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

CLAIM NO: BVIHCV 2007/0083
BETWEEN:

YUKIYASU HAYASHI

Claimant

and

JAN van HAAFTEN

First Defendant

OSATO (EUROPE) LTD

Second Defendant

Appearances: Mr Paul B. Dennis and Mr Malcolm Arthurs for the Claimant
Mrs Tana'ania Small-Davis for the First Defendant
The Second Defendant was not represented and did not appear

JUDGMENT

[2009: 9 and 10; 18 December]

(Transfer of shares in BVI Business Company – whether for valuable consideration – whether outright transfer – whether on trust for transferor – terms of trust – whether revocable)

[1] Bannister J [ag]: This is a claim by Mr Yuki Hayashi ('the Claimant') for a declaration that 6,750 ordinary shares in the capital of the second Defendant ('the company') are held by Mr Jan van Haaften ('the first Defendant') in trust for the Claimant and for an order that the register of members of the company be rectified 'to reflect that the said shares are held by the first Defendant in trust for the Claimant.' The prayer also asks for an order that the company's Registered Agent (which is not a party to these proceedings) effect the rectification sought.

[2] The Claimant is President and sole shareholder of Neo-River Inc ('Neo-River') a company registered under the laws of Japan. Neo-River was formed in 1996 to develop a preparation made from fermented papaya juice ('FPP') marketed as Immun'Age and which is claimed to have beneficial health properties. At some time in 2000 the Claimant met the first Defendant, who is of

Dutch nationality and an entrepreneur with experience in the distribution of food products. He suggested using the vehicle of a BVI registered company for the purpose of distributing Immun'Age on the European market. The company was accordingly incorporated in November 2000 for that purpose and on 28 November 2000 it entered into a distribution agreement with Neo-River ('the distribution agreement'). Sometime later the first Defendant introduced the Claimant to Dr Pierre Mantello ('Dr Mantello') and Mr Folkert J Sneep ('Mr Sneep'). Dr Mantello is a biologist and a director of the Osato Research Institute, which is an organization based in Japan engaged in medical research, including research into the use of FPP and complimentary and alternative medicine. Mr Sneep has worked in the food industry for thirty years and is currently senior vice-president of Sara Lee. He is clearly a man with wide experience of the industry.

[3] The company has an authorized share capital of 50,000 of US$1 each. Of these, 25,000 have been issued. Originally, 6,750 were allotted to each of the Claimant, the first Defendant and Mr Sneep, giving each of them 27% of the company. The remaining 19% were split between Dr Mantello and one Paul Hugenholz. The latter's shares were later redeemed and reissued between Dr Mantello and the first Defendant's wife. Dr Mantello thus holds 3,562 shares and the first Defendant's wife 1,187. It can readily be seen from this distribution that any two of the Claimant, the first Defendant and Mr Sneep can form a majority, but that no one of them can form a majority without an alliance with one of the other two.

[4] The day to day management of the company was handled by the first Defendant. It was common ground at the trial that by early 2005 divisions had arisen between the first Defendant and Mr Sneep. Mr Sneep had formed the view that the first Defendant's management of the company was not transparent and he was pressing for steps to introduce what he considered to be proper corporate governance to the company. There was an unsatisfactory AGM held in Monaco on 8 March 2005 (which the Claimant attended by proxy) but if anything that only served to exacerbate Mr Sneep's concerns. He announced his intention of causing an independent audit of the company's affairs to be made, although how he supposed that he was going to be able to bring that about is not clear.

[5] At this time there was harmony between the Claimant and the first Defendant. It was the Claimant's evidence, which I accept, that during this period and indeed until at least early 2006 he trusted the first Defendant. He told me that the first Defendant enlisted his help in resisting what

the first Defendant perceived to be an attack on the company and/or the company's market for FPP by Mr Sneep (the Claimant referred to this in his oral testimony as 'the Sneep attack'). He said that the first Defendant told him that the only way to fend off the Sneep attack was for majority of the company's issued shares to be held by a single individual. The first Defendant therefore proposed that the Claimant sell his 6,750 shares to the first Defendant.

[6] The first Defendant wrote to the Claimant by letter dated 21 July 2005 (but not posted until 28 July) in the following terms:

> '21 July 2005
>
> Dear Yuki,
>
> I refer to our discussions recently concerning your shares in Osato Europe Ltd., main distributor for FPP products in Europe.
> We agreed that you would sell your shares to me in return for my agreement to let you have a profit share equal to 27.8% of all and any dividends paid out by the Company, which I hereby confirm and guarantee.
> I also attach a share transfer form in respect of your holding of 6,750 shares in Osato Europe Ltd., which please sign where marked and return to me for further processing after which you will no longer be a registered shareholder.
>
> Yours sincerely
> J H van Haaften'

The enclosed transfer document was in the following form:

> 'SHARE TRANSFER FORM
>
> I/We: YUKIHAYASHI of 1956 Inatomi Ono-Cho, Ibi-gun, Gifu 501-0501, Japan (the Transferor)
> and
> JAN VAN HAAFTEN of L'Espadon, 41 Avenue des Papalins, MC 98000 Monaco (the Transferee)
> DO HEREBY TRANSFER to the said TRANSFEREE
> Number of Shares : 6750
> Class of Shares : Ordinary
> Par Value per Share: $1.00
> In the share capital of: OSATO EUROPE LTD.

> To hold unto the said TRANSFEREE, his/their executors, administrators and assigns, subject to the several conditions on which I/WE held the same at the time of execution hereto.
>
> And I/We, said TRANSFEREE, do hereby agree to take the said shares subject to the same conditions.
>
> Signed this 21st day of July, 2005.
>
> TRANSFEROR:…… Witness:……
>
> TRANSFEREE:…… Witness:……..'

[7] The following points will be noticed: first, the letter states that an agreement had already been reached for the sale by the Claimant to the first Defendant of his shareholding in the company. It is the evidence of the Claimant in his witness statement, which was consistent with the evidence which he gave in cross examination, that he never agreed to sell his shares to the first Defendant. Secondly, the terms of the proposed 'sale' are highly unusual. As the holder of 6,750 shares the Claimant was already entitled to 27% of any dividends declared by the company. If he 'sold' the shares to the first Defendant on these terms he would be retaining (as against the first Defendant, at any rate) the right to any dividends that might be declared but giving away the right to vote and to participate in any distributions on the winding up of the company for nothing. Thirdly, the reference to 27.8% (rather than 27%) is puzzling. The same curiosity is apparent at paragraph 14 of the Claimant's witness statement, where the Claimant says that if he sold his shares to the first Defendant, that would result in the first Defendant having a 55.6% holding. No point was taken about these figures at trial and I think that the explanation is probably that there has been a misprint or arithmetical error. In any event, no dividends were paid after 21 July 2005. Finally, it will be noticed that the draft transfer makes no mention of any consideration being payable.

[8] The Claimant says in his witness statement that on about 10 August 2005 the first Defendant 'contacted' him (how is not stated) to persuade him to sign the transfer but that the Claimant refused to do so. Dr Mantello told me, and I accept, that the first Defendant approached him and asked him to speak to the Claimant about the Claimant's shares. The Claimant and Dr Mantello both gave evidence that on 25 August 2005 they met at Neo-River's offices in Japan with a Mr Masaaki Oka ('Mr Oka'), described by both witnesses as a Japanese former banker and an adviser to the Claimant in his capacity as president of the Osato Research Institute. Their evidence is that it was Mr Oka's advice that the Claimant should not sell his shares to the first Defendant but instead transfer them to him to be held in trust for the Claimant. They said that the Claimant

accepted this advice and that Dr Mantello telephoned the first Defendant on 25 August to tell him of the Claimant's decision. I was shown a telephone log of Neo River which evidences that a 60 second call was made to Monaco from its offices on 25 August 2005. Dr Mantello confirmed in cross examination that he had indeed telephoned the first Defendant and told him of the first Claimant's decision and that the first Defendant was upset and told Dr Mantello that he would find another solution. This conversation is denied in the defence. I found the evidence of the Claimant and Dr Mantello as to these events credible, although it is only fair to record that none of this was put to the first Defendant in cross examination.

[9] On the same day, the Claimant sent a fax to the first Defendant in the following terms:

> 'Confidential
>
> August 25, 2005
> Mr. Jan van Haaften
> cc. Jason Office Mr. J.D. Hubbard
> Fax 377 93 25 58 36
> Dear Jan,
> I could know from Pierre about several potential risk which may raise near future.
> So I am pleased to ask you to treat these things.
> I would like to ask you to add one sentence in your letter to me on the 21st July, 2005.
> I am sure to sign my name on the transfer from as soon I received your amended letter with your sing to me.
> With best regards
> Yuki HAYASHI'

[10] On 26 August 2005 Mr Digby Hubbard, of Jason s.a.m. ('Mr Hubbard', 'Jason') sent a three page fax to the Claimant. Mr Hubbard represented Egmont International Associates Inc on the board of the company from 2000 until late 2005 and Jason (which belonged to Mr Hubbard) provided secretarial and accountancy services to the company. The cover letter said as follows:

> 'Ref: Osato Europe Ltd.
> Dear Yuki
> I attach Jan's new letter regarding your shareholding in the above along with a new share transfer form!
> The originals follow by airmail.

Please sign and return the new original share transfer form to us here in Monaco.
Hope all goes well
Yours sincerely
Digby Hubbard'

The 'new' letter was signed by the first Defendant and was in the following terms:

'J.H. van Haaften
L'Espandon
41 Avenue des Papalins
MC 98000 Monaco
Private & confidential

Yuki Hayashi, Esq.
Osato Research Institute
1956 Inatomi Onocho
Ibigun Gifu 501-0501
Japan
21 July, 2005
Dear Yuki,
I refer to our discussions recently concerning your shares in Osato Europe Ltd., main distributor for FPP products in Europe.
We agreed to the idea of a single name concentrated holding of the whole shares, in which regard I would hold your shares in trust for your interest and in return for my agreement I would let you have a profit share equal to 27.8% OF ALL AND ANY DIVIDENDS PAID OUT BY THE Company, which I hereby confirm and guarantee.
I also attach a share transfer form in respect of your holding of 6,750 shares in Osato Europe Ltd., which please sign where marked and return to me for further processing, after which you will no longer be a registered shareholder.
Yours sincerely
J. H. van Haaften'

The accompanying share transfer form was in identical terms to that set out in paragraph [6] above except for the fact that there was inserted immediately after the parties clause the following phrase:

'for good and valuable consideration received'

[11] The originals of these documents were sent to the Claimant by air mail on 30 August 2005 and some time thereafter he executed the share transfer form and must have returned it to Mr Hubbard.

Who drafted the revised wording of the new '21 July' letter is somewhat of a mystery. The Claimant says that the wording was provided to the first Defendant by Dr Montello orally in the telephone call to which I have referred. Dr Montello's evidence in cross examination (taken from my note) was that in that call he told the Claimant that 'it was OK to transfer the shares, but he [the Claimant] wanted to add some sentence because trust OK [but] he did not want to sell'. In cross examination Dr Montello frankly admitted that he did not know what 'trust' means, so that I find it rather surprising that he was able to give instructions on the wording during this short telephone conversation. Mr Hubbard gave evidence at the trial. In his witness statement he refers to the revised wording, but does not say from where it originated. His oral evidence went no further on this point. At the end of the day, it may not matter very much because there is no dispute that the first Defendant signed the revised letter.

[12] The Claimant says that as a result of these dealings the first Defendant holds the transferred shares on trust for him. He said in evidence that he signed the transfer without noticing the additional words regarding consideration and that he received no consideration for the transfer. In his pleaded defence the first Defendant admits that he held the transferred shares on trust for the Claimant but says that the trust was for an 'indefinite period of time' and that the Claimant 'would never return in his capacity as shareholder', but that he would remain entitled to the dividends on the shares. In addition, the first Defendant says that he did give consideration for the transfer, because he agreed to assist the Claimant in exploring the US market and attended trade fairs with that object. Finally, he alleges that the transfer was part of an overall arrangement between himself and the Claimant whereby the first Defendant would eventually become the sole distributor of the product to the exclusion of Mr Sneep (and the other shareholders of the company).

[13] Dealing with the last point first, there is no doubt that on 24 January 2006 an agreement was signed between Neo-River and a Marshall Islands company called Papaya Products Ltd ('Papaya') under which Neo-River appointed Papaya as distributor for a period of five years with effect from 1 October 2005. The territory consisted of the existing member countries of the European Union apart from France and Italy, but with a provision for the addition of those two countries as from 28 June 2010. It appeared that distribution within France and Italy was already contracted to two other companies, who paid a royalty to a subsidiary of the company called Immun'Age Europe and

whose rights would not expire until 27 June 2010. The first Defendant's evidence was that Italy and France then accounted for about 95% of the business. The Claimant put it at 100%.

[14] The first Defendant says and I accept that he is the sole owner of Papaya. The Claimant admitted executing the Papaya agreement on behalf of Neo-River and also admitted that he had no shareholding, direct or indirect, in Papaya. He said that he thought that Papaya was a subsidiary of the company. The first Defendant was adamant that the Claimant knew that Papaya was wholly owned by the first Defendant. What is certain is that the Claimant knew that he himself had no interest in Papaya. The Claimant's evidence was that he trusted the first Defendant at this time and was working with him to protect the market in Immun'Age from attack by Mr Sneep (although the precise nature of that attack was never made clear). In my judgment, the common intention of both men in causing the parties to enter into the Papaya agreement was that the company should be left to wither on the vine and that as a result Mr Sneep would cease to be a problem. It does not seem to me, however, that the execution of the Papaya agreement in January 2006 throws any light upon the terms upon which the Claimant had transferred his shares to the First Defendant pursuant to the exchanges of correspondence in August 2005.

[15] I reject the first Defendant's contention that the share transfer was made by the Claimant in consideration of a promise by the first Defendant to help Neo-River develop the US market. The first Defendant was forced to admit that Neo-River/Osato already had its own presence in the United States. There was no indication that the original proposal for a sale of the Claimant's shares was to be supported by any consideration in the nature of assistance in developing a US market and it is not credible that such a suggestion should have surfaced between the Claimant's rejection of the sale route and the adoption of the trust route. While it is correct that the transfer signed by the Claimant recited that valuable consideration had been received, he is entitled, in my judgment, to assert, as against his immediate transferee, that no consideration was in fact given: Creque v Penn[1]. I find that no consideration was given by the first Defendant for the transfer.

[16] As Mrs Small-Davis, who appeared for the first Defendant, pointed out, the name given by the parties to a transaction must, in the absence of some sort of estoppel, yield to what the court finds to be its true nature if that turns out to be inconsistent with the label given to it by the parties. I do not think that I need to cite authority for that proposition. In this case, of course, the first Defendant

[1] [2007] UKPC 44

admits in his pleading that he held the shares upon trust for the Claimant, but he adds that the trust was for an indefinite period and that the Claimant was never to return as a shareholder. By 'indefinite period' I take the first Defendant to have intended that the pleading should mean not, as the words suggest, a period whose length was not defined (as might be the case with a bare trust) but a period with no terminus at all – in other words, that the transfer was irrevocable. That seems to me to be the sense of the first Defendant's pleading on this point when read as a whole. If I am right in so thinking, what the defence is really pleading is that apart from the entitlement to dividends, which the Claimant retained, the transfer of the shares was an outright transfer.

[17] In cross examination, however, the first Defendant said that may be 'indefinite' was the wrong word. He then said that it would have meant the rest of the period during which the contracts with the existing the French and Italian distribution companies had to run (which appears to have been until sometime in mid-2010). That is a clear concession that the arrangement was intended to be temporary only.

[18] In the revised letter bearing the date 21 July 2005 which the first Defendant signed, there is, as a matter of language, a clear declaration of trust. But if that was intended to take effect according to its terms, it is difficult to see why it was necessary to provide that the Claimant was to retain the right to dividends 'in return'. As the beneficiary the Claimant would be entitled to that in any event. So far as voting rights are concerned, the Claimant in his evidence insisted that he gave the first Defendant instructions how to vote the shares. He had to withdraw this rather rash assertion when it was pointed out to him that no general meetings of the company were ever held following the transfer. In his witness statement the first Defendant says that following the transfer he voted the shares as he thought fit without reference to the Claimant. In cross examination he, too, had to withdraw that part of his evidence. If the intention was, as the first Defendant maintained (although, as mentioned above, he abandoned the suggestion that the arrangement was to be 'indefinite') to give him an unfettered right to block the activities of Mr Sneep, then a bare trust would not fit the purpose, since the Claimant would be entitled to direct the first Defendant how to vote and would remain free, if the alliances shifted, to join forces with Mr Sneep to defeat the first Defendant. The Claimant was inclined to accept that the first Defendant could vote the shares as he wished under the arrangement but only, on his account, for the temporary expedient of fighting off the Sneep attack.

Conclusion

[19] I did not find either of the Claimant or the first Defendant to be a wholly reliable witness, although it has to be appreciated that neither was giving evidence in his first language. The matter is exacerbated because I suspect that the concept of a trust was foreign to both of them and that neither had any understanding of the ordinary English law meaning of the words that were being used in the revised letter, which itself is cobbled together by combining the new 'trust' language with that part of the original language which was supposed to provide the consideration for a sale. What can be said with certainty, however, is that the Claimant clearly rejected the original proposal for a sale of the shares and stipulated for something else, which the first Defendant was prepared to go along with. It seems to me that this drives one to the conclusion that both parties intended that the effect of the transaction should be something less than an outright transfer. That conclusion is reinforced by the first Defendant's concession that the arrangement was not to be 'indefinite'. In my judgment the only available candidate is some sort of share lending designed to clothe the first Defendant with the right to defeat Mr Sneep at a general meeting, which seems to me to fit tolerably well with the concept of a trust, but a trust under which the trustee has full discretion as to the exercise of voting rights so long as it subsists. Mr Sneep's evidence, which I accept, is that after the Annual General Meeting of 8 March 2005 the first Defendant told him that he was going to try to get a permanent proxy to ensure that he always had a majority vote. I think that the overwhelming probability is that the trust idea was perceived and intended by the parties as the way to achieve exactly this result.

[20] I therefore find that the first Defendant did not acquire beneficial ownership of the shares under the transfer. What he got was the right to vote the shares free for any directions on the part of the Claimant for so long as the trust upon which he held them subsisted.

[21] The only question which remains is when and in what circumstances this arrangement could be revoked. I accept the Claimant's evidence that its original purpose was to deal with a perceived threat from Mr Sneep and the first Defendant says as much in his witness statement. There is no evidence that any such threat is ongoing (if it ever existed). The Claimant and the first Defendant fell out in the autumn of 2006, when the Claimant caused Neo-River to determine the distribution agreement which it had with the company. There are ongoing proceedings in the Netherlands arising out of that in which final judgment is awaited. The first Defendant says that the company

has, as a result of Neo-River's and the Claimant's conduct, become an inactive company. I should add for completeness that in an interim judgment the Dutch Court has held that Neo-River was not entitled to terminate the agreement when it did. The Claimant admitted (after first denying it) that his motive in seeking to have the shares back is so that he can cause the company to abandon those proceedings (presumably in concert with Mr Sneep).

[22] It seems to me, therefore, that any original purpose for the transfer must have come to an end and that it has therefore become revocable. It is not asserted and I do not consider that the Claimant's conduct in relation to the termination of the distribution agreement (assuming, without deciding, that it was wrongful) can have affected his beneficial interest in the shares and his motive for wanting them back is, in my judgment, irrelevant to the question of ownership. I accordingly hold that he is entitled to have them re-transferred.

[23] I will therefore grant the declaration sought by paragraph 28(i) of the statement of claim. I will not grant an order in the form sought by paragraph 28(ii) since (unless the Articles of Association of the company are in unusual form, in which case I will hear further submissions on the point) the company will not be affected by notice of any trust and accordingly will not record beneficial interests in its register of members. I will not make an order in the terms sought in paragraph 28(iii) of the statement of claim, since the circumstances under which the Court will order rectification have not arisen: see section 43 of the Business Companies Act, 2004. In any event, I would not make such an order against a non-party.

[24] I will order the first Defendant to execute a transfer of the 6,750 shares which he holds on trust in favour of the Claimant and to deliver it to the Claimant. I further order the first Defendant to deliver to the company the certificate or certificates relative to his present holding for cancellation and for

the issue of separate certificates to him and to the Claimant showing each of them as entitled to 6,750 shares. Should the first Defendant not execute a transfer as ordered I will consider using the Court's powers under section 25 of the West Indies Associated States Supreme Court (Virgin Islands) Ordinance (CAP 80).

Commercial Court Judge

18 December 2009