IN THE EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO.: BVIHC (COM) 115 of 2017

BETWEEN

Takashi Hongo

Claimant

and

[1] Peak Legend Limited

[2] Newhaven Trustees (BVI) Limited

[3] Deep Tach Consultancy Limited

Respondents

Appearances:

Mr Jonathan Addo and Ms Sarah Thompson with him of Harneys for the Claimant

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2018: May 3
May 10

JUDGMENT IN CHAMBERS

[1] **Adderley, J**: The applicant, Mr Takishi Hongo (**Mr Hongo**) is the beneficial owner of the sole share in the capital of Peak Legend Limited (**the Peak Legend Share)** a British Virgin Islands company.

[2] He applies for an order pursuant to section 52 of the Trustee Ordinance 1961 Cap 303 that the right to transfer the Peak Legend Share be vested

in Mr Stephen Briscoe of Fund Fiduciary Partners and that Mr Briscoe transfer the Peak Legend Share to One Virtue Limited (**One Virtue**) as his nominee. One Virtue is a company incorporated in Hong Kong.

[3] The Peak Legend Share is currently held by Deep Tach Consultancy Limited (**Deep Tach)** as his nominee. Deep Tach is a company incorporated in in the United Kingdom.

[4] Deep Tach signed the usual declaration of trust as bare trustee. The declaration of trust provides:

> Clause1"[t]hat the 1 shares now standing in our name in the books of PEAK LEGEND LIMITED do not belong to [Deep Tach} but to Mr Tashi Hongo, passport No Th1232287 as (hereinafter referred to as "the Beneficial Owner") and that [Deep Tach] hold the said shares as nominee for the Beneficial Owner."
> Clause 3 states that Deep Tach "[undertakes when called upon to do so by the Beneficial Owner to transfer the said shares to the Beneficial Owner or as the Beneficial Owner may direct and for such purpose a transfers[sic] of the said share duly executed by us is attached hereto."

[5] For business reasons Mr Hongo wishes to change his nominee from Deep Tach to One Virtue and instructed Deep Tach through its registered agent from 30 November 2016 to transfer the Peak Legend Share to One Virtue but has been unsuccessful in obtaining the assistance of Deep Tach.

[6] Numerous unsuccessful attempts have been made to contact Deep Tach through its registered Agents Stephen MS Lai & Co CPA Ltd trading as Online Company Registration Hong Kong (**OCRHK**).

[7] Deep Tach was struck from the UK Register of Companies on 9 August 2016 and restored on 13 June 2017.

[8] On 3 July Mr Hongo issued a claim under section 43 of the BVI Business companies Act from an order that inter alia the register of members of

Peak Legend be rectified to show that the Peak Legend had been transferred to One Virtue on 30 November 2016. Permission was obtained to serve the claim form outside the jurisdiction and it was served on Peak Legend and its then registered agent Newhaven Trustees Limited (**Newhaven**).

[9] On 3 August 2017 Service took place. According to the affidavit of William Stephens service was effected by leaving the Claim documents in a sealed envelope addressed to Deep Tach at the reception desk of the building housing its registered office. It appeared that Deep Tach was not trading from its registered office. Only Newhaven acknowledged service.

[10] On 1 December 2017 an attempt was made to serve Deep Tach with the official transcript of the Service-out Application but DHL reported that Deep Tach's registered office was no longer being used by it and that its telephone number was out of service.

[11] On 2 March 2018 the hearing took place before Chivers J QC but he declined to grant the application because the applicant had not adduced the copy of the transfer signed by Deep Tach and accordingly could not show that it had an immediate right to registration following the ratio of **Nilon and others v Royal Westminister Investments S.S. and others** [2015] UKPC 2.

[12] Chivers J QC adjourned the matter to allow the applicant an opportunity to reconsider his options. Hence this application. It has been served on Peak Legend and Newhaven,

[13] The application filed 1 May 2018 seeks a vesting order pursuant to s.532 of the Trustee Ordinance 1961 (**Cap 303**) or alternatively the appointment of a Receiver over the Peak Legend Share pursuant to section 24 of the

West Indies Associated States Supreme court (Virgin Islands) Ordinance (**Cap 80**).

VESTING ORDER

[14] Section 82(d) of the Trustee Ordinance provides that the court has jurisdiction where "any trust property is situate in the Territory"

[15] Section 52(1) of the Trustee Ordinance provides:

> "In any of the following cases namely-
>
> […]
>
> (b) where a trustee entitled, whether by way of mortgage or otherwise, alone or jointly with another person to stock or to a thing in action-
>
> […]
>
> (1v) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a thing in action according to the direction of the person absolutely entitled thereto for twenty eight days after a request in writing has been served on him
>
> […]

the Court may make an order vesting the right to transfer or call for a transfer of stock or to receive the dividends or income thereof, or sue for or recover the thing in action in any such person as the Court may appoint…

[16] Section 52(2) of the Ordinance provides:

> "In all cases where a vesting order can be made under this section, the Court may, if it is convenient, appoint some person to make or join in making the transfer.

[17] Section 52(3) provides:

> "The person in whom the right to transfer or call from the transfer of any stock is vested by an order of the Court under this

Ordinance, may transfer the stock to himself or any other person, according to the order, and all companies shall obey every order under his section to its tenor.

[18] Section 52 is identical to section 51 of the English Trustee Act 1925 except that in the English Act the following proviso is added in the under the equivalent of s52(2):

> "**Provided that the person appointed to make or join in making a transfer of stock shall be some proper officer of the bank, or the company or society whose stock is being transferred."**

[19] Cap 303 was enacted on 24 August 1961 and so this provision was in existence in the English Act at the time parliament passed Cap 303. The fact that the proviso was omitted from the BVI ordinance can therefore be seen to be deliberate**.** There is therefore, unlike in the English Act, no limitation on who qualifies as a "proper person" to carry out the power of transfer.

[20] The interpretation section of Trustee Ordinance contain the following definitions:

> "stock" includes fully paid up shares…"
>
> "transfer' in relation to stock or securities, includes the performance and execution of every deed, power of attorney, act, and thing on the part of the transferor to effect and complete the title in the transferee"

[21] On the true reading of the section within the overall purpose of that section of the Act a court has jurisdiction to grant the vesting order applied for. However the jurisdiction is conferred on the court by service on the bare trustee. The purported service on 3 and 18 December 2016 on OCRHK occurred during the period in which the company was struck off the register but there was also service of Deep Tach on 3 August 2017 with the Rectification claim and evidence in support thereof. In my view

the latter service was sufficient to evoke the jurisdiction of the court to consider the grant of the vesting order requested in this application.

[22] Having regard to the evidence and the law the court considers this a proper case in which to exercise its discretion to grant the vesting order requested. Accordingly the court grants the order requested.

[23] Had the court not granted the vesting order this was a proper case for appointing a Receiver over the Peak Legend share.

Hon. K. Neville Adderley

Commercial Judge

By the Court

Registrar