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

CLAIM NO: BVIHC(COM) 2010/178

BETWEEN:

CHAN, YIU-KUI ORLANDO
(Personal representative of the estate of Lam Yat Wah,
Otherwise known as Chan, Lam Yat Wah or Lam Chiu Shun)

Claimant

and

TERRA INTERNATIONAL HOLDING INC.

Defendant

Appearances: Mr Nicholas le Poidevin QC and Jack Husbands for the Claimant in BVIHC (COM) 2010/178 ('the rectification claim')
Mr Michael Pringle for the Defendant to the rectification claim
Mr David Brownbill QC and Mr Ian Mann for the interveners in the rectification claim and for the Claimants in BVIHC (COM) 2011/68 ('the administration claim')

JUDGMENT

[2011: 22 June, 5 July]

(Claim by personal representative for rectification of defendant company's register of members –whether claimant entitled as of right – whether claimant is presently deceased's executor within the meaning of company's articles of association – whether claimant to be restrained on equitable grounds from seeking rectification in his sole name – whether claimant to be directed to seek joint registration in names of himself and other beneficiaries of the trust of which defendant company is trustee – whether such beneficiaries entitled to be registered in place of the claimant – whether claimant to be restrained from changing constitution of the defendant company's board)

[1] **Bannister J [ag]:** I have to decide whether the register of members of a company called Terra International Holdings Inc ('the Company') should be rectified by substituting for the name of Chan, Lam Yat Wah ('the deceased') as the sole holder of the only issued share in the Company ('the

share') that of the Claimant Chan, Yiu-Kui Orlando, who will, I hope, acquit me of any impertinence if I refer to him purely as a matter of convenience as 'Orlando.' A document described as the Company's defence is before Court, although by what authority it has been served escapes me. Mr Pringle, who attended the hearing and rather bravely claimed to be representing the Company, told me that the Company was content to abide by the order of the Court. The necessity for the present proceedings appears to have its origins the most recent of what appear to have been many breakdown in relations between Orlando and certain of his siblings, one of whom, Cecilia Chan Kit Lai (whom I shall on a similar basis refer to as 'Cecilia') is, together with Orlando and their nephew, Geoffrey Chan ('Geoffrey'), a member of the Company's three-director board.

Background

[2] The Company is the sole trustee of a trust called the Terra Unit Trust ('the trust'), which was set up by the deceased. Units are held by some of Orlando's siblings and Geoffrey and some were held by the deceased herself and thus form part of her estate, which is presently held (subject to questions which are raised in respect of the interests of two of his sisters (Anita and Rosalind) for Orlando and his siblings other than his eldest brother. As far as I understand it, the trust assets currently consist of the proceeds of sale, amounting to some CAD 30.5m, of a property in Vancouver called the Bellevue Tower. The proceeds are held by a special purpose vehicle called Canterra International Holdings Inc ('Canterra'), which is a wholly owned subsidiary of the Company. It follows that if Orlando's application is granted, he will have sole control of the assets of the trust.

[3] The background to this application is what may be described without, I hope, discourtesy, as a family dispute. Its ultimate origins, if they ever were discernible, are not known to the Court. No doubt as a result of this background the course of argument during the hearing tended at times to confound matters of pure company law with deep principles of the law of administration of estates and of trusts and allegations of real or imagined misconduct. I have come to the conclusion that the only way in which I can hope to achieve anything approaching a just result is by taking things in stages. I shall therefore start by considering Orlando's application for rectification of the Company's share register.

Rectification claim - facts

[4] The deceased died on 1 January 2002. Probate of her will was granted in Hong Kong to Orlando and his brother Michael on 12 June 2003. They obtained a grant from the Supreme Court of British Columbia later in the same year. Michael died on 6 May 2010. On 22 June 2010 Orlando wrote to the Company's board enclosing copies of the Hong Kong grant and Michael's death certificate and asked as her sole surviving personal representative to be registered in place of the deceased. A copy of the letter was sent to Harney's in their capacity as the Company's registered agent.

[5] Orlando's request was considered at a meeting of the Company's board held in Hong Kong on the same day. The meeting was attended by all three directors (in the case of Orlando by an alternate) and by legal advisors to the Company. The minutes of the meeting record that the board considered Orlando's request in light of the Company's Articles of Association, noted that there was no dispute that Orlando was the sole surviving executor named in the deceased's will, but formed the view that Orlando needed a BVI grant, even though Orlando's legal representatives, Walkers, had already advised that the application was sufficiently made as presently constituted. At the end of the meeting it was agreed by Cecilia and Geoffrey that in order to save costs it would be sufficient if an opinion from Walkers confirming their advice were to be 'produced to the Company to accept [Orlando's] application.'

[6] On 18 October 2010 Orlando obtained a grant out of the Registry of the Supreme Court here in the BVI. On 27 October 2010 he wrote again to the Company (copy to Harneys) enclosing a copy of the BVI grant and asking the board to treat the letter, together with that of 22 June 2010, as his application for registration. On 17 November 2010 Canadian lawyers acting for Geoffrey submitted an amended draft board resolution in terms with which, they said, Geoffrey 'would be more comfortable.' The amendments consisted in substituting the words 'Executor of the Estate' for the words 'personal representative' where they appeared in the existing draft board resolution. A draft written resolution incorporating the amendments was sent by Orlando's lawyers to Geoffrey's Canadian lawyers on 18 November 2010 for signature by Geoffrey. The email was copied to Cecilia. On 19 November 2010 the Canadian lawyers responded saying that they expected that Geoffrey would attend at their offices to sign the document on 22 November 2010. That was

followed by an email from the Canadian lawyers saying that Geoffrey would instead like to execute and sign the resolution at a forthcoming board meeting to be held in Hong Kong on 23 November 2010 and which was to be attended by Orlando and Cecilia (or any subsequent day that week).

[7] An email sent on 23 November 2010 by Orlando's lawyers to Cecilia (which appears to have included the written resolution as an attachment) stated their understanding that Geoffrey had signed the written resolution on 22 November 2010 and invited Cecilia to sign the attachment and return it by email, followed by hard copy.

[8] There then appears to have been a change of plan. The board meeting envisaged for the week commencing 22 November 2010 was now to be replaced by a family meeting instead of a formal board meeting of the company, in order to enable Michael's executor, his widow Lily, to attend. The resolution to accept Orlando's registration would, therefore, be carried out by way of written resolution as originally envisaged. Why the fact that the meeting was now to be a family meeting precluded those attendees who were directors of the Company from passing the resolution at an *ad hoc* board meeting (or simply signing the written resolution on the spot) is not explained.

[9] On 29 November 2010 Cecilia emailed Geoffrey's Canadian lawyers and Orlando's Hong Kong lawyers to say that she would be attending the proposed family meeting on 2 December 2010 at the offices of Orlando's lawyers and that 'she would conclude the transfer of the shares then.'

[10] The first signs of backsliding appeared in an email of 6 December 2010 from Orlando's lawyers to Geoffrey's Canadian lawyers (copied to Cecilia). It appears that Geoffrey had been having difficulty arranging an airline reservation, so that the intended family meeting had not taken place in Hong Kong on 2 December 2010. Accordingly, Orlando's lawyers asked that the matter be dealt with, as originally agreed, by way of round robin written resolution.

[11] That request appears to have been met with silence and by email dated 16 December 2010 Orlando, through his lawyers, called a board meeting for 21 December 2010 for the purposes of considering Orlando's request for registration. Orlando turned up but neither Cecilia nor Geoffrey attended. The intended meeting had to be abandoned as inquorate.

[12] On 30 December 2010 Orlando issued his claim form and statement of claim seeking the rectification of the company's register of members and Barker Adams (Mr Pringle's firm) appears to have felt comfortable enough to accept instructions from (I presume) two only out of the three members of the company's board to serve a defence purportedly on its behalf on 24 February 2011.

[13] On 28 March 2011 Lily, Cecilia and Cecilia's sister Belinda applied to be joined as parties to Orlando's rectification claim. They did so, according to their notice of application, as residuary legatees of the deceased. Lily is Michael's executrix. The grounds relied upon in the joinder application are that the applicants wish to argue that Orlando's claim should be refused and instead the single share in the company should be registered in the joint names of Lily, Orlando, Belinda and Cecilia. The reasons given in the application why the Court should adopt that course are: that the administration of the deceased's estate is complete; that the residue is ascertained; and that Orlando has accordingly ceased to be an executor and has become a trustee of the residue, with the sole duty of transferring the remaining assets to those entitled under the deceased's will. There is therefore, so it is said, no good reason for registering the share in the name of Orlando alone. It should be registered instead in the names of the residuary legatees, or of those of them who have not waived or surrendered their entitlement. Finally, it is said that Orlando's request for registration has presented the Company's directors with a dilemma as to whom they should accept as entitled to be registered as the holder of the share. This dilemma seems to have been one of fairly recent origin. At any rate, it does not appear to have presented itself until sometime after 29 November 2010. On those grounds, they seek joinder.

[14] On 1 June 2011 Orlando issued an application for summary judgment and to strike out the defence. That came before me on 22 June 2011, together with the joinder application.

Other proceedings

[15] On 14 June 2011 Lily, Cecilia, Belinda and Geoffrey issued a fixed date claim form, returnable on 22 June 2011, seeking (1) the appointment of Cecilia as co-trustee together with the Company of the trusts of the deceased's will and (2) what is described as a 'direction' to Orlando that, if he is

registered as the member in respect of the deceased's share in the Company, he will make no unilateral changes to the Company's board. Similar relief is sought in relation to the unit trust. Obviously, Orlando had had no proper opportunity to respond to this very late application and, although its existence was noted by the Court, it was not treated as being for decision on 22 June 2011. I shall refer to this as 'the administration action.'

The rectification claim - reasons

[16] It seems to me that the first question I have to decide is whether Orlando is *prima facie* entitled to be registered as member of the Company in place of the deceased. Only if I come to the conclusion that he is should I proceed to consider whether to hear the interveners. I bear in mind that the joinder application relies indiscriminately upon matters which go to the question whether Orlando is entitled under the Company's Articles of Association to be registered as a member and separately upon matters said to give the Court jurisdiction to deny Orlando registration even if he is shown to be otherwise entitled to it. In what follows I shall attempt to keep these two quite different lines of argument separate.

The Company's Articles of Association

[17] The relevant Articles of Association of the Company are, first, Articles 41 to 44:

> 'TRANSMISSION OF SHARES'
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> 41. The Executor or administrator of a deceased member, the guardian of an incompetent member or the trustee of a bankrupt member shall be the only person recognized by the Company as having any title to his share but they shall not be entitled to exercise any rights as a member of the Company until they have proceeded as set forth in the next following three Regulations.
>
> 42. The production to the Company of any document which is evidence of probate of the will, or letters of administration of the estate, or confirmation as executor, of a deceased member or of the appointment of a guardian of an incompetent member or the trustee of a bankrupt member shall be accepted by the Company even if the deceased, incompetent or bankrupt member is domiciled outside the British Virgin Islands if the document evidencing the grant of probate or letters of administration, confirmation as

executor, appointment as guardian or trustee in bankruptcy is issued by a foreign court which had competent jurisdiction in the matter. For the purpose of establishing whether or not a foreign court had competent jurisdiction in such a matter the directors may obtain appropriate legal advice. The directors may also require an indemnity to be given by the executor, administrator, guardian or trustee in bankruptcy.

43. Any person becoming entitled by operation of law or otherwise to a share or shares in consequence of the death, incompetence or bankruptcy of any member may be registered as a member upon such evidence being produced as may reasonably be required by the directors. An application by any such person to be registered as a member shall for all purposes be deemed to be a transfer of shares of the deceased, incompetent or bankrupt member and the directors shall treat it as such.

44. Any person who has become entitled to a share or shares in consequence of the death, incompetence or bankruptcy of any member may, instead of being registered himself, request in writing that some person to be named by him be registered as the transferee of such share or shares and such request shall likewise be treated as if it were a transfer.'

[18] Transfer of shares is dealt with by Article 40:

'TRANSFER OF SHARES

40. Subject to any limitations in the Memorandum, the Company must on the application of the transferor or transferee of a registered share in the Company enter in the share register the name of the transferee of the share save that the registration of transfers may be suspended and the share register closed at such times and for such periods as the Company may from time to time by resolution of directors determine provided always that such registration shall not be suspended and the share register closed for more than 60 days in any period of 12 months.'

[19] The scheme of these provisions does not seem to me to admit of very much argument. When a member dies the only persons whom the Company may recognize as having any title to the shares of the deceased member are his personal representatives (Article 41). The directors are obliged to accept title a grant of probate or letters of administration granted by any Court of competent jurisdiction as evidence of status (Article 42). Orlando more than fulfils these requirements. It follows, in my judgment, that not only is no other person able to assert title to the deceased's share, but the board has no right to consider, let alone accede to a claim by any other person.

[20] It further follows that Orlando's application of 22 June 2010 should have been treated by the board as a transfer of the deceased's share (Article 43). Since registration of transfers had not been suspended, Article 40 obliged the directors to enter Orlando's name in the company's register of members as transferee of the share. That they have not done.

[21] Mr David Brownbill QC, who has appeared together with Mr Ian Mann on behalf of the interveners, says that Orlando is no longer an executor within the meaning of Articles 41 and 42. He submits that the estate is now fully administered and that Orlando has in consequence ceased to be an executor and instead become a trustee. There was a lot of heavy argument whether as a matter of fact and law Orlando has entered into that estate. I would have thought that where an asset, in this case the share, remains to be got in by acquiring legal title to it, it could not be said that the estate had been fully administered, even where the asset is of no financial value to the estate as such, but given the view I take of the construction and effect of the Company's Articles of Association, it is not necessary for me to decide the point.

[22] Orlando's title as executor derives from the deceased's will. On her death he, together with his now deceased brother Michael, became the only persons capable of being recognised by the Company as having title to the share registered in her name. Article 41 is dealing with identity. It identifies the person with whom alone the Company may deal in respect of a deceased member's shares. That person is the deceased member's personal representative. Article 42 deals with proof of identity. Article 43 (read together with Article 40) provides that the person(s) identified pursuant to Articles 41 and 42 are entitled to be registered. It does not, in my judgment, make any difference if somewhere along the line an executor entitled to recognition under Article 41 becomes a trustee of the residuary estate or even ceases to be a trustee altogether following distribution. Having been identified by the Articles as from the moment of the death of the deceased as the only person[1] with title to the share, he does not at some time in the future cease to be that person. He remains the identified person.

[1] in the present case Orlando is the survivor of two co-executors, but that does not affect the point

[23] Any other construction would be a recipe for chaos. The directors of the Company could never safely deal with an executor if ever there was the slightest doubt (which they themselves would have no means of resolving) whether the estate in question had yet to be fully administered. The construction contended for by Mr Brownbill QC treats the opening words of Article 41 as if they read 'The person who at the time when the request for registration is made is performing the functions of the executor, etc.' That is not what Article 41 says. Article 41 requires the company to recognise, and recognise only, the person who fits the description of the deceased member's executor. Orlando may (or may not) have finished carrying out his functions as such, but that does not make him any the less his mother's executor, as anyone reading her will can ascertain - any more than her death meant that he was no longer her son.

[24] If Mr Brownbill QC were right, then any share standing registered in the name of a deceased member would be permanently disabled if no application was made to re-register the share during the actual process of administration. I would not construe these Articles of Association as productive of such a result unless I felt compelled to do so. For the reasons given earlier I do not feel anything of the sort.

[25] Mr Brownbill QC points to the words 'or otherwise' where they appear in Article 43. He says that his clients have, on the basis that the estate has now been fully administered, become entitled to the deceased's share in consequence of her death. If he is right that the administration of the estate is complete, so indeed they have. Their difficulty is that they are not the deceased's executor. The company is therefore precluded by Article 41 from recognizing them as having any title to the share. In my judgment, the words 'or otherwise' where they appear in Article 43 are designed to cover the case where someone has succeeded to shares otherwise than by operation of law – e.g. by being vested with the property of an incompetent on appointment as guardian. The words are not intended to and do not create an additional class of persons entitled to be recognised under Article 41.

[26] There is therefore no room for doubt that Orlando is absolutely entitled as against the Company to have the deceased's share registered in his name. The fact that he could, if he chose to do so,

request that it be registered in the names of the interveners, is, as between himself and the Company, nothing to the point.

[27] Section 43 of the Business Companies Act, 2004 ('the Act) provides:

> 'Rectification of register of members
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> 43.(1) If
>
> (a) information that is required to be entered in the register of members under section 41 is omitted from the register or inaccurately entered in the register, or
>
> (b) there is unreasonable delay in entering the information in the register,
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> a member of the company, or any person who is aggrieved by the omission, inaccuracy or delay, may apply to the Court for an order that the register be rectified, and the Court may either refuse the application, with or without costs to be paid by the applicant, or order the rectification of the register, and may direct the company to pay all costs of the application and any damages the applicant may have sustained.
>
> (2) The Court may, in any proceedings under subsection (1), determine any question relating to the right of a person who is a party to the proceedings to have his name entered in or omitted from the register of members, whether the question arises between
>
> (a) two or more members or alleged members, or
>
> (b) between members or alleged members and the company,
>
> and generally the Court may, in the proceedings, determine any question that may be necessary or expedient to be determined for the rectification of the register of members.'

There can be no dispute in these circumstances that Orlando's name has been omitted from the Company's register of members. He is aggrieved in consequence. The Company has no grounds for persisting in the omission and no defence to his application. The prospective interveners are not members of the company and have no rights under the Company's Articles of Association to be treated as if they were or to interfere in the company's management of the Company. They can have no better right than the Company to resist Orlando's application. Their application to be

joined must therefore be dismissed. I will therefore order the company's register of members to be rectified to show Orlando as the holder of the deceased's share.

[28] I was pressed hard by Mr Brownbill QC not to order rectification. He relies upon affidavits from Cecilia, Belinda and Lily cataloguing some of the ancient disputes which seem to have dogged the family's relations with each other and which are said, strangely, to have given rise to their recently[2] acquired anxieties. Nothing in any of this hoary and embarrassing material gives me any grounds to believe, let alone convinces me, that Orlando is likely to pocket the CAD30.5m or any part of it.

[29] Mr Brownbill QC is on firmer ground when he submits that there is no need for Orlando to get himself registered. The co-executors did not seek registration during Michael's lifetime and it has taken eight and a half years since her death her death for this application to be made. It is only since the check on unilateral action has been removed by the death of Michael that registration is sought. Mr Brownbill QC submitted that there can only be some sinister motive behind Orlando's wish to be so registered and invited me either to deny him registration (which, for the reasons I have given above, I am in no position to do) or, if he is to be registered, to impose restrictions upon what he can do in consequence.

[30] Mr Le Poidevin QC submitted that Orlando needed to be registered in order to find out what is going on, or has been going on, at the Canterra level. He objects to my taking any account of what, he submits, are no more than suspicions on the part of those represented by Mr Brownbill QC and complains, with some considerable force, about the delay in bringing the administration action and the absence of any opportunity for him to respond to it before the hearing of the rectification claim. He objects that no properly formulated claim for interim relief has been served upon Orlando and says that the change in attitude between the apparent willingness of the interveners to accept Orlando's registration request up until sometime after the end of November 2010 and the insinuations of apprehended wrongdoing being made now cries out for some sort of explanation.

[2] see the narrative at paragraphs [4] to [9] above

[31] My mind has wavered about this but I have come to the conclusion that Mr Le Poidevin's submissions are to be preferred. I do not think that it would be right for me to make an order restraining Orlando from taking whatever lawful steps will be open to him once registration has been completed on the basis of nothing more that sibling rivalry and unparticularised apprehension. That is not a proper basis for granting interim relief.

Commercial Court Judge
5 July 2011