

**BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO: BVIHC (COM) 2011/0001

BETWEEN:

OLEKSANDR ZABUDKIN

Claimant/Respondent

and

DIMITRY ITKIN

First Defendant

DIMITRY VITORVICH POPOV

Second Defendant/Applicant

CRYSTAL PROMOTION

Third Defendant

Appearances: Mr Robert Nader for the Applicant, the third Defendant
Mr Paul Dennis for the Respondent Claimant

JUDGMENT

[2011: 8, 9 December]

(Claim for declaration that Claimant sole member and director of third Defendant company ('the Company') and that second Defendant is not sole member and director of the Company – claim for rectification of register of members of the Company to delete name of second Defendant and substitute name of Claimant – similar relief claimed in respect of Company's register of directors – claim for injunction restraining company from holding out second Defendant or any person other than Claimant as director or member of the Company - second Defendant outside the jurisdiction and not yet served - whether claim for declaration and injunction having any prospect of success in absence of second Defendant – whether claim should be struck out pursuant to CPR 15.2 and/or 26.3(1)(b) and (c) – whether claim should be struck out as an abuse of process – whether proceedings to be stayed pending successful joinder of second Defendant)

- [1] **Bannister J [ag]:** These are my written reasons for an order which I made on 8 December 2011 dismissing an application by the third Defendant company ('the Company') that two paragraphs in the prayer to the statement of claim be struck out either as having no prospect of success, or as disclosing no reasonable ground for bringing the claim or, thirdly, as an abuse of the process. I also refused the Company's alternative application for an order that the proceedings be stayed until the second Defendant ('Mr Popov'), who is outside the jurisdiction, is served with these proceedings.

History

- [2] These proceedings were commenced on 6 January 2011. The Claimant ('Mr Zabudkin') claims that on 18 February 2005 he was appointed first director of the Company. He also claims that the original issue by the Company of bearer shares was cancelled with his consent and a new certificate was issued to him as sole shareholder of the Company on 18 March 2005. He says that 'on or about 17 March 2010' and unbeknown to him the first Defendant ('Mr Itkin') and Mr Popov caused the books and records of the Company to be altered to show (a) a transfer, as at 23 August 2010, of his shares in the Company to Mr Popov, so that the register shows Mr Popov as sole member of the Company in place of Mr Zabudkin and (b) that Mr Zabudkin resigned on 17 March 2010 and that Mr Popov was appointed in his place. He says he never transferred his shares and never resigned or was removed from the office of director.
- [3] Based upon these allegations, Mr Zabudkin claims: (1) a declaration that he is the sole shareholder and director of the Company, as well as being its sole beneficial owner; (2) a declaration that Mr Popov is neither a shareholder nor a director of the Company; (3) an injunction restraining all three Defendants from holding out Mr Itkin or Mr Popov or any other person other than Mr Zabudkin as a director or member of the Company or as being entitled to control or bind the Company; and (4) rectification of the Company's register of members and register of directors so as to show Mr Zabudkin as the Company's sole shareholder and sole director.
- [4] Mr Itkin is resident outside the jurisdiction. No application to serve these proceedings upon him outside the jurisdiction has been made, so that Mr Itkin is not party to these proceedings.

Permission to serve Mr Popov out of the jurisdiction was granted on 26 January 2011, but he has not yet been served. It is not known whether this is the result of lack of effort on the part of Mr Zabudkin or whether there is some other reason. Either way, Mr Popov is not – or at any rate not yet – a party to the action. Despite this, Mr Popov is active in the proceedings. He signed the statement of truth for the statement of claim, pays the bills of the Company's lawyers and gives instructions to them, either directly or, as I understand it, through a firm of United States lawyers who act for Mr Popov within that jurisdiction. He will, of course, say that he does all of these things as sole director of the Company.

The Company's applications

- [5] On 11 November 2011 the Company issued an application asking that the claims for an injunction¹ and rectification of the Company's registers² be struck out under CPR 15.2 and 26.3 (1)(b) and (c) as either having no real prospect of succeeding or as disclosing no reasonable ground for bringing the claim; or alternatively as an abuse of the process. In the alternative, the Company asks for the proceedings to be stayed until such time as Mr Popov has been served and thus become a party. It will be observed that there is no application to strike out the substance of the claim or any part of it. The only application³ is for the striking out of two only out of the four heads of relief included in the prayer.

The Company's grounds

- [6] I start by saying that I do not find it obvious that CPR 15.2 and/or 26.3(1) apply to enable the Court to strike out heads of relief rather than claims (or issues) but Mr Dennis, who appeared for Mr Zabudkin, did not contend that they do not and for present purposes I am going to proceed on the assumption, but without deciding, that they do.
- [7] The Company's argument runs as follows. Mr Zabudkin cannot obtain the declaratory orders (in respect of which there is, as I have said, no application to strike out) because Mr Popov, who is, as

¹ see paragraph 2(3) above

² see paragraph 2(4) above

³ other than the alternative application for a stay

the currently registered sole member and director of the Company, a person with an interest in the subject matter of those declarations, is not party to these proceedings. The next step in the argument is that unless the Court makes the declarations then it cannot grant the injunction sought or rectify the Company's register of members. Both the premise and the conclusion of this argument are, in my judgment, fallacious.

[8] Mr Nader, who appeared for the Company on the application, relied upon a passage from **Gouriet v Post Office Engineering Union**⁴ in which Lord Diplock said that the jurisdiction of the Court is not to declare the law generally or to give advisory opinions, but is confined to declaring contested legal rights, subsisting or future, of parties represented in the litigation before it and not those of anyone else. In saying what he did Lord Diplock was not saying that the Court could not make a declaration unless all persons conceivably interested in the outcome were before the Court. What he was doing was contrasting the value of declaratory judgments for disposing of private law disputes (in which case all parties were bound by the declaration) with their use (which he held to be illegitimate) to declare the law generally. In fact, as is shown by **Office of Fair Trading v Foxtons**⁵ the latter view no longer holds good.

[9] In the present case Mr Zabudkin pleads that he never transferred his shares in the Company. The Company's response to this allegation is to say that on 17 March 2010 Mr Zabudkin executed a share transfer transferring all his shares to Mr Popov and also gave notice in writing of his resignation as a director of the Company. It asserts that the Company's registers reflect the alleged share transfer and also show Mr Popov as sole director. What Mr Zabudkin is saying is that the documents relied upon by the Company as entitling and obliging it to amend its registers accordingly are not his documents. If he proves that at trial, then it will turn out, in the absence of some plea not yet put forward by the Company, that the Company had no right to remove Mr Zabudkin's name from the documents and add that of Mr Popov. In that event there would seem to be no objection of principle to the grant of declarations *against the Company* in the form sought by Mr Zabudkin.

⁴ [1978] AC 435 at 501F-G

⁵ [2009] EWCA Civ 288

- [10] There may be a question, which I leave entirely open, whether Mr Popov would, for practical purposes, be bound by such declarations, but I am not concerned with that issue at this stage. I am deciding only that it is not, in my judgment, necessary for a party who claims (by way of example) that he has been deprived of his shares as a result of the presentation to the company in question of forged documents, to join the forger or the person who has apparently benefitted from the forgery as party to the action before he can obtain a declaration that he remains entitled to the relevant shares and rectification of the register of members accordingly. In this case there is no allegation of forgery. Mr Zabudkin's position is that the registers have been altered by the Company against him without authority – he has executed no transfer and has not resigned his directorship. As between himself and the Company the position of Mr Popov is immaterial. If Mr Zabudkin fails to prove that the transfer and other documents are not his documents, he will not have proved that the registers were rectified without authority. Mr Popov's name will remain on the register. If he proves that the documents were not his, the Company will have been shown to have amended the registers without authority and will have to return them to their former state. Mr Zabudkin's does not need to make a claim against Mr Popov. His argument is with the Company.
- [11] The position might have been different if there was a dispute between Mr Zabudkin and Mr Popov as to their entitlement to the shares (e.g. if one was claiming them under a contract which the other claimed to have been rescinded). In such a case the Company would, in effect, drop out and the issue would be left to be determined between the parties to the alleged agreement. In this case, however, there is no such issue between Mr Zabudkin and Mr Popov as requires the Court to make a determination as to their rights *inter se*. All Mr Zabudkin needs to establish is that the Company had no right to remove his name from its registers.
- [12] Although it was not put like this, the Company's argument, skillfully deployed as it was by Mr Nader, amounted to a submission that the proceedings were not properly constituted unless Mr Popov was a party to them. It is true that there are cases where a defendant is entitled to an order that other persons be joined before judgment is given on a claim – for example, where it is necessary that an equitable assignor be made a party in order not to expose a defendant to the risk of double payment⁶ (although even in that case the difficulty is regarded as procedural rather

⁶ although see **Three Rivers DC v Bank of England** [1996] QB 292

than substantive) or where a debtor is entitled to be sued by all of his alleged joint creditors (or to have such as refuse to be claimants added as defendants).

- [13] That is not this case, or anything like this case. The Company has no right to compel Mr Zabudkin to sue Mr Popov. The fact that Mr Popov's name appears in the title to the action is irrelevant. If the Company feels that it may be exposed to some sort of claim from Mr Popov should Mr Zabudkin succeed, or would prefer that he be bound by the result, then of course it is open to the Company to bring ancillary proceedings against him seeking whatever protection it feels it is entitled to and may require in that event. What it cannot do is to insist upon Mr Zabudkin suing Mr Popov before he can be heard to complain about what he says is the fact that the Company has removed his name from its register of members and register of directors without any authority or other legal justification.

Conclusion

- [14] For these reasons the Company has no right to have paragraphs (3) and (4) of the prayer struck out as bound to fail or as disclosing no case or, for that matter, as amounting to an abuse of the process. Nor, for the same reasons, is there any justification for staying the proceedings until such time, if at all, that Mr Popov is served with them.

Commercial Court Judge

9 December 2011