

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

CLAIM NO: BVIHCOM2010/0160

BETWEEN:

DR WOLFGANG HERTEL

Claimant/Applicant

And

(1) VISOKA ENERGY CORPORATION
(formerly IEC VISOKA INC.)

(2) EURO INDUSTRIES LTD

Defendants/Respondents

Appearances: Mr Jack Husbands for the Claimant/Applicant
Mr John Carrington for the Second Defendant/Respondent

JUDGMENT

[2011: 5, 6 January]

- [1] The Claimant ('Dr Hertel') applies by an amended notice of application issued on 13 December 2010 for summary judgment against the first Defendant, a BVI incorporated company called IEC Visoka Inc ('Visoka') and the second Defendant, another BVI incorporated company called Euro Industries Limited ('Euro'). By a notice of application issued on the following day, Euro applies to strike out the claim on the grounds that it discloses no reasonable cause of action.
- [2] In his statement of claim Dr Hertel pleads that he is the founder and sole shareholder of Visoka, which was incorporated on 8 January 2008. He goes on to plead that on the same day Visoka's then registered agent, Trident Trust Co (BVI) Ltd ('Trident'), appointed him, together with a lady

named Alojza Gornicki ('Ms Gornicki') and Citilegal Directors Ltd ('Citi') to be Visoka's first directors and that those directors remain in office, never having resigned or been removed. The pleading refers to these persons as 'the Original Directors.'

- [3] Dr Hertel pleads that in about September 2010 he discovered that a person or persons (presumably it is intended to refer to Larry Dahl, Pauline Champ and Mr Reno Ammerman, who figure later in the pleading) represented to Trident that Dr Hertel, Ms Gornicki and Citi were no longer directors of Visoka; that Euro had become Visoka's sole director in their place; and that Euro caused Trident and MacNamara Corporate Services Limited ('MacNamara') in July 2009 and June 2010 to file with the Registrar for Corporate Affairs (a) amendments to Visoka's register of directors to show, first, a company called IEC Technologies Ltd ('IEC Tech') and subsequently Euro as being, successively, Visoka's sole director and (b) a change of name to Visoka Energy Corporation and of registered agent from Trident to MacNamara (with consequential change of Visoka's registered office). Something has obviously gone wrong with the language here, because it makes no sense to say that someone represented to Trident that Trident itself had carried out this or that act.
- [4] Dr Hertel supplements this by going on to plead that on about 1 July 2009 Larry Dahl, Pauline Champ and Mr Ammerman sent Trident instructions 'containing' (a) resolutions on behalf of IEC Tech as purportedly the then sole director of Visoka, to approve the name change and (b) an updated register of directors for Visoka with a request that they be filed with the Registrar.
- [5] Dr Hertel pleads that none of Larry Dahl, Pauline Champ or Mr Ammerman, whether on their own or behalf or on behalf of IEC Tech, had any authority to represent Visoka in place of the Original Directors; that their pleaded acts were calculated to cause Trident to accept the three of them as validly appointed representatives with authority to approve the alterations to the register of members and to Visoka's memorandum of association; and that those acts were invalid and of no effect.
- [6] It is then pleaded that the Original Directors did not pass resolutions or 'give permission' for the appointment of new directors in their place or for the amendment of Visoka's memorandum of association or register of directors and that they remain Visoka's only directors. The pleading is silent as to whether (or not) an appropriate resolution to the same effect had been previously

passed by the members (if any) of Visoka. Indeed, the pleading is silent throughout as to any action taken (or not taken) by the members of Visoka as a body (pleaded as comprising Dr Hertel alone).

- [7] The relief claimed is for declarations that Dr Hertel, Ms Gornicki and Citi have since their appointment (stated to have taken place on 4 September 2007, but to be amended to 8 January 2008) been and remain directors of Visoka and that the appointments of IEC Tech and subsequently Euro to Visoka's board were invalid and should be set aside.
- [8] Euro filed a defence on 22 December 2010, although it was not, I think, seen by Mr Husbands, who appeared for Dr Hertel, until the hearing. Although defectively worded, I gathered at the hearing that paragraph 2 was intended to admit that Dr Hertel had originally been a director of Visoka, but to deny that he has ever been a shareholder. Indeed, paragraph 5 of Euro's defence expressly admits that the Original Directors (as defined in Dr Hertel's statement of claim) were appointed on 8 January 2008, although Euro pleads that they were subsequently removed from office on 12 June 2009, the removal being said to have been effected, at any rate in the case of Dr Hertel, by 'resolution of a co-director and resolution of the members' (paragraph 7(a) of the defence) or (paragraph 12) by resolution of a co-director.'
- [9] Euro's defence further alleges that Visoka was incorporated as a subsidiary of a company called IEC International Energy Corporation ('IEC Energy') on instructions prepared by Larry Dahl and that Euro was appointed as a director of Visoka 'in accordance with its articles of association' (later particularized as having been effected pursuant to a resolution of Visoka's members) on 3 August 2009, becoming Visoka's sole director on 14 June 2010.
- [10] So far as concerns the change in registered office and registered agent Euro pleads that that was effected by a resolution of IEC Tech 'as sole director' on 29 June 2009.
- [11] What purports to be a copy of Visoka's register of directors was in evidence. It shows the appointments of Dr Hertel, Ms Gornicki and Citi on 8 January 2008 and the 'termination' of their appointments on 12 June 2009, with IEC Tech shown as having been appointed on the same day and being 'terminated' two days later. The appointment of Euro is shown as having taken place on 3 August 2009.

[12] A purported copy of Visoka's register of members shows IEC Energy as having acquired the whole of Visoka's then issued share capital (described, in contradiction to clause 6.1 of Visoka's unamended articles of association, as 50,000 undifferentiated shares) on incorporation. Euro's evidence on the application makes clear, however, that what is relied upon is an issue of shares to IEC Energy made, allegedly, on 12 June 2009 but with effect from Visoka's incorporation. If valid at all, the issue of these shares can have taken place only from the date of actual issue, so that Visoka's register of members is on any footing defective as to the date when the shares were issued. According to the register, these shares passed on 20 June 2009 from IEC Energy to an entity called Nexim Oil Corporation ('Nexim'). Nexim appears to have transferred half of the shares to a company called MSK Beteiligungsberatung GesmbH ('MSK') on 17 July 2009. The register of members shows Nexim and MSK as the current equal holders of Visoka's subsequently increased share capital. There is nothing in the document to suggest that Dr Hertel was ever a member of Visoka. Although he asserted that he was in possession of share certificates, none had been produced in evidence by the time of the hearing, although an attempt was made after the hearing to introduce evidence that Dr Hertel has in his possession two certificated which purport to show him as the holder of 1 million A and 1 million B shares in the capital of Visoka. Since the question whether Dr Hertel holds shares in Visoka does not arise for determination in the present applications, I say no more about that.

[13] It appears from an affidavit put in on behalf of Dr Hertel and made by Paul Simms, CEO of Citilegal International Limited (Citi's parent) that the original intention was for Dr Hertel, Pauline Champ and Mr Ammerman to participate in a joint venture for the exploitation, through IEC Energy, of technology developed by Dr Hertel, with Dr Hertel having 80% and Ms Champ and Mr Ammerman 20% of the ultimate ownership of IEC Energy. This is consistent with a copy shareholders agreement which has been put in evidence by Euro. The scheme appears to have involved the formation of a number of subsidiaries of IEC Energy, of which Visoka was to be one. Mr Simms says that Citi was to be the original sole director of Visoka, although he accepts that the paperwork was finalized by Ms Champ and Mr Ammerman. At any rate, and as I have said, it is common ground that Dr Hertel and Ms Gornicki was appointed Original Directors in addition to Citi. Mr Simms says that at meetings in January 2009 it had been accepted 'by all parties' that Citi was sole director of 'the IEC companies'. Although he does not explain it in his affidavit, Mr Simms exhibits a document dated 12 June 2009 signed by himself on behalf of Citi and purporting to

resolve that the offices of Dr Hertel and Ms Gornicki be terminated 'in case their appointment should be legally valid'. It is obvious that if, as is common ground, Dr Hertel and Ms Gornicki were directors of Visoka, a 'resolution' passed by a co-director cannot have terminated their appointments. Nor can a mere 'acceptance' that as at January 2009 Citi was sole director of Visoka.

- [14] Mr Husbands, who appeared for Dr Hertel, says that in this state of affairs, no shares can have been issued except by resolution of Visoka's board of directors. Given that Mr Simms' efforts to remove Dr Hertel and Ms Gornicki were plainly ineffective, only a resolution of a quorate meeting of at least two of these persons of which proper notice had been given can have effected the issue of shares to IEC Energy upon which Euro relies (in an affidavit sworn on 22 December 2010 by Mishka Jacobs, a solicitor employed by McW Todman & Co) as supporting an alleged resolution of the members of Visoka removing Citi as (on Euro's case) the last remaining Original Director and appointing Euro in its place. No copy of any resolution approving the issue of shares to IEC Energy or of IEC Energy as sole member of Visoka effecting changes to the constitution of Visoka's board has been produced in evidence.
- [15] There is in evidence what purports to be a resolution, dated 20 December 2010, of Nexim and MSK (the persons currently stated in Visoka's share register to be its only members) removing Citi, Dr Hertel and Ms Gornicki from Visoka's board and ratifying a resolution of IEC Energy said to have been passed on 12 June 2009, but of which no copy is in evidence, removing 'the former directors'. This will have been effective to remove the Original Directors with effect from 20 December 2010 if, but only if, Nexim and MSK were on that date indeed holders of the entirety of Visoka's issued shares. Similarly, a resolution of IEC Energy passed on 12 June 2009 to the same effect will only have validly removed the Original Directors if IEC Energy was then Visoka's sole shareholder.
- [16] In order to establish that Dr Hertel has been validly removed and Euro has been validly appointed, Euro would need to plead and prove resolutions of members of Visoka effecting the relevant removals and appointments. In my judgment Euro has no reasonable prospect of establishing at trial that any shares in Visoka were ever validly issued to IEC Energy. Certainly, it has produced no evidence, apart from assertion by Ms Jacobs, and a backdated entry in Visoka's register of members, that that has happened. It produces, as I have said, no copy of any board minute

evidencing a resolution to issue any shares and it does not seem to me that, in a case of this type, I ought to assume that a copy of such a resolution might turn up at trial. There has clearly been a considerable effort on the part of the Euro parties, if I may refer to them in that way, to provide the Court with whatever evidence they have available in order to buttress their defence and I think that in those circumstances I am not only entitled, but bound to assume that if no such resolutions are to hand now, they will not be to hand at trial, either.

- [17] Mr Carrington, who has appeared for Euro on these applications, says that the status of a BVI company's register of members as *prima facie* evidence that those entered as the holders of shares are the legal owners of the shares should not be overridden on a summary judgment application. I see the force of that, but in circumstances where it seems to me that Euro has no realistic prospect of proving at trial that it came to be the allottee of any shares in the capital of Versoka (and thus to have been in a position to make changes to Visoka's board) I do not think that I should be blinded by the entries in the register of members, which, in my judgment reached on the evidence which I have received, were made without due authority.
- [18] Mr Carrington submits that Dr Hertel has no *locus standi* to ask for the declarations sought, first because he says that only Visoka as the Company concerned is entitled to seek relief concerning matters relating to its own internal administration. I do not accept that submission. It seems to me that a person contending that he is a director of a corporation in the face of opposition from other interested parties is entitled to a declaration as to his status if he can establish his case. It is not suggested that Visoka has not been served with these proceedings (although no acknowledgement is to be found within the papers with which I have been supplied) and it will accordingly be bound by the result.
- [19] Mr Carrington further submits that to make a declaration as to the status of Citi and Ms Gornicki would be to infringe the principle mentioned in **Prudential Assurance Co Ltd v Newman Industries Ltd**¹ that

' . . . A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and, therefore, the person in whom the cause of action is vested.'

¹ [1982] 1 Ch 204 at 210

[20] It seems to me that that principle has no application here. Dr Hertel is not seeking to recover loss or to secure any other relief based upon a cause of action vested in either Citi or Ms Gornicki. He seeks a declaration as to the current constitution of the board of Visoka, of which he claims, correctly in my judgment, to be a member. The fact that either of Citi or Ms Gornicki might have made a similar application does not affect Dr Hertel's right to do so. Dr Hertel is asserting a state of facts, not seeking relief based upon causes of action vested in third parties. At the hearing I raised the question whether it would be appropriate for me to make binding declarations as to the status of persons not parties to these proceedings. Although affidavits have been sought to be put in after the hearing from each of Citi and Ms Gornicki which state that they consider that they were never validly removed and are content to resume their respective functions as board members, neither has applied to be joined to these proceedings and I prefer, in the circumstances, to grant declarations to the effect only that Dr Hertel is a director of Visoka and that Euro is not. The order will recite that it appears to the Court that the other members of the board of Visoka, in addition to Dr Hertel, are Citi and Ms Gornicki. Euro's strike out application will be dismissed.

A handwritten signature in black ink, appearing to read 'Edward Bannister', with a stylized, flowing script.

Edward Bannister

Commercial Court Judge

6 January 2011