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

CLAIM NO: BVIHCOM 2010/54

BETWEEN:

VISCAYA AMADAORA SA
PMP ANGUILLA LIMITED

Claimants/Respondents

and

VIRGTEL LIMITED

First Defendant

HARVEY ZABUSKY

Second Defendant

Appearances: Mr Paul Dennis and Ms Nadine Whyte for the Claimants
Mr John Carrington for the second Defendant
The first Defendant was not represented and did not appear

JUDGMENT

[2011: 3-6; 14 October]

[1] **Bannister J [ag]:** The first Defendant ('Virgtel') was incorporated on 5 February 1999 as an International Business Company with an authorised capital of 600,000 shares of US$1 each. Virgtel was set up to invest in a Nigerian telecommunications company called Virgin Technologies Limited ('VTL'). Although the evidence is far from clear, it appears that VTL had been established in around 1995 by the second Defendant ('Mr Zabusky'), who appears to have provided it with loan capital. Mr Zabusky held his interest through a BVI registered company called Morginat Enterprise SA ('Morginat'), a company beneficially owned by him and his wife. There were other shareholders in VTL including a Nigerian registered company called BZ Investments Limited ('BZ'), which was owned by one Mohammed Shuiabu ('Mr Shuiabu'). Mr Shuiabu appears to have acted as manager of VTL. Some time before May 1999 Mr Zabusky had persuaded a gentlemen called

Sam Gazal ('Mr Gazal') to invest in VTL. For reasons which never became clear at trial, this investment was to be structured through Virgtel, and to that intent on 16 May 1999 a shareholders agreement was entered into between a BVI registered company called White Owl Limited ('WOL'), beneficially owned by Mr Gazal, BZ and a BVI registered company called Amalia Investments Limited ('Amalia') ('the SHA'). Amalia was ultimately beneficially owned by Mr Zabusky and his wife through Morginat. Virgtel was a party to the SHA, its then sole director having approved it and authorised its execution by Virgtel.

[2] The principal terms of the SHA may be summarised as follows. Virgtel's issued share capital was to be held 50% by WOL, 40% by Amalia and 10% by BZ. Shares were issued to those parties in those proportions, paid up by capitalising US$300,000 of loans made by WOL and another US$300,000 lent by Amalia and BZ. The result, which is common ground, is that WOL held 300,000 shares, Amalia 240,000 and BZ 60,000. The SHA also dealt with outstanding shareholders' loans. It recorded that WOL had already lent US$1.2 million and that Amalia and BZ had lent a similar amount 'jointly.' It was wholly unclear whether these loans were made to Virgtel or directly to VTL, but the SHA stipulated that their repayment would depend upon profits made by the operating company, VTL. Mr Zabusky says in his witness statement that the sum of US$960,000 remains outstanding from Virgtel to Amalia in respect of its lending and that allegation was not challenged. The SHA entitled each of WOL and Amalia to appoint two directors to the Virgtel board and declared, by clause 7.2, that the initial board of directors would consist of: Alan Robertson ('Mr Robertson'), a Hong Kong solicitor who appears to have acted as formation agent for Virgtel and its shareholders and who was Virgtel's first director (his firm being its first secretary); Mr Zabusky; Mr Gazal; Mr Shuiabu; and a Mr Gulotta (who apparently represented Mr Gazal's interest).

[3] Clause 8 of the SHA contained a preemption provision requiring a proposing transferor to offer its shares to the remaining shareholders in proportion to their existing holdings. There was an exemption for transfers to wholly owned subsidiaries and by wholly owned subsidiaries to their parents.

[4] Whether Virgtel ever became a shareholder in VTL remained the subject of confusion from start to finish of the trial. The statement of claim asserts that Virgtel holds 85% of VTL's issued shares. Although Mr Zabusky's further amended defence appears[1] to accept by implication that Virgtel held shares in VTL down to 1 November 1999, Mr Zabusky denies in his witness statement that Virgtel ever held any shares in VTL and although there is some support for this in a so-called Protocol (to which I shall have to return later) dated 20 October 2000[2], a 'Summary' of VTL's position as at 31 July 2000 sent by Mr Gazal to Mr Hendrik van Leeuwen ('Mr van Leeuwen') when he was contemplating investing in Virgtel/VTL described Virgtel as the holder of the 85% stake in VTL. The share sale agreement of 12 October 2000 between WOL and Viscaya Armadora SA to which I shall also have to return later recites Virgtel as having 85% of VTL's shares and was expressed to be conditional upon confirmation of (presumably) WOL's solicitors that they had custody of a share certificate evidencing that holding. I find as a fact that Virgtel was and remains the holder of 85% of the issued share capital of VTL.

[5] What is at issue in these proceedings is the question who controls Virgtel. Since VTL went into receivership some years ago and has ceased to trade the question might be asked why it matters. The answer is that in 2005 Mr van Leeuwen caused Virgtel to launch a derivative claim on behalf of VTL in the High Court in Queensland claiming, as I understand, misfeasance on the part of Mr Zabusky in relation to the affairs of VTL. I stress that I have no idea and express absolutely no view as to whether those allegations are well founded or as to Virgtel's locus to maintain the Australian proceedings, but they have caused considerable distress to Mr and Mrs Zabusky (a search order was made and enforced against them by the High Court in Queensland). In April 2010 Mr Zabusky took steps here to assert that he is the sole director of Virgtel and to change its registered office. The present proceedings were Mr van Leeuwen's response and in May 2010 I granted an interim injunction restraining Mr Zabusky from holding himself out in this jurisdiction as solely entitled to give instructions on behalf of Virgtel. So what Mr Zabusky wants is a decision that he is, or is in a position to become, the only person with authority to give instructions on behalf of Virgtel and thus to bring the Australian proceedings to an end. This has required an exhaustive

[1] at paragraph 20.2

[2] recital 4 refers to WOL's successor in title, Amalia and BZ as having 85% of VTL

consideration of the dealings with Virgtel's shares and of the constitution from time to time of its board.

The dealings with the shares in Virgtel

The single share

[6] In about September 1999, some three months after the SHA was entered into, VTL appears to have got into difficulties and Mr Gazal, through a company of his, agreed to lend sufficient funds to Virgtel to enable it to meet VTL's operating costs for three months from 30 September 2009. Mr Gazal's condition was the transfer of one share in Virgtel from Amalia to WOL, thus giving WOL an overall majority. Amalia and BZ agreed to this condition and on 30 September 1999 a written agreement was entered into by Mr Gazal, Amalia (by Mr Zabusky) and BZ (by Mr Shuiabu) providing for the transfer and for some adjustments to the parties' loan accounts, which was reflected in an addendum to the SHA. On 1 October 1999 Mr Zabusky (for Morginat) wrote to Mr Robertson instructing him to prepare a transfer of the single share from Amalia to WOL. That was done and the transfer was approved by Virgtel, acting by Mr Robertson as sole director and executed by Amalia and WOL on 1 October 1999. The transfer document itself was unconditional. On the same day WOL was issued with a share certificate showing it as the holder of an additional share in Virgtel and Amalia was issued with a new certificate showing it as the holder of 239,999 shares.

[7] Mr Gazal did not come up with the promised funding and on 31 May 2000 Mr Zabusky wrote on behalf of Amalia to Mr Roberton's firm stating that the transfer of the single share had been 'forced' and had been on a temporary basis only and demanding that Mr Robertson's firm return the single share to Amalia. This was obviously passed on to Mr Gazal, who responded by saying that the transfer had been unconditional and threatening legal action if Mr Zabusky persisted in his demands. Mr Robertson replied on 7 June 2000 saying that his firm had no record that the transfer had been 'enforced' or that it had been on a temporary basis. On the same day Mr Shuiabu emailed Mr Gazal repeating Mr Zabusky's contention that the transfer had been temporary only and demanding the retransfer of the share. After this point the trail goes cold, no doubt because a

new investor, in the shape of Mr van Leeuwen, had come on to the scene at around the end of September/beginning of October 2000.

[8] It is the contention of Mr Carrington, who has appeared for Mr Zabusky in these proceedings, that since about early 2000 the single share has been held on trust for Amalia (which, it will have been noticed, is not a party to this action) upon failure of the purpose for which it was transferred, being the provision of funds to meet VTL's operating costs for the three months beginning on 1 October 1999.

The transfer to Viscaya Panama

[9] As I have said, around the end of September/beginning of October 2000 Mr van Leeuwen appeared on the scene as a potential new investor. I can cut straight to the upshot, which was that on 12 October 2000 an agreement was entered into between WOL and a Panamanian registered company called Viscaya Armadora SA ('VP') which it is common ground that Mr van Leeuwen owns and controls[3] for the transfer of 300,001 shares in Virgtel from WOL to VP.

[10] This agreement recited the fact of the SHA (as amended on 30 September 1999) and that WOL was the holder of 300,001 shares in Virgtel. By clause 1 WOL agreed to sell to VP its parcel of 300,001 shares 'for its book value of US$300,000.' WOL further agreed to assign to VP WOL's loan of US$1.2 million 'for [its] book value.' VP also agreed to take an assignment of a loan of US$92,055 made by one of Mr Gazal's companies and to discharge a debt of US$174,465 owed by VTL to a firm of consultants. There is no dispute that VP/Mr van Leeuwen did all these things and he told me it cost him €1.5 million overall. I accept that evidence, which was not challenged.

[11] On the previous day Amalia, by Mr Zabusky, wrote two letters to VP at the office of its registered agents, Icaza Gonzales-Ruiz & Aleman in Panama ('Icaza Panama'). The first consented to the acquisition of the WOL interest and all matters referred to in the share sale agreement to which I have just referred. The second, also addressed to VP, waived Amalia's rights under the SHA.

[3] see paragraph 4 of Mr Zabusky's witness statement

[12] VP was registered as the holder of the 300,001 shares in Virgtel's register of members on 3 November 2000. The shares were held under a single certificate designated Rb. The consideration for the transfer was stated in the register as US$300,001. There are thus two anomalies surrounding this transfer. First, that the 'book value' of 300,001 shares of US$1 each is US$300,001, not US$300,000; and, secondly, that if the price was indeed US$300,000, then it is incorrectly stated in the certificate issued to VP following the transfer.

[13] There is no evidence that BZ consented to this transfer or waived its preemption rights under the SHA. This fact is irrelevant for the purposes of the present inquiry. A transfer in breach of preemption provisions passes a good equitable interest and once VP became registered it perfected its legal title. That could be disturbed only by a successful claim by BZ that VP had notice of BZ's equity and the making of an order compelling VP to honour the preemption provisions. BZ has made no such claim and VP's title therefore remains undisturbed. Apart from that it is quite clear that any complaint which BZ might otherwise have had would now be barred by laches and in any case BZ clearly acquiesced in VP's acquisition when it sold it 18,000 shares in January 2001 (see below). In any case, Mr Zabusky has no *locus standi* to complain about a breach of preemption provisions in an agreement to which he was not party. The point is a red herring.

[14] Mr Zabusky attempts to run two inconsistent cases in relation to the transfer from WOL to VP. He says, first, that if VP took at all (I shall come to that in a moment), it took the single share on trust for Amalia. Mr Zabusky says in his witness statement that he met Mr Van Leeuwen on 31 July 2000 (his defence says the meeting took place in Holland) and told him about Mr Gazal's refusal to return the single share and says that Mr van Leeuwen accepted that Mr Gazal's actions were wrongful and that WOL only held 300,000 shares in consequence. Mr Zabusky was not cross examined on this point, but the suggestion was put to Mr van Leeuwen, who denied that he had ever seen the correspondence demanding the return of the single share to which I have referred above. That is difficult to accept, since a copy of Mr Shuiabu's letter of 7 June 2000 to Mr Gazal was disclosed by Mr van Leeuwen in the Australian proceedings, as was an undated 'Virgin Technologies Limited Summary 31/07/2000' document showing Mr Gazal as having only 300,000 shares in Virgtel. The latter document appears to have been produced by Mr Zabusky. Mr van

Leeuwen told me, and I accept, that he was only approached as an investor after the death of Mr Shuiabu in September 2000, but that does not mean that he could not have been shown a document which appears to be a summary of the position of VTL at the end of its latest accounting period. I find as a fact that Mr van Leeuwen was aware, when VP bought the WOL shares on 12 October 2000, that Virgtel's other shareholders had demanded the single share back upon Mr Gazal's failure to provide the additional working capital.

[15] Mr Zabusky further relies upon the discrepancy between the price identified in the 12 October 2000 share sale agreement as paid for the shares and the reference to 'book value' in support of his contention that VP intended to purchase only 300,000 shares.

[16] Mr Carrington may be right when he submits that WOL held the single share on trust for Amalia upon Mr Gazal's failure to provide further finance. I do not have to decide that point, because it is clear to me from the evidence that VP/Mr van Leeuwen was insisting upon a bare majority stake in Virgtel as part of what was in effect a rescue package and that Mr Zabusky/Amalia were perfectly well aware of that when they consented to 'all matters referred to' in the share sale agreement. That agreement is specific in reciting that WOL held 300,001 shares in Virgtel and that VP was to pay US$300,000 to acquire them. To rely upon the fact that the 'book value' was 'out' by 0.00000333% as demonstrating that the intention must have been, contrary to the clear words of the contract, to acquire only 300,000 shares is beyond unpersuasive. Similarly, even if WOL did hold the single share in trust for Amalia, Amalia's consent to a transaction plainly intended to give VP beneficial ownership of all 300,001 shares transferred[4] for good consideration means that it[5] cannot set up an equitable interest in opposition to VP's legal title.

[17] Mr Zabusky's other argument rests upon a so-called Protocol of Understanding and Undertaking ('the Protocol') entered into between Amalia (by Mr Zabusky) and VP (by Mr van Leeuwen) on 20 October 2000 – just a few days after VP had acquired its majority equitable interest but before it was registered with legal title to the shares. BZ was not a party to the Protocol – presumably because following the death of Mr Shuiabu it was treated as a sleeping partner. Having recited

[4] reaffirmed in recital 3 of the Protocol referred to in the next paragraph

[5] I ignore the fact that Amalia is not a party to these proceedings and makes no claim in them

that the shares of Virgtel would be held 300,001 by VP, 239,999 by Amalia and 60,000 by BZ it went on, in recital 4, to describe VP, Amalia and BZ as having 85% of the shares in VTL., with the remaining 15% being held by Nigerian investors. By clause 1 of the Protocol it was agreed that VP and Amalia had decided to establish a new company 'with location in the Netherlands (founders being Mrs Maja van Hal and Mr Zabusky), with share capital to be advised by HLB Holland.[6]' Clause 2 stated that VP, Amalia and BZ would

> 'bring in all their shares of [Virgtel], in exchange of which the new established company shall issue new shares in the following proportion: [VP] 42.5%, Amalia 42.5%, BZ 10% and the Nig[erian] Investors [Malami] 5%.'

Clause 3 obliged Mr Zabusky to approach and negotiate with the 15% Nigerian investors in VTL and offer them shares in the proposed new company or buy them out at a rate to be agreed by Mr van Leeuwen. Clause 4 provided that VTL was to have a share capital of NGN5 million, to be wholly owned by the new company. A Mr Adam Broadhurst was to be the Managing Director of VTL. There were provisions for the constitution of the board of directors of the new company and provisions governing the repayment of VP's and Amalia's loan accounts. There were other detailed provisions to which I do not need to refer.

[18] Although VTL did submit forms to the Nigerian Corporate Affairs Commission in 2001 purporting to show a company called Virgin Global Networks NV ('Global') as 99% holder of the shares of VTL (the other 1% being held by VP) and although it appears that a Mr Malami, holder of 5% of VTL's shares, may have disposed of them (there is a dispute about what actually took place), nothing else envisaged by the Protocol actually happened. A Netherlands company was formed, but its shares were held by the late Mrs van Leeuwen (something which Mr Zabusky did not discover until February 2004). In particular, there was no share exchange as envisaged by the Protocol and Mr Zabusky did not (with the possible exception of Mr Malami) arrange for the Nigerian shareholders in VTL to exchange their shares for shares in the new Dutch company or buy them out at a price agreed by Mr van Leeuwen.

[6] this may be a reference to an associate firm of the lawyers HLB Mann Judd, which appears to have advised VP on its acquisition from WOL

[19] Mr Zabusky maintains that on these facts and on the basis that Mr van Leeuwen is alleged to have constantly represented that Global was the majority shareholder in VTL, Mr van Leeuwen and/or VP and/or its successor in title (an Anguillan registered company called Viscaya Armadora SA ('VA')) are estopped from denying the truth of such representations and from asserting that they hold any shares in Virgtel.

[20] Mr Carrington did not identify the species of estoppel advanced, but if it was estoppel by representation, it must fail. Even if Mr van Leeuwen had represented that Amalia held shares in Global, Amalia knew that that was untrue. Since the Protocol envisaged and indeed required an exchange of shares involving a transfer by Amalia to the new Dutch company and the issue by that company of shares to Amalia in exchange, Mr Zabusky must have known that what had been envisaged by the Protocol had simply not happened. No change of position, prejudice or detrimental conduct in reliance upon any of this is pleaded. Mr Carrington valiantly gave evidence in an attempt to plug this hole, but the attempt is hopeless. If what is relied on is the Protocol, rather than representations made by Mr van Leeuwen, that (apart from its recitals) was a plan for the future, not any form of representation of fact which, for the reasons which I have given, Mr Zabusky must have known had not been implemented. Mr Carrington may be relying (although he did not put it this way) on some species of estoppel by convention. The difficulty is that it is impossible to identify any course of dealings conducted by the parties together in reliance upon any shared assumption that the Protocol had been fully put into effect.

[21] It is in reliance upon the supposed estoppel allegedly created by the entry into the Protocol (and possibly Mr van Leeuwen's alleged subsequent representations) that Mr Zabusky contends that all share dealings after 20 October 2000 must be treated as dealings not with the shares of Virgtel but with shares of Global. It is by this chain of reasoning (if that is the right expression) that Mr Zabusky arrives at his alternative contention that the shares acquired by VP from WOL on 12 October/3 November 2000 are to be treated as shares in Global, not as shares in Virgtel, with the astonishing result that VP has never held any shares in Virgtel and has never had a majority. Although not expressly spelt out, I suppose that by parity of reasoning it must be assumed that Amalia has no shares in Virgtel, either.

[22] None of this embarrasses Mr Zabusky when he claims that he is the sole director of Virgtel.

[23] Mr Zabusky's contention that no shares in Virgtel have been capable of being acquired or transferred since 20 October 2000 is clearly hopeless. It relies upon the artificial device of supposing that what was intended to happen did indeed happen, in circumstances when Mr Zabusky/Amalia knew that it had not happened. In my judgment, therefore, VP became the beneficial owner of 300,001 shares in Virgtel on 12 October 2000 and their legal owner on 3 November 2000.

The transfer from BZ

[24] On 25 January 2001 BZ entered into a written agreement with VP for the sale to VP of 18,000 out of its holding of 60,000 shares in the capital of Virgtel. The reason given for this transaction (which I accept) is that Mr Shuiabu had died in unhappy circumstances and that his estate had a legal requirement to pay his mother one sixth of its value. The written agreement recites that this liability amounted to NGN1,905,000 (there is some evidence that that equated to about US$17,000 at the time) and that in consideration of payment of that sum to Mr Shuiabu's mother, BZ transferred 18,000 shares to VP.

[25] There is in evidence what purports to be an instrument of transfer from BZ to VP of 18,000 shares, but the document is not executed and in any event names both BZ and WOL as transferor. It may be an inaccurate copy of an original. It gives the consideration for the transfer not as NGN1, 905,000 but as US$18,000.

[26] Virgtel issued VP with a certificate to include both the previously acquired 300,001 shares and the 18,000 acquired from BZ. The certificate shows the consideration for the transfer of the 300,001 WOL shares as US$300,001 and the consideration for the transfer of the BZ shares as US$18,000. As a result of this transfer, VP became the holder of 53.002% of Virgtel's issued share capital and was registered as the holder of the 18,000 shares on 25 January 2001.

[27] Amalia did not consent to this transfer nor did it waive its rights under the SHA. Mr Zabusky pleads that as well as being in breach of the SHA, this transfer was in breach of an agreement between VP and Amalia that they would acquire 3% of BZ's shares equally for which they would pay NGN1, 905,000 by way of reduction of their respective loan accounts with VTL. Quite how a reduction of

these loan accounts would effect payment to Mr Shuiabu's widow is not explained. In his witness statement Mr Zabusky (who, as explained above contends that by 25 January 2001 BZ's shares in Virgtel had been converted into 10% of the shares of Global), appears to suggest that NGN1,905,000 was indeed paid to Mr Suiabu's widow, of which NGN1,000,000 was paid for 3% of BZ's shares. Mr Zabusky's evidence is inconsistent with his pleading and in uncorroborated by any documentary evidence. I have no hesitation in rejecting it.

[28] This parcel of 18,000 shares was not offered to Amalia, as it should have been under the SHA. Despite his contention that all Virgtel's shares had been converted by this date in shares in Global, so that, one assumes, the SHA must on his hypothesis have ceased to have any effect, Mr Zabusky complains of this omission. For the reasons given in paragraph [13] above the complaint is not material for present purposes.

[29] In my judgment, therefore, VP became the legal owner of the 18,000 BZ shares when it was registered as their holder on 25 January 2001.

The transfer to the Claimant

[30] There is in evidence a document dated 7 August 2009 purporting to be a transfer from VP of its 318,001 Virgtel shares to VA. It is common ground that Mr van Leeuwen is the owner and controller of VA. The consideration for the transfer is expressed to be US$1. The document purports to be executed on behalf of VP by Mr van Leeuwen as 'Proxyholder'; by the second Claimant ('PMP') for VA; and by PMP again on behalf of Virgtel (it being VA's case that by this time PMP was the sole director of Virgtel). Although there are in evidence certificates signed by PMP to the effect that VA is the registered holder of the 318,001 shares, it is common ground that VA is not in fact registered in Virgtel's register of members as the holder of any of its shares. It follows, therefore, that VA is not a shareholder of Virgtel within the meaning of section 78 of the Business Companies Act, 2004 ('BCA'). It goes without saying that VP did not offer the shares to any other member of Virgtel before transferring them to VA. It had no obligation to do so, not being party to the SHA.

[31] The ingenuity of those advising Mr Zabusky raises an additional contention in relation to this transfer. He says, and it appears to be the case, that when the transfer was executed VP had neither directors nor registered agent. It is said that as a result it had no capacity to dispose of any of its assets, including the Virgtel shares. I heard evidence from two Panamanian lawyers on this point. Mr Bonilla, for the Claimants, said that despite the absence of a functioning board, VP's members had the inherent capacity to conduct business on its behalf. Mr Quijano, for Mr Zabusky, said that VP could do nothing in the absence of a functioning board, but he accepted that transactions purportedly carried out in the absence of a properly constituted board could be ratified by the membership as a whole. I accept the evidence of Mr Quijano, who was the more composed and of the two witnesses and gave his evidence with greater clarity, but at the end of the day I think that both experts were saying much the same thing. Mr van Leeuwen, as sole owner and controller of each of VP and VA has clearly ratified the transfer of 7 August 2009.

[32] I should mention that Mr Carrington took another point based upon the terms of regulation 15 of Virgtel's memorandum of Association, which provides that registered shares in Virgtel may be transferred, subject to the prior or subsequent approval of the company as evidenced by a resolution of directors or members. The transfer to VP must, in my judgment, have been impliedly approved by the resolution of 20 October 2000 appointing the new board, which was predicated upon VP's membership of Virgtel and, for the reasons which I have given, must have embraced the transfers of the single share. It is true that there is no such implied resolution in relation to the shares acquired from BZ. From Mr Zabusky's perspective, however, the point is irrelevant. VP is registered as the holder of 318,001 shares in Virgtel. The only persons with any standing to complain about that are the other members of Virgtel, who may bring proceedings pursuant to section 43 BCA if so advised. Meanwhile, section 42(1) BCA provides that prima facie VP is duly registered as the holder of its shares.

[33] The upshot is that VP is the legal holder of 318,001 shares in the capital of Virgtel, which it holds as nominee for VA. Amalia holds 239,999 shares and BZ 32,000.

Virgtel's board

[34] It is common ground, as I have said, that before execution of the SHA the sole director of Virgtel was Mr Robertson. The SHA envisaged the appointment of Mr Zabusky, Mr Gazal, Mr Shuiabu and Mr Gulotta to the board and on 1 April 1999 Mr Gulotta emailed Mr Zabusky and asked for personal details for himself and Mr Shuiabu so that they could be appointed as directors. There is no evidence that any such particulars were provided and as at 1 October 1999 Mr Robertson was still describing himself as sole director. Mr Carrington submitted that the documents of 16 May 1999 under which as sole director Mr Robertson had approved Virgtel's entry into the SHA, which envisaged the appointments I have referred to above, amounted to an appointment of the named individuals. I do not accept that submission. The language is not of appointment but of approval of an agreement and, although the named individuals appear in a version of Virgtel's register of directors,[7] no dates are given for their appointments, although they are recorded as having resigned on 20 October 2000 (the date borne by the Protocol). Another version of Virgtel's register of directors, which appear to correspond with the format used by Mr Robertson's firm[8] records only the appointment of Mr Robertson on 26 February 1999, his resignation on 3 November 2000 and the appointment of Mrs de Trute of Icaza, Panama on 10 November 2000 without mention of any other person at all. There is a copy of what purports to be a shareholders meeting held in Australia on 25 October 2000 at which the resignations of Messrs Gazal, Shuiabu and Gulotta were accepted. This appears to have been done because the share sale agreement stipulated for their resignations. I prefer to think that Mr Robertson, whose correspondence shows him to have been a meticulous lawyer, was being accurate when he described himself on 1 October 1999 as sole director and there being no evidence of any later appointments as envisaged by the SHA, I find that Messrs Gazal, Shuiabu and Gulotta were never appointed directors of Virgtel.

[35] I also find that Mr Zabusky was not appointed a director of Virgtel at any time before 20 October 2000. This is in part because that corresponds to the information contained in both versions of Virgtel's register of directors and in part because on 20 October 2000 Mr Zabusky signed a 'Shareholders Meeting Resolution' purporting to appoint Mr van Leeuwen, an associate of Mr van

[7] at Bundle B page 414
[8] Bundle C page 1434

Leeuwen named Cornelis Droppert (who has since died) and himself as 'the new Directors' of Virgtel. I do not believe that Mr Zabusky would have signed this document if he had considered that he was already a director. Mr Carrington submitted that this resolution was invalid because VP was not yet a member and BZ, he says, did not take part. The former point is correct but that does not mean that a valid meeting could not have been attended in person or by proxy by Amalia and BZ. There is no evidence that BZ did not take part. There is in evidence, however, a letter dated 19 December 2000 from Mr Robertson's firm confirming that a shareholders meeting was held on 20 October 2000, which accepted Mr Robertson's resignation and appointed new directors. Taken with the entries in at least one version of Virgtel's register of directors, I therefore find that Mr van Leeuwen, Mr Droppert and Mr Zabusky were appointed directors of Virgtel on 20 October 2000.

[36] It is common ground that Mr Robertson resigned with effect from 3 November 2000.

[37] There is in evidence a document signed by Mr van Leeuwen and Mr Droppert purporting to be a minute of a shareholders meeting held in Holland at which, among other things, Mrs de Trute was appointed as 'the new director' of Virgtel. An almost identical document, this time dated 21 December 2000 and allegedly minuting a shareholders meeting held in Panama, but signed by Mr van Leeuwen as Chairman and Mr Droppert as secretary is to the same effect. Although these documents purport to appoint Mrs de Trute as 'the' new director, in the absence of any evidence that Mr van Leeuwen, Mr Zabusky or Mr Droppert had resigned, 'the new director' must be read as 'a new director'. Each of these documents raises a number of questions, but since it is common ground that Mrs de Trute resigned (if she had ever been appointed), I do not have to determine their validity for the purpose of deciding who are the present directors of Virgtel.

[38] On 15 June 2009 VP (by Mr van Leeuwen) purported to pass a written shareholder's resolution of Virgtel (a) accepting the resignation of Mrs de Trute (b) appointing the second Claimant ('PMP') as 'Sole Director' of Virgtel and (c) changing the registered office of Virgtel to Circle Trust Services (BVI) Limited. Notice of this purported resolution was given to Mr Zabusky by Mr van Leeuwen on 6 August 2009. BZ was not informed (Mr van Leeuwen's evidence was that he had no contact details for BZ).

[39] This 'resolution', even if otherwise validly passed,[9] was clearly defective inasmuch as VP could not appoint PMP as 'sole director' without first removing Mr van Leeuwen and Mr Zabusky. That would have required a resolution of members to that effect or (or a resolution of directors on cause given).[10] No such resolution was proposed or passed. Apart from that, any members' resolution would have been required to have been carried either at a meeting called for the purpose of removing Mr van Leeuwen and Mr Zabusky[11] or by a written resolution passed by at least 75% of members entitled to vote. VP did not have a 75% majority[12]. Mr Dennis submits that since Article 1 of Virgtel's Articles of Association defines a members' resolution as (inter alia) a resolution in writing consented to by an absolute majority of those entitled to vote, and since section 114 BCA is expressed to be subject to a company's memorandum and articles, the resolution of 15 June 2009 would (assuming, contrary to the fact, that it proposed the removal of either of Mr van Leeuwen or Mr Zabusky) be compliant. But Article 1 applies only where not inconsistent with subject or context. Where the context is the removal of a director, the 75% requirement of section 114 will operate unless expressly disapplied by the Articles. Article 86 of Virgtel's Articles of Association did not purport to modify the effect of these provisions. The resolution of 15 June 2009 was therefore ineffective to remove Mr Zabusky or Mr van Leeuwen.

[40] In my judgment the resolution was also ineffective to appoint PMP as a director of Virgtel. Mr Carrington raised an interesting question about the validity of Article 82 of Virgtel's Articles of Association, which on its face appears to permit a members resolution to be passed in writing signed by the majority only of a company's shareholders without notice to the others, on condition only that a copy of the resolution must in that case be forthwith sent to all non-consenting members. I see no reason why members of a company should not agree to be bound by a regulation in this form, provided that its terms are strictly adhered to. If the minority is aggrieved by any step taken in reliance on the regulation, they have their remedy under section 184I of the BCA. But in my judgment the validity of any resolution passed in reliance upon Article 82 depends upon scrupulous compliance with its terms. Although Mr van Leeuwen gave notice of the resolution to

[9] Mr van Leeuwen said it was a forgery
[10] Article 86
[11] section 114(2)(a) BCA
[12] Section 114(2)(b) BCA

Mr Zabusky, no notice was given to Amalia or to BZ and in any event notice given on 6 August of a resolution passed on 15 June cannot be said to have been given forthwith. In my judgment, therefore, the purported resolution of 15 June 2009 was invalid.

[41] The upshot is that the directors of Virgtel are Mr van Leeuwen and Mr Zabusky.

Conclusion

[42] VA is not the 53.002% majority shareholder of Virgtel within the meaning of section 78 BCA, although subject to compliance with regulation 15 of its Memorandum of Association Virgtel is obliged by Article 50 of its Articles of Association to register VA as member. PMP is not a director of Virgtel. Mr Zabusky is a director of Virgtel, but not its sole director. Since there is no evidence contradicting that on the basis of which I granted interlocutory relief against Mr Zabusky on 6 May 2010, I will grant a final injunction in the same terms.

[43] I will hear Counsel on the question of costs.

Commercial Court Judge
14 October 2011