

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

(Civil)

A.D. 2010

CLAIM NO. ANUHCv2009/0514

BETWEEN:

JULIEN SPRECHER

(as lawful attorney of Jean Francois Sprecher)

CLAIMANT/APPLICANT

AND

1. PRICE WATERHOUSE COOPERS(A Firm)

2. CHARLES WALWYN

3.FREDERIC LEGOUBEY

4.OLIVIER LEGOUBEY

DEFENDANTS/RESPONDENTS

Ms. Jean M. Dyer and Mr. D. Wason for the Claimant/Applicant;

Ms. K. Bennett and Mr. K. Kentish for the 1st and 2nd Defendant/Respondents;

Mrs. L. Clarke-Solomon for the 3rd and 4th Defendants.

.....
2010: 14 June;

2010: 29 July
.....

DECISION

1. **Harris J.:** This concerns an application by the claimant Julien Sprecher, seeking interim relief pursuant to Rule 17.1(h)(ii) of the Eastern Caribbean Civil Procedure Rules(“CPR2000”) which there provides for; the “Detention, Custody, or Preservation of Relevant property”. The relevant

property in this matter are Bearer shares of a company, Sunshine Enterprises Holding Limited (also variously referred to herein as “Sunshine”), registered in the British Virgin Islands (“BVI”).

2. The Claimant claims to be entitled to the bearer shares pursuant to a series of transactions between Jean Francois Sprecher and Jean Legoubey, deceased, dating back from on or around 1998. The details of those transactions for the most part do not concern us in this application before the Court. It is sufficient to know that the first defendant, PriceWaterhouseCoopers in Antigua and Barbuda, has custody of the bearer shares at the instance of the parties to this litigation and that the said defendants, among other claims, oppose the claimant’s claim to title to those bearer shares. Further, the Sunshine Enterprise company holds controlling shares in the Antigua registered company Lipstick (Antigua) Limited (“Lipstick”). This local company is a going concern and also the subject of the substantive litigation.
3. The substantive matter concerns, inter alia, the application for a; *“Declaration that Jean Francois Sprecher is the lawful owner of 50% of all the paid up and issued shareholding interest in Sunshine Enterprises Holdings Limited and/or that Jean Francois Sprecher is the lawful legal owner of 33.335% of all paid up and issued share holding interest in Lipstick(Antigua) Limited”; A “Declaration that the 1st defendant and/or the 2nd defendant is/are jointly and/or severally the nominees for Jean Francois Sprecher holding in trust for Jean Francois Sprecher 50% of all paid up and issued shareholding interest in Sunshine Enterprises Holding Limited and/or that of 33.335% of all the paid up an issued shareholding interest in Lipstick(Antigua) Limited”; and an Order that the 1st defendant and/or 2nd defendant deliver up to the Claimant the share certificates representing Jean Francois Sprecher’s 50% shareholding in Sunshine Enterprises Holdings Limited.*

THE APPLICATION

4. In this application filed the 16th of April 2010, the claimant/applicant, a resident of Dubai, United Arab Emirates, seeks and includes the following Orders¹; (i) *An Order directing that the 1st defendant deliver up custody of the bearer share certificates representing 50% of all the issue shareholding interest in Sunshine Enterprise Holdings Limited and forthwith deposit same with such Authorized Custodian within the meaning of section 67 of the BVI Business Companies Act(No. 16 of 2004) as this Honorable Court may direct or alternatively to the registered agent of Sunshine Enterprise Holdings Limited, Equity International Incorporated; ... (iii) An Order directing that the authorized custodian holds the bearer share certificates referred to at paragraph 2 of this order in trust until further order of this Honorable Court;*

¹ See the Notice of Application.

5. The applicant/defendant provides several grounds for the application including the central ground, as follows; that the issued share holding of Sunshine Enterprises Holding Limited ("Sunshine") formerly a BVI international business company but which was automatically converted by operation of law to a BVI business company on the 1st day of January 2007, is the subject matter of the substantive proceedings. The applicant contends that an issue has arisen with regard to custody of the issued bearer shareholding of Sunshine. He claims that in late February 2010 he became aware that a new bearer share regime is to come into effect in the BVI and that by virtue of section 70 of the BVI Business Company Act (No. 16 of 2004) ("the Act") bearer shares which are not deposited with an Authorized Custodian by 31st December 2009 will be disabled for any period it is held by a person other than an authorized or recognized custodian; freezing all the beneficial owner's rights including the right to vote, to receive dividends and to share in the assets of the company².
6. A further ground of the application is that given the far reaching consequences of non-compliance with the new bearer share regime, the applicant, through his Anguilla Solicitors, wrote to the 1st and 2nd named defendant's Solicitor in March 2010 seeking confirmation that the 1st named defendant is an authorized custodian and at the date of the application the 1st defendant had not responded³.

DEFENDANT'S SUBMISSIONS

7. Counsel for the 3rd and 4th defendants, Mrs. Clarke-Solomon, indicated at the hearing that her two clients did not object to the application. I note that they are the likely ultimate beneficiaries of a successful defense to the substantive claim.
8. Counsel for the 1st and 2nd defendants made an oral objection to the application at the hearing on the following grounds: (i) The applicable law for the determination of the issues raised by this interim application is the law of the BVI – the *lex causae*. Counsel contended that this court does not have the authority to make orders for local litigants to comply with the foreign law of the BVI; (ii) Thus, the proper forum to litigate this matter is also the BVI; (iii) The BVI law is foreign Law – a question of fact - and must be proved by an expert, of which the claimant is not.

CLAIMANT'S SUBMISSIONS

9. At the onset, let me say that I am not convinced by the arguments for the 1st and 2nd defendants. The arguments for the claimant made at the hearing of the 14th May on each issue and set out in its skeleton arguments filed on May 20th is for the most part preferred.

² See para 3 of the Notice of Application for Interim Relief filed April 16, 2010.

³ *Ibid.* para 4

10. Briefly, the claimant contends that the determination of the beneficial ownership of the bearer shares is not an issue on this interim application. The claimant contends that even if the application were to relate to title to bearer shares (which is not admitted), it is trite law that bearer shares are negotiable instruments – tangible movables – so that the *lex situs* applies⁴. There is no dispute that the *lex situs* is Antigua and Barbuda.
11. The claimant contends further, that even if the BVI law was the proper law, it does not necessarily follow that the BVI is the appropriate forum⁵. In settling the appropriate forum several factors are to be taken into account, including the governing law, the nature of the dispute, legal and practical issues involved, matters of local knowledge, availability of witnesses and their evidence and expense, the residence and place of business of the parties, the enforceability of a judgment obtained in one jurisdiction⁶. The claimant submits that if a forum issue arises in this interim application, the only connecting factor with the BVI is that Sunshine, which is the holding company of Lipstick, is a BVI registered company. All the other critical connecting factors point to Antigua and Barbuda as the appropriate forum such as; the bearer share certificates are situated in Antigua and Barbuda; the said certificates are held by the 1st defendant which is incorporated in Antigua; the 2nd defendant resides in Antigua; Sunshine is a holding company and holds 6,667 of the issued registered shares of Lipstick(Antigua) Limited which is an Antiguan company; the business and operation of Lipstick are conducted in Antigua and not the BVI and the *lex situs* is the BVI⁷.
12. On the issue as to whether the BVI Law is foreign Law, the claimant submits that upon proper construction of Rule 2.4 of the E.C.S.C CPR2000, the court's jurisdiction extends to all the member states and territories including territories such as the BVI and that Judgments and laws alike, of member states ought not to be considered as foreign⁸.

⁴ See MacMillan Inc v Bishopsgate Investment Trust PLC and Others [1996] 1WLR 387 per Slaughter L.J.

⁵ See para 55 of Konamanemi and others v Rolls Royce Industrial Power(India) Ltd and others[2002] 1 WLR 1269; see also Amazing Global technologies Limited v Prudential Trustee Company Limited HCVAP 2008/0008 Eastern Caribbean Supreme Court of Appeal; see further, the **Mac Millan case**.

⁶ See para 15 of the claimants written skeleton arguments; see Bacardi International v Pendragon International Limited et al claim No. AXAHCV2007/0007 of the Eastern Caribbean Supreme Court.

⁷ An additional factor to consider for the defendants is the existence of a specialized commercial court located in the BVI.

⁸ But look at Part 71 and 72 of the CPR2000 governing the obtaining of foreign evidence and reciprocal enforcement of judgments respectively for their treatment of member states as 'foreign'.

13. The claimant next addresses, perhaps a stronger point, that is, if BVI Law is foreign law, it may be proved in several ways. The claimant contends that the foreign law can be proved by the court taking judicial notice of the foreign law as provided by the Evidence Act, Cap 155, section 13(1)(a). Here the Act provides for the court taking judicial notice of the “*Government gazette of any other part of Her Majesty’s dominions or of any territory under her Majesty’s...*” The claimant contends that the BVI is covered by this section and it is apparent on the face of the Act itself that it was gazetted on the 29th December 2004 and as such it has proved the foreign law to the satisfaction of the Court⁹.

ISSUES

14. Counsel for the claimant/applicant, identified in her skeleton arguments filed May 20th 2010, the following issues for the determination of the court: (i) whether Antigua and Barbuda is the appropriate forum for the determination of the issue raised by the interim application; (ii) whether BVI Law is in fact foreign Law; (iii) if BVI is foreign law, whether the Applicant is competent to give evidence as to BVI Law. I accept the resolution of these issues as determinative of the application before the court.

CONCLUSION

15. The court need not determine the applicable law of the substantive cause of action at this time with any finality. The applicable law of the preliminary application need not be the same as that of the *lex causae*. The question first before the court is whether the court should invoke its powers under the CPR2000 and make, essentially what is a preservation order under Part 17. All matters of procedure are governed by the *lex fori*, namely the law of the country in which the action is brought.¹⁰ So, the instant application is governed by the CPR2000. Whether the court should accept the law of the BVI as proved by the claimant goes to the grounds of the application. Even if I accept that the foreign law can be proved by the means contended by the claimant (and I do accept that), is what is put before the court sufficient to grant the orders as prayed? Whereas the deposit of the share certificates with the *authorized custodian* might enable the beneficial owner of the share or registered owner of the Company, Sunshine, to the benefits referred to in section 68(2) of the BVI Act, the beneficial owner is yet to be determined. Who is going to exercise the rights such as to vote at the meetings of the company, receive entitlements to dividends or a share in the assets of the company on its winding up or on its dissolution. What useful purpose is served by the application if only the 1st defendant and whosoever they claim through, possesses the certificates and any attendant rights thereto. Considering all the relevant factors, and notwithstanding the operation of the commercial court in the BVI, I am of the view that Antigua is the proper forum to hear this interim application and to consider, among other

⁹ Counsel refers the Court to pp 12 of the Act.

¹⁰ See para 11 Halsbury’s Laws 4th edit. Reissue Vol. 8(3); see also there cited, *Chaplin v Boys* [1971] 356 at 378-379.

considerations, whether the relevant statutory imperatives of the BVI Act are sufficient grounds to move the court to grant the Orders as prayed.

16. The 3rd and 4th defendants have expressed no concern about the potential for dissipation of the shares or assets of Sunshine in the hands of the *authorized custodian* neither have the 1st and 2nd defendants. It appears to me also that the BVI Act is silent as to whether a duty is imposed on the custodian to hold the shares on behalf of the person delivering the shares to them. This matter has not been addressed by the parties and it must be assumed that as between them, that issue (if it is an issue at all) is resolved. However, the court must take some steps to preserve and protect its processes and subject matter before it¹¹.
17. The 1st and 2nd defendants objected to the application on very specific and narrow grounds which essentially revolved around the foreign law status of the BVI statute. I do not accept that Rule 2.6 of the CPR2000 divests BVI law of its foreign law character. Her Majesty would undoubtedly be startled by this proposition. The Evidence Act exception however, lends some force to the notion of comity between nations, particularly those that share such a common heritage and a Court system, that is the E.C.S.C. There is no doubt that this court can take judicial notice of the BVI gazette pursuant to the Evidence Act¹². What does this mean? Does it include the reference to the gazetted date on a copy of the Act produced for the court? Does it exempt the applicant from proving the gazette in evidence in the ordinary way? Well, judicial notice encompasses the court either from its own general knowledge or on its own volition, making available to itself the content of the gazette¹³. The rules of evidence do not apply¹⁴. It does not require proof in the ordinary way of evidence. To require this proof would defeat the logic, purpose and convenience of reliance on *Judicial Notice*. I accept the Law known as The Business Companies Act, 2004 as proved by this means.
18. For the reasons provided above and in the written skeleton arguments of the claimant, I reject the objections of counsel for the 1st and 2nd defendants that the court does not have the authority to make an - *in personam* - order against a local litigant to comply with a foreign law. In any event, the relief asked for by the claimant is not fundamentally about complying with a foreign law, but about preserving the *res*, the subject of litigation in what is at this point in time, the *lex fori*,

¹¹ In this case, by amending the draft order presented by the claimant to require the *authorized custodian* of the bearer shares to hold the shares in trust for the 1st and/or 2nd defendants respectively.

¹² See further pp 218, Dicey & Morris, *The Conflict of laws*, 11th edit. Vol. 1

¹³ See paras 47.25 – 47.32 of Blackstone's *Civil practice*, 2003.

¹⁴ *Ibid.* para 42.28

Antigua and Barbuda. If, as contended by the claimant the proper law and appropriate forum ¹⁵ is that of the BVI, would that BVI court not likewise be making orders for the Antiguan litigants and entities – including Lipstick and the 1st defendant - to comply with?

19. I note that once the share certificate is deposited with the *Custodian* under the Act, if in the BVI, the *lex situs* moves to the BVI from Antigua. Again, that is a matter for the parties and the effect of this on the determination of which is the appropriate forum for the substantive litigation has not been fully addressed in this interim application and indeed is not the subject of the application.

20. For the reasons provided above, **IT IS HEREBY ORDERED AS FOLLOWS:**

- i. That time is abridged for the hearing of this application pursuant to Rules 17.4(3) and 26.1(2)(k) of the CPR2000;
- ii. That the 1st defendant and/or 2nd defendant is directed to deliver up custody of the bearer share certificates representing 50% of all the issued shareholding interest in Sunshine Enterprises Holdings Limited and within 21 days of this Order, deposit same with such *Authorized Custodian* within the meaning of section 67 of the BVI Business Company Act (No. 16 of 2004). Such Authorized Custodian to be selected and retained by either the 1st defendant, or the 1st and 2nd defendant in their own discretion;
- iii. That the 1st defendant within 22 days of the date of this Order provide the Applicant with proof in writing of such delivery or deposit;
- iv. That the Authorized Custodian shall be caused by the 1st defendant or both the 1st and 2nd defendant to hold the said bearer share certificates referred to above in trust for either the 1st defendant or the 1st and 2nd defendant until further order of this court.
- v. That cost of this application is that of the claimant against the 1st and 2nd defendants only. There shall be no order as to cost against the 3rd and 4th defendants.

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DAVID C HARRIS
HIGH COURT JUDGE
ANTIGUA AND BARBUDA

¹⁵ The two do not necessarily have to be the same.

