue it is not the role of the court at this stage to reach a final conclusion on the evidence. All that is required now is for the claimants to show a good arguable case.

- [22] On its face, the Whatsapp message is an offer of an agreement which was capable of acceptance by the agent of Mr and Mrs Nargolwala. If there were fundamental misunderstandings concerning its terms this is not the stage at which the court can make that determination. The same applies to the Defendants’ argument that the acceptance was not unequivocal.

- [23] Next it is necessary to decide whether damages would be an adequate remedy for the Claimant. Since the underlying asset of the company is land (apartment buildings) I was referred to the view of the Privy Council in **Mungalsingh v Juman** [2015] UKPC 18 expressed by Lord Neuberger, as he then was, where he said obiter at [33]:

“In the context of a contract for the sale of land, damages have traditionally not been regarded as an adequate remedy on the basis that each piece of land is unique-see *AMEC Properties Ltd v Planning Research Systems Plc* [1992] 1 EGLR 70, 72.”

- [24] A similar principle applies in the case of a contract for the sale of shares where the shares are not freely available for purchase. In such cases the court may order specific performance.
- [25] In his judgment given in the earlier pre-action discovery proceeding in Singapore Judge Nel noted that the plaintiff was not precluded from seeking damages (instead of specific performance) in Singapore. Indeed in the case **EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd and others** [2001] SGCA 50 the Singapore Court of Appeal has held that "...damages may still be considered adequate notwithstanding that land is generally deemed to be unique." I understand this to be the prevailing view in Canada and in a few other jurisdictions as well.
- [26] The view of the Privy Council would, of course, be binding authority on me. However, I consider that the BVI is the jurisdiction of the satellite action, and the main action is taking place in Singapore.
- [27] Nevertheless, as I understand the submission, in the context of agreements for sale, land is still deemed to be unique and so are private shares. This would mean that the burden of proof is on the Defendant to show that it is not unique. Evidence has been adduced by the defendant from Mr Kenneth Gondry with this objective. However, this will have to be determined in the Singapore Proceedings and is clearly not a function of the court to carry out at this stage without the processes of a trial, including testing the evidence, at its disposal.
- [28] I must next assess where the balance of convenience lies and really ought not to be obliged to do so unless the first two limbs of the test proves inconclusive. In doing so I must consider the situation of the Claimant if the injunction were discontinued and that of the defendants if it was continued. If it were discontinued, I would have concluded that damages are an adequate remedy.
- [29] The Defendants argue that if the injunction is continued and the Defendants succeed in the Singapore action damages would not be an adequate remedy for the Defendants because they would suffer substantial prejudice which would be difficult (if not impossible) to quantify because the court would have to assess the opportunity costs arising from a complex hypothetical state of affairs. This they say is because Quo Vadis is Mr Larpin's investment vehicle and the effect of the injunction, if allowed to continue would:

- (a) Restrict Quo Vadis from dealing with the shares in Querencia of which consideration had already been made.
- (b) Prevent Quo Vadis from utilising the shares in Querencia for the purposes of raising money to finance its investment projects. To illustrate, Mr Larpin had entered into another investment in April 2018 for the construction of another villa (in Phuket) for US\$9,700,000 . Mr Larpin had intended to finance the investment through a bank loan with Quo Vadis using the shares of Querencia as security for the loan. As a result of the injunction, he was no longer able to fulfil his financial obligations in respect of the investment in that way.
- (c) Despite having been approached with numerous long lease proposals Quo Vadis will be prevented from leasing the villa to interested parties because Mr Larpin would have to incur expenditure with the possibility that any revenue generated in return would be for the benefit of the Claimant.
- (d) Quo Vadis' auditors have requested that a sum of US\$5,500,000 be recorded as a provision on its balance sheet. This will have a consequential effect on its financial standing and prejudice its ability to borrow.

[30] All of the matters listed are the vagaries of litigation and it has not been demonstrated that Mr Larpin cannot use another investment vehicle. The fact that the court may have difficulty in assessing damages for the Defendants is not, in my judgment, a good enough reason to ignore the principle that land or restricted shares are deemed to be unique and therefore prima facie damages are not an adequate remedy for the Claimant. In my judgment the balance of convenience favours the Claimant.

[31] Having regard to this and all the circumstances, in my judgment it is just and convenient to continue the injunction first imposed by Wallbank J.

[32] After hearing the parties on costs, in accordance with the guidance given in **Desquenue et Giral Ltd v Richardson** [2000] F.S.R. 1 CA and **Picnic at Ascot v Kalus Derigs** [2001] F.S.R.2 I in the context of interim injunctions, I order that costs be reserved ..

Hon K. Neville Adderley  
**Commercial Court Judge**

**By the Court**

**Registrar**