BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 2007/0058

BETWEEN:

In the matter of the BVI Business Companies Act, 2004
In the Matter of Premier Caribbean Properties Limited ('the Company')

DONALD ASHLEY

Applicant/Claimant

and

IRENE ASHLEY
CHRISTINE WILSON MERILL
JUSTIN NEY WILSON

Respondent/Defendants

Appearances:

Steven Thompson and Hazelann Hannaway-Boreland of Harney Westwood & Riegels for the Claimant
Joseph Archibald Q.C. and Anthea Smith of J. S. Archibald & Co. for the Defendants

---

2008: April 2nd, July 16th

JUDGMENT

(Company Law - directors' meeting – whether a director entitled to be notified of meetings – if so whether resolution passed at that meeting of which he has deliberately being given no notice valid

No registrar of members kept or valid share certificates issued – annual returns show two directors and two shareholders – business of the company carried on by those two persons - what factors to be taken into account in determining who are the directors and shareholders of the company

W**hether director breached fiduciary duties to Company when she withdraw monies from company's accounts contrary to the terms of a consent order – whether monies used for the company's business- if not whether Claimant director/shareholder can recover damages resulting from that breach**

Two persons allegedly acting as directors and shareholders without valid authority- whether so acting – whether Claimant director/shareholder can recover damages)

[1] **Joseph-Olivetti, J.:** The fallout from a failed marriage can take many forms. Thus classical Greek legend relates how the Colchian princess, Medea, exacted sanguinary revenge on her beloved Jason when he grew tired of her bewitching charms. However in these modern times other weapons are used and we seldom hear of such exotic methods as poisoned hymeneal robes or noxious potions. And, in this case when their marriage failed Mrs. Irene Ashley resorted to convening a directors' meeting behind the back of her husband, her co- director and co-shareholder of their company and caused dubious share certificates to be issued altering the shareholding in favour of her children, the Second and Third defendants. Her actions lie at the heart of these proceedings which on the surface appear to speak to a shareholders' dispute.

Background Facts

[2] Mr. Donald Ashley and Mrs. Irene Ashley were married on 6th June 1992 in Pennsylvania in the United States of America. They had no children but Mrs. Ashley had two children by her former marriage, Mrs. Christine Wilson-Merrill ('Christine") and Mr. Justin Ney Wilson ('Justin'). They were aged approximately 14 and 12 respectively at the time but are now adults.

[3] In or about February 1999 the Ashleys decided to buy property at West End on the island of Tortola in the Territory of the British Virgin Islands (this property is hereinafter referred to as "Steele Pointe")[1]. They subsequently formed a company, Premier Caribbean Properties Limited, (" the Company") for the primary purpose of holding Steele Pointe. The Company was incorporated on 22nd April 1999 under the provisions of the Companies Act Cap. 285 and is now regulated by the BVI Business Companies Act, 2004.

[4] Steele Point is an established holiday resort and as of 31st December 2005 the Company held assets of $ 2.6 Million U.S dollars.

[1] Parcels 1, 2, 3, 5, 6 & 7 West End Registration Section Block 1834B

[5] The Ashleys retained the services of the firm of attorneys, Farara Kerins (then Farara George-Creque Kerins) to incorporate the Company and FCG Corporate Services an associated company of that firm acted as the Company's registered agent.

[6] The Ashleys apparently did not have sufficient ready funds to meet the down payment on Steele Point and on 24th and 25th February 1999 Christine and Justin ostensibly advanced sums of $108,000.00 each, aggregating $216,000.00 towards the 10% down payment on the purchase price of Steele Point. The asking price for the property was $2.65 million and the down payment was $265,000.00. Therefore, those funds represented a mere 0.08% of the total price of the property never mind the total cost of acquiring same and are in any event a long way from 10% of the total purchase. These funds came from stock broking accounts in the names of Christine and Justin and not from their individual bank accounts as Mrs. Ashley stated in her affidavit.

[7] Further, the Ashleys bore the financial and guarantee obligations in respect of the purchase on behalf of the Company with no contributions by Christine and Justin. In addition, Mr. Ashley alleged that he made further financial contributions of US$1Milion without any proportionate contributions from either Justin or Christine. The unaudited balance sheet of the Company as at December 31st 2005 exhibited at p.34 to his first affidavit refers to shareholders' advances as being US$2,817,725. However, one cannot say from this who made those contributions only that they were made and I accept Mr. Ashley's evidence that he advanced the additional sums alleged. The Second and Third Defendants speak to making other "substantial" financial contributions but they have not even stated a figure (see Mrs. Ashley's affidavit at para.1 (i) (e) TB Tab 3) and I cannot accept this bare assertion.

[8] The Defendants, and in particular, Christine and Justin by way of their defence allege that they are each entitled to a 10% shareholding in the Company on the basis of their financial contributions of $216,000.00 as they allege that there was a contract/contracts between them and the Ashleys to give them such a stake in return for their making this contribution.

[9] Mr. Ashley's evidence on this issue is to the effect that he and his estranged wife were the only directors and shareholders and that they had no contract with Christine and Justin as alleged. He said that there was an informal understanding or arrangement between he

and Mrs. Ashley that her children would get a 10% shareholding but that the terms and conditions had not being finalized. I shall consider this aspect of the case when I come to deal with the issue of who are or are entitled to be directors and shareholders of the Company.

[10] The Ashleys operated the Company and its business successfully and without any apparent difficulty for the next seven years. However, their marital relations deteriorated to such an extent that on or about 16th January 2007 Mrs. Ashley issued divorce proceedings in the USA. She apparently left the matrimonial home; it is not clear when. And, Mr. Ashley deposed, and this was not challenged, that his personal files on the Company which he kept at their home was missing. The clear inference being that Mrs. Ashley took them.

[11] On Friday, 9th March 2007 the Ashleys met with Mrs. Ashley's lawyer in the USA in an attempt to settle their various property matters. Shortly thereafter, Mr. Ashley discovered that Mrs. Ashley was planning to visit the B.V.I. He became suspicious and followed her to the Territory on 12th March 2007 and asked for sight of the Company's records from FCG Corporate Services. He then discovered four share certificates dated 22nd January 1999. He knew that there were only two issued shares and that certificates had never been prepared. He also discovered a fax from Mrs. Ashley to FCG Corporate Services attaching what purported to be a resolution from a 6th February 2007 Directors' Meeting purportedly ratifying the issue of four share certificates. Moreover, Christine and Justin were represented as being present at and participating in that meeting in the capacity of directors and as far as he was concerned he knew that they had never acted as or been appointed directors and that they were not shareholders. Most significantly however Mr. Ashley had received no notice of that meeting.

[12] Accordingly, he sought and obtained an explanation from Mr. Charles Kerins of FCG Corporate Services and Farara Kerins. He learnt from him that Mrs. Ashley had telephoned Mr. Kerins in late January or early February and that she claimed that she had lost the four share certificates issued to her, Mr. Ashley, Christine and Justin and asked if she could get new ones. Allegedly, Mr. Kerins informed him that his response to Mrs.

Ashley was to the effect that they did not have any share certificates and that he would need a resolution to issue new ones.

[13] It is obvious that later, FCG Corporate Services issued the four share certificates requested by Mrs. Ashley relying on the resolution sent to them by Mrs. Ashley ostensibly passed at a meeting of 6th February, 2007 and back dated them to 22nd April 1999.

[14] This then is the basic state of affairs which gave rise to this claim in which Mr. Ashley seeks the following relief:-

'1. A declaration pursuant to the Company's Articles of Association regulations 44, 45, 49 and 50 that the resolution of 6 February 2007 and all actions ensuing therefrom are void and of no effect.

2. A declaration that the Claimant and First Defendant are the only shareholders of the Company, each holding 50% of the Company's share capital, no further shares in the Company having been validly issued.

3. An injunction against the Second and Third Defendant that they be prohibited from holding themselves out as shareholders or directors of the Company.

4. Damages and or restitution to the Claimant against the First Defendant for breach of fiduciary duty as director and against the Second and Third Defendant for wrongfully holding themselves out as shareholders and directors of the Company.

5. Costs.

[15] Since the commencement of this action in lieu of an injunction being sought by Mr. Ashley to protect the status quo immediately before the contested resolution, the parties, by consent order dated 2nd April 2007 agreed that Mrs. Ashley will not deal with or diminish the value of any of the Company's assets and that she was not to have any further dealings with the Company's share capital or give any instructions to the Company's registered agent or the Company's banks.

[16] This Order was amended again by consent on 27th April by giving Mrs. Ashley permission to give instructions to the Company's banks for payment of reasonable expenses and obligations incurred or otherwise payable by her during the ordinary course of business and to pay her legal expenses, fees and disbursements.

[17] Mr. Ashley alleged that Mrs. Ashley wrongfully withdrew monies from the Company's bank accounts in that she paid sums totaling $20,000.000 between Dec. 17th 2006 and March 29th 2007 to Justin and the further sum of $25,000.00 to Justin by three cheques to Justin. These monies were paid to him after his employment with the company had ended. That those payments were made is not disputed. By letter dated July 17th 2007 from Mr. Ashley's U.S solicitors Mrs. Ashley was asked for an explanation and to present supporting documentation. Apparently she did not respond. In the face of this I can only assume that she had no justification for making these payments to Justin. Justin did work for the Company but was no longer so employed at the time of payment. In all likelihood she took the monies to assist Justin with medical expenses for his young child. However, I say this with some reservation as Justin himself was not allowed to comment on this as Mr. Thompson indicated when Mr. Archibald sought leave for him to do so that he was not pursuing that point, and was not sure that further evidence was needed - whatever that meant. See Transcript of proceeding of 2nd April 2008 p.131lines 10-16.

Issues Arising

[18] The main issues arising can be stated as follows:-

(1) Was Mr. Ashley entitled to be notified of the meeting of 6th February, 2007 and if so was the meeting properly convened and the resolution passed valid in view of the fact that he was not notified?

(2) Are Mr. and Mrs. Ashley the only directors and or shareholders or the only persons entitled to be directors and or shareholders of the Company?

(3) Whether Mrs. Ashley, by her actions of 22nd January 2007, abused her position as a co-director of the Company and fraudulently and or wrongfully induced the Company's

Registered Agent to issue the four share certificates and if so whether Mr. Ashley is entitled to damages for those breaches.

(4) Whether Mrs. Ashley, by her actions of 29th March 2007 in making unauthorised withdrawals from the Company's bank accounts abused her position as a co-director of the Company and if so what recourse is available to Mr. Ashley.

Issue 1 – Was Mr. Ashley entitled to be notified of the meeting of 6th February, 2007 and if so was the meeting properly convened and the resolution passed valid in view of the fact that he was not notified?

[19] First, on the evidence I find that it is not disputed that both Mr. and Mrs. Ashley were directors and shareholders of the Company although all the formal company documentation[2] was not in place and the extent of their shareholding disputed. Mrs. Ashley deliberately excluded Mr. Ashley from the meeting. I do not accept her lame attempt to justify her actions by saying that he was out of town when she convened the meeting and therefore she was unable to give him notice. I find that she had no intention of giving him notice and did not trouble herself to find out whether he was entitled in law to notice although she seems to have been aware that he might be so entitled. She is the President of her own company in the USA. It was her intention from the very start to exclude him from the meeting because of the nature of the transactions she wished to carry out. From her emotional outburst in cross-examination it became abundantly clear that she considered herself a wronged wife and sought to steal a match on her husband in retaliation for perceived wrongs by attempting to secure for herself and her children an advantageous position in the Company knowing full well that Mr. Ashley was not in agreement with her ideas. Thus she deliberately held a meeting when he was away – literally behind his back so to speak.

[20] It is also of significance that she never informed Mr. Ashley of the meeting on his return and that he only found out about the meeting when he came to Tortola and made

[2] In the TB there is a notice by the subscribers to the Memorandum of Association who are entitled to appoint the first directors appointing them first directors but it appears to be unsigned and the annul returns speak to two directors and to two shares being issued to them but no share certificates and valid share registrar was produced.

inquiries of the registered agent and obtained copies of the resolution. This tells against her evidence to the effect that what she did was not wrong as it was what they had agreed on in any event. In all this it was a pity that her adult children saw it fit to allow themselves to be dragged into the fray as serious damage has been caused to whatever benign relations the children and Mr. Ashley might have forged during their years as a united family but this too is not unusual on the breakdown of intimate relationships.[3]

[21] Now, was Mr. Ashley entitled to be notified of the meeting? First, one must consider the nature of the meeting, that is whether it was a directors' or a shareholders' meeting as there seems to be some confusion about that.

[22] Mr. Steven Thompson acting on behalf of Mr. Ashley submitted that it was a shareholders' meeting, that Mr. Ashley who it is not disputed was both a shareholder and a director was entitled to notice and that as he was not given notice the meeting had been improperly convened and constituted. Counsel relied in particular on the Company's Articles of Association ("the Articles") Articles 44, 45, 49 and 50.

[23] Mr. Archibald Q.C. for the Defendants submitted that the meeting was a directors' meeting, that it was properly constituted in accordance with the Companies Act and the Articles and that ergo the resolution is valid even though Mr. Ashley a director was not given notice. Counsel contended that there was no requirement in the Articles for Mrs. Ashley to give notice of a directors' meeting. Furthermore, that the specific Articles relied on by Mr Thompson are not relevant as they relate only to a shareholders' meetings.

[24] On this issue, to my mind, the Minutes are decisive as to the nature of the meeting. They are exhibited to Mr. Ashley's First affidavit and can be found in the Trial Bundle ("TB") Tab 2, p.80. They are brief and I shall set them out in full.

[25] The minutes read as follows:-

> **"Minutes of a Meeting held at King of Prussia, PA USA on Tuesday 6th February, 2007 at 6.000p.m.**
>
> **Present:**

[3] See Justin's answers in re-examination Transcript 2nd April 2008 p.168, lines 21 to 25 and p. 169 lines 1-17.

Irene Ashley – Director/Secretary

Christine Wilson Merrill - Director

Justin Wilson - Director

Irene Ashley took the chair and declared the Meeting duly convened and constituted.

It was agreed that stock certificates indicating the representative ownership of each individual be issued as follows:

Irene Ashley – 40%

Donald Ashley - 40%

Christine Wilson Merrill - 10%

Justin Ney Wilson - 10%

All shares are voting shares.

There being no further business the Meeting was adjourned."

[26] These minutes were signed by all three attendees in the capacities already noted.

[27] Having regard to the stated capacities of the persons attending one can only properly conclude that this was intended to be a directors' meeting and not a shareholders meeting. Indeed, as already noted that is the position adopted by Mr. Archibald on behalf of the Defendants. I also conclude that the person calling the meeting, Mrs. Ashley, considered that she was calling a directors' meeting and in fact she said as much in cross-examination.

[28] Now, what does the Articles (TB 51) say about convening a directors' meeting? Article 88 specifically addresses director's meetings. It speaks to the "proceedings of directors". It provides that the directors may meet together anywhere within the British Virgin Islands or elsewhere for the dispatch of business, adjourn and otherwise regulate their meetings and proceedings as they think fit. That questions arising at any meeting shall be decided by a majority of votes; that in case of an equality of votes the chairman shall have a casting vote and that a director may and the secretary on the requisition of the director shall at any time summon a meeting of the directors.

[29] Article 89 stipulates that the quorum for the transaction of business of the directors may be fixed by the directors and unless so fixed shall be two if there is more than two directors and one if there be two or less directors.

[30] Article 96 provides – "All acts done by any meeting of the directors or of a committee of directors or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such director or person acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director".

[31] Article 97 provides that a resolution in writing signed "**by all the directors for the time being entitled to receive notice of a meeting of the directors"**, shall be as valid and effectual as if it had been passed at a meeting of the directors duly convened and held.

[32] From these provisions it can readily be seen that the Articles do not specifically provide for the giving of notice of a directors' meeting to a director. However, the Articles contemplate that the directors shall carry on the business of the company in accordance with the law and that the Articles are subject to the law. Further, that it is contemplated (reference Article 97) that all directors must be given notice of directors meetings. (Indeed, if it were otherwise the Articles would be doing violence to the basic principles of Company law on this issue which we will consider further). On that basis alone the meeting was improperly convened and the resolution invalid as a result of Mrs. Ashley's failure to give notice to Mr. Ashley.

[33] Now what are the general principles governing a director's entitlement to notice of directors meetings? First, I will look at the relevant provisions of the **BVI Business Companies Act 2004** which now governs the Company although it was incorporated under the former Companies Act. Section 127 provides:-

> **"(1) Subject to any requirements as to notice in the memorandum and articles a director shall be given reasonable notice of a meeting of directors.**
>
> **(2) Notwithstanding subsection (1), subject to the memorandum or articles, a meeting of directors held in contravention of that subsection is valid if all of the**

directors, or such majority thereof as may be specified in the memorandum or articles entitled to vote at the meeting have waived the notice of the meeting; and, for this purpose, the presence of a director at the meeting shall be deemed to constitute waiver on his part.

(3) The inadvertent failure to give notice of a meeting to a director or the fact that the director has not received the notice does not invalidate the meeting". (Emphasis added).

[34] From these provisions it cannot be gainsaid that Mr. Ashley as a director was entitled to be given notice of any directors' meeting. The period of notice is to be in accordance with that specified in the Articles and in the absence of such a provision, reasonable notice must be given. Here, the Articles do not stipulate the period of notice and therefore any notice must be reasonable notice. In passing, Mrs. Ashley cannot rely on s.127 (3) as it would unduly tax the imagination to describe her failure to give notice to Mr Ashley as inadvertent in these circumstances and happily she has not attempted to do so.

[35] Furthermore, the requirement that all directors must be given notice of meetings is well established. This is borne out by **Gore-Browne on Companies** at para. 26.2 - "**Notice of the meeting must be given to all the directors, for business done at a meeting of which some directors had no notice is invalid, and a director has no power to waive his right to notice; but if a director is abroad and out of reach of notices, a meeting held without notice to him is valid." (As it can readily be seen the position on waiver has changed having regard to section 127 (2)) of the 2004 Act.).**

[36] For this proposition the learned authors relied on **Re Portuguese Consolidated Copper Mines Ltd (1889) 42 Ch D 160, Young v. Ladies Imperial Club [1920] 2KB 523 CA** and **Halifax Sugar Refining Co Ltd v. Franklyn (1890) 59 LJ Ch. 591.**

[37] In **Re Portuguese Consolidated Copper Mines Ltd,** Mr**.** W. J. Steele brought a motion to rectify the register of members of the company by removing his name therefrom as the holder of 100 shares on the ground that no formal and binding allotment of shares to him was ever made. The basis of this application was as follows. Four persons were appointed directors by the seven subscribers to the new memorandum. Subsequently Mr.

Steele applied for 100 shares. On the same day as he made his application the first meeting of directors were held at which two only of the other four directors were present. No sufficient notice of this meeting had been given to the other directors. The two directors resolved that two directors should form a quorum and then they proceeded to allot shares including a 100 to Mr. Steele. They adjourned the meeting to the next day. Mr. Steele received notice of allotment on the 24th and on the 25th he gave notice to the company that he withdrew his application .on the 25th the meeting was further adjourned to the 26th. On the 26th three directors were present and one of them who had been absent on the 24th expressed in writing his approval of the resolution as to a quorum. At this meeting the former allotments were confirmed. The other absent director on the same day wrote an approval of the resolution as to a quorum and it was received by the company on the 27th North J granted the motion. The Court of Appeal held that the allotment was invalid on the ground that notice of the meeting of the 24th October had not been given to all the directors, that this meeting was therefore irregular and the adjourned meeting of the 26th was therefore equally irregular.

[38] Cotton LJ said at p. 168 - "**I am of the same opinion. Lord Inchiquin only went to Ireland, and there is a post daily to Ireland, so there was no want of means of communication. There is no evidence whatever that any notice was sent to him of the meeting to be held on the 24th which was the origin of the meeting of the 26 and in my opinion assuming that notice to all would have made the meeting held on the 24th a good meeting, yet if in point of fact notice was not given or sent to all the directors when it could have been given or sent to all, the meeting was a bad one, and the whole foundation of the argument breaks down. The appeal therefore fails."**

[39] And the learned authors explain that the mere fact that a director is abroad is not sufficient if he can be reached by notice: **Mitropoulos v. Greek Orthodox Church (1993) 10 ACSR 134 SC (NSW**). On the meaning of "out of reach" see **African Organic Fertilizers & Associated Industries Ltd v. Premier Fertilisers Ltd 1948 (3) SA 233, PD (Natal),** where the question whether a director was within reach was considered to depend in part on the seriousness of the business of the proposed meeting.

[40] Having considered the law on the subject and setting aside the question whether Christine and Justin are directors as it does not affect this issue there can be no doubt that the directors' meeting was not properly convened as Mr. Ashley was not given notice. This was not because he was out of reach as Mrs. Ashley would have us believe (he had simply left the home to play golf out of town) but because she deliberately chose not to give him notice having regard to what she intended to achieve at that meeting. It was a strategic move on her part. The meeting was therefore invalid and it follows then that no company business could have been properly conducted at that meeting and that the resolution passed is null and void and any steps taken to implement this resolution or acts done pursuant to it are likewise invalid.

[41] This brings me to the share certificates, were they the fruits of the invalid resolution? Mrs. Ashley would have us believe that the registered agent simply prepared the disputed share certificates of their own accord and that she had nothing to do with it. This is the distinct impression one gets one when one reads para. 1 (vi) of her affidavit in response to Mr. Ashley's first affidavit. She simply recites that the four share certificates all dated **22nd April 1999** were prepared by Farara Kerins for execution by her as director. However, a different picture emerged in cross-examination when she was subjected to the skilful examination of Mr. Thompson and it became glaring that Mrs. Ashley was the architect of the certificates and that Mr. Ashley's version of events was correct. See also TB 79 with the fax she sent to Mr. Kerins accompanying the resolution.

[42] Having seen and heard the parties and examined the various documents relied on I have no hesitation in saying that I prefer the evidence of Mr. Ashley in all respects where it differs from that of the Defendants as Mrs. Ashley has not been forthcoming with the truth and has acted vindictively. Her attempt to distance herself from the certificates and to refrain from telling the court how she obtained them at the first opportunity presented to her to do so is patently dishonest and has done untold damage to her credibility.

[43] First, I find that the Company had not issued any share certificates since its incorporation in 1999 and prior to March 2007. And, that the registered agent did not keep the register of members as is required by law to do. Annual returns were filed by Farara Kerins on behalf of the company for the years 1999 - 2006. Those indicate that two shares had been

issued and that Mr. and Mrs. Ashley each held one share. In reality share certificates in respect of those two issued shares were never actually drawn up and sealed. These also indicated that the only directors were the Ashleys.

[44] Second, I find that the registered agent issued the certificates at the behest and on the representations of Mrs. Ashley and in reliance on the resolution which she sent to them. It follows therefore that the share certificates themselves are invalid and represented Mrs. Ashley's attempts to revenge herself by securing an advantage for her children and herself - a very human failing but ill-advised.

[45] Now a word on the relief sought. Mr. Ashley prayed for a declaration pursuant to the Company's Articles of Association regulations 44, 45, 49 and 50 that the resolution of 6th February 2007 and all actions ensuing therefrom are void and of no effect. Mr. Archibald contends that he should be denied that relief as he relied on irrelevant provisions in the Articles. In my judgment, the fact that he relied on provisions dealing with shareholders' meeting cannot deprive him of a declaration that the resolution is invalid when it is in fact invalid. One can understand how his legal advisors may have been misled as to the nature of the meeting as the Minutes did not state on their face what their nature was as is customary and this confusion was caused by Mrs. Ashley albeit unwittingly and she cannot benefit by that.

[46] However, more pertinently, Mrs. Ashley's advisers were not prejudiced by his reliance on those provisions and had every opportunity to persuade the court that the meeting was properly convened and constituted in every respect and the resolution valid. If the court has no power to declare them void simply because in the pleadings inappropriate and or irrelevant provisions were relied on it would mean that Mr. Ashley will be forced to bring a new challenge again relying on Mrs. Ashley's failure to give him notice which in the light of the law could not fail. This would be unjust and a colossal waste of resources, both the court's and the parties. Fortunately, I consider that under s. 20 of the West Indies Associated Supreme Court (Virgin Islands) Act the court has the power to grant the appropriate relief having regarded to the findings made.

[47] Section 20 reads - The High Court and the Court of Appeal respectively in the exercise of the jurisdiction vested in them by this Ordinance shall in every cause or matter pending

before the Court grant either absolutely or on such terms and conditions as the court thinks just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim or matter so that as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of these matters avoided.

Issue 2 - Are Mr. and Mrs. Ashley the only shareholders and/or directors of the Company or the only persons entitled to shares to in the Company?

[48] First, it is noted that Christine and Justin did not make a counterclaim to seek a declaration that they are directors and shareholders. However, in closing submissions Mr. Archibald on their behalf asked us to find that Mr. Ashley and Mrs. Ashley holds 40% each in the Company and that by virtue of an agreement reached with Christine and Justin in respect of their financial contributions each of $108,000.00 that Christine and Justin are entitled each to 10% of the shares in the Company and he asked that the four share certificates be declared valid. Counsel relied on section 20 West Indies Associated Supreme Court (Virgin Islands) Act already referred to. I have already dealt with the share certificates and that aspect of the relief cannot in any event be granted.

[49] Mr. Thompson submitted that the court should not entertain such a belated claim and sought to restrict the court simply to the relief sought by Mr Ashley. However, in determining whether Mr. and Mr. Ashley are the sole shareholders and directors of the Company the court must have regard to all the evidence adduced before it and make the appropriate findings. If the court should find that persons other than the Ashleys are entitled to shares then it seems to me that the court cannot ignore this and make only the declaration specifically sought but must perforce grant the appropriate relief based on those findings. Further, what is of real moment is that all persons who might be affected or might have an interest in this matter are before the court now. It is in the interests of justice that all matters which can properly be dealt with by the court be determined and the appropriate relief granted so that there could be an end to this litigation. This accords with the overriding objective as enshrined in CPR 2000 and with the powers granted to the court by section 20 of the West Indies Associated Supreme Court (Virgin Islands) Act.

Furthermore, I am satisfied that Mr. Ashley has been in no way prejudiced by the relief claimed on behalf of Christine and Justin albeit late and if they are entitled to relief the court will not withhold that relief simply because they did not make a specific claim initially but merely denied Mr. Ashley's claims.

[50] First, as already found, it is common ground that Mr. and Mrs. Ashley are both directors and shareholders. However, Mr. Ashley says that they hold the two issued shares equally whilst Mrs. Ashley says that they each hold 40% of the shares and that Christine and Justin hold 10% each. Additionally, Mrs. Ashley, Justin and Christine claim that Justin and Christine are also directors and Mr. Ashley says no.

[51] Section 42 of the BVI Business Companies Act provides that a share certificate is prima facie evidence of title, that no record of trust is to be entered in the register and that on entry of one's name in the register one becomes a member of the company. If we were to restrict ourselves to ascertaining the members by merely looking at the register then it follows that we cannot take this much further. The evidence is that the register before us was compiled only after it was requested by Mr. Ashley's solicitors after the dispute arose and that it includes entries which ought not properly to have been made as it sought to reflect the resolution giving rise to the invalid share certificates. Accordingly, the register cannot be accepted at face value. It follows then that we must consider the whole of the evidence to determine who is entitled to be registered as members of this Company and that the court is not precluded from doing so by that provision in the Act.

[52] Christine, Justin and Mrs. Ashley state the claim of Christine and Justin to be entitled to be holders each of 10% of the shareholding and directors primarily on a contract allegedly made between Christine, Justin and the Ashleys the consideration therefore being the monetary contributions made by Christine and Justin. I have already found that this amounts to 0.08% of the selling price of Steele Point.

[53] The main evidence relied on by the Defendants was the affidavit of Mrs. Ashley which both Christine and Justin adopted **in toto**. Justin added little more to that and Christine additionally deposed to a suggestion by Mr. Ashley on the eve of her marriage about her entering into a pre-nuptial agreement to protect her 10% interest in the Company which she claimed supported her contention that she was a 10% shareholder of the Company.

She also relied on an affidavit of her husband, Mr. Dirk Merrill to the effect that Christine had reported the alleged conversation between her and her stepfather to him.

[54] However, it is significant that in their affidavits they gave no particulars of this contract/ contracts, not even where they were allegedly made. However, in cross-examination Christine sought to explain that the monies in the stock broking accounts belonged to them as the monies represented the fruits of a legacy from their deceased father which had been used to start the accounts. Neither of them gave any details of this alleged legacy or when these accounts were started but she accepted that Mr. Ashley would call the broker and ask him to make certain investments from that account.

[55] Mr. Ashley testified that there was no contract or contracts between the Ashleys and Christine and Justin as alleged. The funds in the stock broking accounts in the children's names were regarded as family funds as he gave the seed money so to speak to start the accounts. He however always accepted that the money was intended as a gift to the children in any event. He and Mrs. Ashley were the only shareholders and directors of the Company. However, from the beginning he and Mrs. Ashley had what he described as an informal arrangement or understanding between themselves that they would give 10% of the shares to each of Christine and Justin but there was no agreement on precisely how they were going to achieve this as it was always his position that Mrs. Ashley's children's shares should come out of her 50% shareholding and that they should be non-voting shares. However, that Mrs. Ashley did not agree to this and held out for the shareholding to be divided 40% each to the Ashleys and 10% each to Christine and Justin. They could not even agree on whether the children's 10% would be voting or non-voting shares.

[56] The Defendants relied also on the licences which were obtained for Christine and Justin to be directors and shareholders. Indeed, the Ashleys applied for and obtained BVI Non-Belonger's Land Holding licences for the Company and themselves in dual shareholder/director capacities when the Company was incorporated. They also sought and obtained similar licences at the same time for Christine and Justin to be shareholders and directors of the Company as well. Those licences were issued on 31st July 2000.

[57] However, Mr. Ashley explained that the licences in respect of Christine and Justin were obtained to make it possible for shares to be given to them and to add them to the Board in

the future and that they never became shareholders or directors. I accept this explanation. I also take judicial notice of the lengthy and involved process of applying for and obtaining Non-Belonger's licences and that it is not unusual for persons to obtain licences at the same time for a venture if it is intended that they should all participate in it whether then or in the near future. However, the mere issue of such a licence by the Government to the holder does not constitute the holder a director and or shareholder but might be some evidence of the intention of a company's directors and shareholders to confer these rights on the holder but until they take steps to do so then the mere production of a licence will not suffice.

[58] The Defendants placed great store on the U.S. tax returns prepared on their behalf by Mr. Ashley as supporting their testimony that the Ashleys had agreed to give Justin and Christine a 10% share in the Company. However, I accept the explanation given by Mr. Ashley that in the returns he stated that Christine and Justin held 10% of the Company and that he only did so as a favour to Mrs. Ashley to reduce their tax liability in the USA. The Company was shown as making losses here in the BVI. Literature is replete with what acts are done for the sake of a beloved and I call again to mind Medea's acts when she sought to protect her beloved Jason from the wrath of her father when her father discovered Jason's daring theft (aided of course by Medea) of one of his most treasured possessions. Added to that explanation, the clandestine manner in which Mrs. Ashley and her children tried to cement their position leaves me in no doubt that there was no contract as alleged.

[59] Further, the annual returns that were filed by the Registered agent since the inception of the Company indicate that the Company had only two shareholders and two directors, the Ashleys, who each held fifty per cent of the issued shares in the Company. The unaudited financial statements likewise speak to only two shareholders.

[60] Christine relied on a statement allegedly made by Mr. Ashley to her immediately prior to her marriage in July 2004 to the effect that she should enter into a prenuptial agreement with her prospective husband to secure her shareholding in the company as evidence that she was entitled to 10% of the shares in the Company. Christine apparently was affronted at this suggestion and allegedly reported it to her husband and he swore an affidavit as to

Christine relating the conversation to him. Needless to say Christine did not act on her stepfather's suggestion. I accept Mr. Ashley's explanation that he discussed the apparent disparity in Christine and her fiancé's financial position with his wife having regard to Christine's future prospects vis-à-vis the Company and then suggested a prenuptial agreement to Christine. Indeed there is nothing wrong in a prenuptial agreement or in a parent suggesting this to his or her offspring especially when one has regard to the bitter disputes which so often arise over property when a marriage designates, this being a case in point.

[61] Justin testified in cross-examination as to the agreement that had been reached between himself and Mr. Ashley. He spoke of a meeting with Mr. Ashley at his college and even to having been shown a videotape of the Property to induce him to invest his money. Again Justin did not see fit to put these details in his affidavit or to even mention a meeting at his college at all and therefore Mr. Ashley would not have had an opportunity to fully give instructions and respond to them. The court is of the view that if these matters were important and took place as alleged and indeed form the basis of his claim that he ought properly to have set them out in his affidavit. It is interesting as already that both he and his sister in their affidavits merely adopted in full the affidavit of their mother save as to Christine's evidence about the prenuptial suggestion.

[62] Justin also relied on his work permit and the description therein of himself as owner. I attach no weight to the description of Justin as owner in the work permit. He admitted that he himself filled out the application form and it follows that he would have described himself as owner. There is no evidence that the Company through any of its directors or Mr. Ashley himself had vetted the application. In fact it was apparent that Mr. Ashley had not seen the work permit prior to the disclosure by Justin.

[63] Mrs. Ashley relies on a memorandum of 17th October 2002 from the Ashleys' American lawyers, Messrs. Heckscher, Teillon, Terrill & Sager, P.C. which she claims they wrote to the Ashleys' BVI solicitors, Farara, George-Creque and Kerins. (See Exhibit E to Mrs. Ashley's Affidavit in response, TB Tab 3). She testified that this memorandum set out the parties' shareholding in the Company in the relative proportions of 10% for each child and 40% each for her husband and herself and that this supports their claims. She deposed (see paras. 1(iii) & (iv)) that her husband perused the memorandum and instructed Mrs.

Janice George-Creque[4], "… **in the matter to the extent that Mrs. George-Creque wrote with her own hand dated 10th November 2000 on the said memorandum, 'client instructs us to hold until he gives further instructions**."

[64] I fail to see the point of this as to my mind it does not prove or support the existence of the agreement contended for by the Defendants. First it is written not to the Ashleys BVI lawyers but "to File", it is not signed by Mr. Ashley or for that matter any of the Defendants and crucially it was not put into effect insofar as the shareholding is concerned. The mere fact that Mr. Ashley requested Mrs. George–Creque to hold would indicate that all issues were not settled and does not establish an agreement or a representation to the effect that the parties would hold the shares in the manner indicated in the memorandum.

[65] The memorandum itself if one takes the trouble to examine it in full speaks to the real possibility that the Company would be structured in the manner indicated by the writer who is obviously giving advice to the Ashleys. The opening paragraph reads: - "it now appears that the structuring of the property purchase will be more or less as follows…" It also speaks to each child being issued "**100 non-voting shares**." This last is contrary to the shares that Mrs. Ashley sought to have issued by the resolution which speaks to voting shares. Nothing is said of any consideration having been paid by Christine and Justin and indeed if they contributed such substantial amounts from their own monies as they would have us believe one would ask why they were being discriminated against and relegated to being the holders of just non-voting shares. I also note that the lawyers speak of a simple shareholders agreement which would require them to offer their shares to the other shareholders if they wanted to part with them. Again, this seems like a provision that should apply to all shareholders and not just Justin and Christine and to my mind if implemented would lend support to Mr. Ashley's explanation that this was a family arrangement to be implemented in the future.

[66] On the whole of the evidence I am satisfied that there was no binding agreement between the Ashleys, Christine and Justin to the effect that in return for their financial contributions they would each be given 10% of the shareholding in the Company. Furthermore, I am not satisfied that any representation to that effect was made to them on which they acted to their detriment such that would attract the well-known principles of equitable estoppel on

[4] In passing it is noted that Mrs. George-Creque is now a High Court Judge in this jurisdiction.

which Mr. Archibald sought to rely. Finally, as Mr. Ashley accepts that the monies were meant to be gifts to them in any event it seems to me having regard to the whole of the evidence that the most they might be entitled to as against the Company would be the return of the sum of $216,000.00.

[67] Mr. Archibald seeks a declaration that Christine and Justin are entitled to be directors of the Company on the basis of representations made to them by the Ashleys and that they had always acted as such. However, even if the court were minded to grant such declarations in an attempt to bring an end to all issues arising in this litigation there is not a scintilla of evidence led by Christine and Justin in their respective affidavits to justify the court in making any such declarations. Furthermore, they were both aware that Mr. Ashley was asking to injunct them from holding themselves out as directors and therefore it was incumbent on them to disclose the evidence on which they wished to rely beforehand. Their attempts to do so in cross-examination carry no weight as Mr. Ashley would not have had any proper opportunity to answer them. Justin's explanation that he acted as director in the capacity of general manager in which he was employed as the acts referred to would in any event fall within the jurisdiction of a general manger and the position is at most ambiguous. Accordingly, no such relief would be granted.

[68] I must remark that the state of the Company's records insofar as the registered agent is concerned leaves a lot to be desired. The registered agent did not keep the register of members as it is obliged in law to do. They compiled a register and backdated it to boot only when Mr. Ashley's lawyers requested sight of the register in March 2008. They even backdated the disputed share certificates even though the resolution did not ask that the certificates be backdated and they must have been aware that no share certificates were ever issued prior to that resolution and of the contents of the annual returns.

[69] This apparent laxity in keeping the records has no doubt contributed to the state of affairs which gave rise to this litigation. And, what is more this is not a small dormant private company but one with substantial property actively engaged in business here. In saying all this I am mindful that no one from the registered agent's was called by either party to explain these apparent shortcomings and my observations must be read in that light. It follows also that the register will have to be amended to reflect that the only persons who

are entitled to be shareholders and directors are the Ashleys and that they hold the two issued shares in the Company.

Issues 3 and 4 – In essence, whether Mrs. Ashley as director breached her fiduciary duties to the Company when she induced the company's registered agent to issue certificates and when she made withdrawals from the Company's accounts and if so whether Mr. Ashley is entitled to damages resulting from that breach.

[70] These two issues can be dealt with together as to my mind they raise the same basic points of law. It is not disputed that both the Ashleys are directors. Mrs. Ashley as all company directors owes a fiduciary duty to the Company to act in its best interests. I find on the evidence that she abused her authority as director when she made the false representations to the registered agent and then deliberately submitted to them a resolution which she knew or ought to have known was not valid. Further, that she made unauthorised withdrawals from the Company's accounts for purposes not related to the Company's business and in breach of the consent Order. In so doing she undoubtedly acted improperly and in breach of her fiduciary duties to the Company and the Company has a cause of action against her in respect of those breaches.

[71] The rule that a director's fiduciary duties are owed to the Company is put thus by the learned authors of **Gore-Browne on Companies** at para. 27.3:- "**It is an established general rule that, insofar as a director of a company is bound by fiduciary duties at general law, these duties are owed to the company only. Thus, they are not owed to other companies or bodies corporate with which the company is associated, e.g. its holding company or subsidiary, nor do they operate in favour of any person simply because he is a person to whom the company itself stands in a fiduciary relationship. <u>More significantly, they are not owed to the individual shareholders of the company</u>". (emphasis added)**

[72] Moreover, Mr. Ashley cannot without more sue in respect of that breach and recover damages whether nominal or otherwise unless he is doing so on behalf of the Company in what is termed a derivative action. There is no evidence to suggest that he has obtained the necessary consent to bring such an action and accordingly has no standing to make a

claim against Mrs. Ashley for breach of her fiduciary duties to the Company. He is therefore not entitled to any relief in respect of that breach as the Company has been wronged.

[73] It may be useful to remind ourselves of the governing principles which are well established and of the relevant sections of the BVI Business Companies Act 2004 which cement them.

[74] **Palmers Company Law** in Volume 2 (March 1999) para. 8.804 explains the nature of derivative actions. Essentially a derivative action is when a plaintiff is seeking to enforce not his own right of action but a right of action vested in or derived from company.

[75] The relevant provision of the BVI Business Companies Act is section 184C. In summary it gives the court power to grant leave to a member of a company to bring proceedings in the name and on behalf of that company, or to intervene in proceedings to which the company is a party for the purpose of continuing, defending or discontinuing the proceedings on behalf of the company. And, it states categorically that a member is not entitled to bring or intervene in any proceedings in the name of or on behalf of a company without the leave of the court. See subsection 184C (6).

Relief against Christine and Justin

[76] Mr. Ashley seeks an injunction against Christine and Justin prohibiting them from holding themselves out as shareholders or directors of the Company. They undoubtedly held themselves out as directors when they attended the meeting and they were not directors. However, this is a wrong done to the Company and for the reasons stated in relation to the penultimate issue Mr. Ashley is not entitled to any relief against them as any wrong suffered would have been to the Company and not him.

Costs.

[77] The usual order is that the successful party will have his costs. Mr. Ashley did not succeed on his claim for damages but this was only a minor part of his claim and I will make no discount for that. No arguments were advanced why he should not recover all his costs. Accordingly he is to have his costs. This is not a claim for monetary sum and therefore the deemed value of the claim for the purposes of costs is $50,000. Mr. Ashley is to have the whole of his prescribed costs calculated on that value.

Conclusion

[78] In conclusion for the foregoing reasons the court orders as follows:-

(i) A declaration that the resolution of 6 February 2007 and all actions ensuing therefrom and in particular the four share certificates are void and of no effect.

(ii) A declaration that the Claimant, Mr. Donald Ashley and the First Defendant, Mrs. Irene Ashley are the only persons entitled to be shareholders of the Company, each holding 50% of the Company's issued share capital, no further shares in the Company having been validly issued.

(iii) That the registered agent do amend the share register to reflect that the Claimant and the First Defendant are the only shareholders of the Company each holding one share and that share certificates be issued accordingly.

(iv) Prescribed costs awarded to Mr. Ashley in accordance with CPR Part 65.5 Appendix B.

Rita Joseph-Olivetti
Resident Judge
British Virgin Islands

.