

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

CLAIM NO: BVIHC (COM) 2011/0120
IN THE MATTER OF THE BVI BUSINESS COMPANIES ACT
AND
IN THE MATTER OF GST INTERNATIONAL MANAGEMENT LIMITED

BETWEEN:

POTENTIAL MIGHT GROUP LIMITED

Claimant

and

GST INTERNATIONAL MANAGEMENT LIMITED

Defendant

Appearances: Ms Tana'ania Small for the Claimant
The Defendant company did not appear

JUDGMENT

[2011: 19, 22 December]

(Summary judgment – claimant seeking declaration that defendant company bound by share subscription agreement – defendant not appearing – whether defendant has no real prospect of defending claim – section 31 Business Companies Act, 2004)

- [1] **Bannister J [ag]:** This is an application for summary judgment on the grounds that (I quote) 'there is no argument that the Defendant can raise that will have any realistic prospect of success.' In other words, and although the application does not track the wording of CPR 15.2(b) literally, this is an application for summary judgment under CPR Part 15.

The pleadings

- [2] The amended statement of claim, dated 14 October 2011, pleads that the Claimant, Potential Might Group ('PMG') is a limited liability company incorporated under the laws of the state of Samoa and that the Defendant, GST International Management Limited ('GST Management') is a BVI registered company. It is then alleged that on 10 September 2010 PMG entered into a subscription agreement with GST Management under which GST Management would issue three million shares to PMG at a subscription price of US\$3 million. PMG says that it did this in reliance upon GST Management's certificate of incorporation, a certificate of incumbency issued by GST Management's registered agent on 6 September 2010, a copy of the register of members and directors and 'board resolutions.' Having pleaded that it was PMG's intention in making the investment that it should become the controlling shareholder of GST Management, PMG goes on to say that it paid the subscription price and received a share certificate evidencing that it was the holder of three million shares in the capital of GST Management.
- [3] So far so straightforward, but the pleading then digresses, as it were, to plead that having made the investment, PMG discovered that in August 2010 GST Management had been made defendant to a claim in the High Court of the Hong Kong SAR for alleged breaches of warranties and non-competition covenants which it had given to a company called United Technologies Far East Limited ('UTFE') upon its disposal to UTFE of a majority holding in a subsidiary of GST Management called GST Holdings Limited ('the Hong Kong proceedings').
- [4] PMG pleads that this claim posed a threat to its interests in GST Management and that it accordingly demanded that these claims be defended. PMG then asserts that in the Hong Kong proceedings three individuals, said to be former shareholders of GST Management, have challenged the right of what I am going to refer to as the PMG board of GST Management to conduct its defence. It is pleaded that these individuals, through Hong Kong lawyers instructed by them, have filed a statement of case in the name of GST Management disputing PMG's status as a shareholder on the grounds (a) that the subscription agreement had not been approved by the membership of GST Management and (b) that the members of GST Management's board of directors at the date when the subscription agreement was purportedly approved were the three

former shareholders, of whom the leader appears to be Zeng Jun ('Mr Zeng' 'the Zeng board') rather than the persons with or through whom PMG concluded the transaction and that the allotment of the three million shares to PMG in September 2010 was accordingly invalid.

- [5] PMG then pleads that this challenge is of concern to PMG and that PMG's understanding is that the High Court of the Hong Kong SAR is seized of the dispute and may decide the issue between the rival boards (if I may call them that) of GST Management. PMG further pleads that unless it is granted a declaration confirming, in effect, that GST Management is bound by the subscription agreement not only PMG's interest in GST Management but investment projects 'invested by [PMG] in China' will be adversely affected.
- [6] The prayer seeks (1) a declaration that the subscription agreement is binding on GST Management (2) a declaration that the resolution of the board of GST Management upon which PMG pleads that it relied when making its investment is valid and (3) that PMG holds three million shares in GST Management.
- [7] GST Management has neither acknowledged service nor filed or served a defence.

The application

- [8] The summary judgment application asks for a declaration that GST Management is bound by the subscription agreement and that PMG is the holder of three million shares in GST Management. No relief is sought in respect of the board resolution by which the allotment is alleged to have been approved.

The evidence

- [9] Evidence in support of the application is provided in three affidavits sworn by Su Xiao Man ('Mr Su'). In his first affidavit Mr Su says that he is authorised by the sole director of PMG to give this evidence on its behalf. He first deposes to the truth of the amended statement of claim, which I

have summarised above. He fleshes this out by stating that in making the investment in GST Management PMG relied (amongst other things) upon (1) a certificate of incumbency provided by Amicorp BVI Limited, claiming to be GST Management's registered agent and which showed that its board comprised eight individuals whose chairman was Song Jiachen ('Mr Song'); (2) GST Management's certificate of incorporation and Amended Memorandum and Articles of Association; and (3) a copy of what purported to be a resolution of GST Management's board of directors of 10 September 2010 approving the subscription agreement and authorising all or any of the members of the board to execute it. He deposes to the fact that the subscription price of US\$3 million was paid and a certificate received in respect of the allotted shares. He recounts the discovery, by what appears to have been a board appointed in reliance upon PMG's majority holding in GST Management (although this is nowhere explicitly stated), of the existence of the Hong Kong proceedings.

[10] Mr Su goes on to say that what I have referred to as the Zeng board at some stage which is not precisely identified 'changed their position' and challenged PMG's status as a member of GST Management, in reliance, so Mr Su says, upon allegations that (1) the allotment was not approved by the members of GST Management, but only by its board; and (2) that in any event the persons purporting to approve the allotment in their character as the then board of GST Management were not in fact directors of GST Management, the true directors as at 10 September 2010 being the Zeng board. Mr Su says that PMG is not party to the Hong Kong proceedings and thus cannot seek relief in their context and that it makes the present application here in order to protect its position.

[11] In his second affidavit Mr Su exhibits three letters which he says were sent to the three individual members of the Zeng board on 16 November 2011 enclosing the amended claim form and amended statement of claim and informing the recipient that the summary judgment application was to come on for its first hearing on 30 November 2011. The Court has no means of knowing whether these letters and enclosures were actually received by all or any of the individuals making up the Zeng board and in any case it seems to me to be irrelevant, given the constitution of the present action, whether they did or not.

[12] In his third affidavit Mr Su says that in the Hong Kong proceedings Solicitors, D.S.Cheung & Co ('DSC'), have claimed that they have been instructed by the Zeng board and have challenged the entitlement of other Solicitors, Alvan Liu & Partners ('ALP'), appointed, it would appear, by the PMG board, to represent GST Management in the Hong Kong Proceedings. Mr Su then exhibits copy documents from the Hong Kong Proceedings from which it can be seen that the High Court in Hong Kong is entertaining an issue in the Hong Kong proceedings as to the correct constitution of the board of GST Management and, thus, the question of authority to represent GST Management in the Hong Kong proceedings and has directed points of claim and reply on that issue. Very detailed pleadings have been exchanged going to the resolution of this issue. In fact, it appears from material subsequently submitted to this Court on behalf of the members of the Zeng board and to which I shall have to refer in a moment that these pleadings are being exchanged pursuant to the order of Reyes J made on 24 May 2011 and that a hearing to resolve the issue is to take place in the High Court in Hong Kong on 30 January 2012.

[13] I have had a look at the pleadings exhibited to Mr Su's third affidavit. They are primarily concerned with the constitution of the board of GST Management from time to time, rather than the validity of the allotment of 10 September 2010, but obviously the validity of that allotment is indirectly called into question if it should turn out that the true board of directors at that date was the Zeng board. The Zeng board (or, more accurately, the Solicitors, DSC, which it claims to have instructed on behalf of GST Management), deny in a document dated 20 June 2011 that the allotment was validly made. APL, representing, if I can put it that way, the PMG board responds in a pleading dated 21 June 2011 by relying upon the subscription agreement and asserting that the board of GST Management as at 10 September 2010 comprised the eight persons named in the certificate of incumbency upon which PMG claims that it relied in making its investment and to which I have referred in paragraph [10] above. So far as I have been able to discern, these are the only references in the Hong Kong pleadings to the subscription agreement as such.

[14] That summarises the evidence for PMG on its Part 15 application. The defendant GST Management has not put in any evidence in answer.

The hearing

- [15] The matter came before me first on 30 November 2011, when I adjourned it to 19 December 2011 to allow for compliance with CPR 15.4(1) and 15.5(1). No one appeared for GST Management on 30 November 2011.
- [16] On the morning of the adjourned hearing Conyers Dill & Pearman made an application for an adjournment, supported by an affidavit of Mr Jerry Samuel ('Mr Samuel'). That application was expressly not made on behalf of the defendant GST Management, but on behalf of the members of the Zeng board. Mr Samuel sought an adjournment, first, because his firm had been approached only on the morning of Friday 15 December 2011, but also because, as he put it, the right course was to adjourn the present application until after the High Court in Hong Kong had resolved the dispute currently before it as to the proper constitution of the board of GST Management from time to time. It was Mr Samuel's evidence which indicated that a hearing for that purpose would be taking place in Hong Kong on 30 January 2012.
- [17] I refused the adjournment application on the grounds that persons not party to, and not seeking to be added as parties to, proceedings in front of the Court had no standing to ask for those proceedings to be adjourned. Mr Evans and Mr Samuel, who had made the application on behalf of the Zen board, remained in Chambers without protest from Ms Small while she made her summary judgment application, but took no part in it.

Summary judgment

- [18] As I have said, GST Management has neither acknowledged service nor served a defence. No doubt this is because the Zeng board, being the only body with an interest to contest PMG's claim, has been unable to find solicitors prepared to accept instructions to act on behalf of GST Management from them while their authority to give them remains in issue in Hong Kong. I was not taken to authority upon the approach to be adopted by the Court when an application for summary judgment is not opposed. In my judgment, however, such an application is not to be treated as if it were an application for a judgment in default. CPR 15.2(b) permits the Court to give

summary judgment *if it considers* that the defendant has no real prospect of defending the claim. These words indicate, in my judgment, that even where the application is unopposed, the Court must satisfy itself that there is no real prospect of a successful defence being raised to the claim being made. I shall therefore approach the application on that basis.

[19] The unchallenged evidence is that PMG applied for and was allotted three million shares in the capital of GST Management pursuant to a resolution passed by persons who, according to the certificate of incumbency of 6 September 2004, were, or were among, the members of GST Management's then board. PMG was supplied with what purported to be a board resolution of 10 September 2010 approving the allotment. What I assume to be a copy of that document is in evidence. The copy subscription agreement is signed by Mr Song, who appears as one of the directors in the certificate of incumbency to which I have referred. That document appears (although the copy is too indistinct to enable it to be seen positively) to bear the seal of GST Management. The 'Particulars of the Issuer' appearing as Schedule 1 to the subscription agreement sets out a board with membership identical to that set out in the certificate of incumbency. PMG was issued with a share certificate, one of the signatures on which appears to be the same as that of Mr Song where it appears on the subscription agreement. PMG pleads that it also relied, in entering into the transaction, upon a copy of GST Management's register of directors and register of members. No copy of a register of members is in evidence. A copy of a purported register of directors is in evidence, but that purports to state the position as at 6 May 2011 and cannot have been (at any rate in the form in which it is exhibited it cannot have been) a copy of a document relied upon when the subscription agreement was entered into.

[20] In these circumstances, Ms Small, for PMG, submits that GST Management has no real prospect of successfully defending the claim. She relies (as does Mr Su in his first affidavit) upon section 31 of the Business Companies Act, 2004 ('section 31' 'the BCA'):

'Dealings between company and other persons

31. (1) A company or a guarantor of an obligation of a company may not assert against a person dealing with the company or with a person who has acquired assets, rights or interests from the company that

- (a) this Act or the memorandum or articles of the company has not been complied with,
- (b) a person named as a director in the company's register of directors
 - (i) is not a director of the company,
 - (ii) has not been duly appointed as a director of the company, or
 - (iii) does not have authority to exercise a power which a director of a company carrying on business of the kind carried on by the company customarily has authority to exercise,
- (c) a person held out by the company as a director, employee or agent of the company
 - (i) has not been duly appointed, or
 - (ii) does not have authority to exercise a power which a director, employee or agent of a company carrying on business of the kind carried on by the company customarily has authority to exercise,
- (d) a person held out by the company as a director, employee or agent of the company with authority to exercise a power which a director, employee or agent of a company carrying on business of the kind carried on by the company does not customarily have authority to exercise, does not have authority to exercise that power, or
- (e) a document issued on behalf of a company by a director, employee or agent of the company with actual or usual authority to issue the document is not valid or not genuine,

unless the person has, or ought to have, by virtue of his relationship to the company, knowledge of the matters referred to in any of paragraphs (a) to (e).

- (2) Subsection (1) applies even though a person of the kind specified in paragraphs (b) to (e) of that subsection acts fraudulently or forges a document that appears to have been signed on behalf of the company, unless the person dealing with the company or with a person who has acquired assets, rights or interests from the company has actual knowledge of the fraud or forgery.'

[21] I propose first to deal with the limbs of subsection 31(1).

[22] So far as subsection 31(1)(a) goes, the copy of the Amended Memorandum and Articles of Association of GST Management in evidence does not require a resolution of members before shares in GST Management may be validly allotted. As I have said, there is in evidence what

appears to be a resolution of its board of directors authorising them to enter into the subscription agreement and issue and allot the shares to PMG. There is a suggestion in the pleadings filed in the Hong Kong proceedings that the Amended Memorandum and Articles of Association of GST Management is not a valid document, but GST Management has not come forward in these proceedings to make, let alone give any grounds for thinking that at trial it might succeed in making good, such an assertion. Even if it could, and even if the unamended Memorandum and Articles of Association of GST Management required a resolution of members before shares could validly be issued and allotted, the failure to pass such a resolution would not affect PMG unless it could be shown that PMG knew or, as a result of its relationship with GST Management ought to have known, that the Amended Memorandum and Articles of Association were invalid and that the original Articles of Association required a members' resolution. I can see no grounds on the material before me for supposing that at trial a properly constituted board of GST Management would be able, on behalf of the company, to make such a defence good.

- [23] There is clearly an ongoing dispute in Hong Kong as to the constitution of the board of directors of GST Management as at (among other times) 10 September 2010. Subsection 31(1)(b) applies to prevent the relevant company from contradicting entries in its register of directors. This subsection does not seem to me to be dispositive of the present case, since there is no evidence before me establishing what the state of the register of directors of GST Management was as at 10 September 2010. The certificate of incumbency does not assist, since the names there set out are not stated to have been taken from GST Management's register of members and may, for all that the Court knows, have been taken only from a copy of the register of directors kept by the registered agent at its office pursuant to section 96(1) (c) of the BCA and which may or may not have been updated under section 96(2)(a). As for the document exhibited to Mr Su's first affidavit, it is quite unclear whether that is a subsequently amended copy of GST Management's actual register of directors as at 10 September 2010 or only an amended copy of that register kept at the office of the registered agent. That document certainly cannot have been seen by PMG in the altered state in which it was exhibited by Mr Su when PMG entered into the subscription agreement.

[24] Clearly Mr Song and whoever acted alongside him in the transaction held himself out as a director of GST Management. What subsection 31(b) requires, however, is that such a person should have been held out *by GST Management*. As is pointed out in **Gore Browne on Companies**¹ this type of principle, whether embodied in a statute or arising from the general law of agency and estoppel, will usually prevent a properly constituted board from denying the authority of some third party whom they have permitted to be held out as having actual authority, when in fact he did not. Ms Small relied upon **Mahony v East Holyford Mining Company Limited**² in which it was held that an entire 'board', none of whose members had ever been validly appointed, could bind a company. But in that case it was proved, and the House of Lords relied heavily upon the fact, that the company manned an office at which the individuals had a presence and appeared to be carrying on the business of the company from the premises which they occupied. It was also held that the invalidly appointed directors, while not directors *de jure*, were directors *de facto*. In the present case, there is no evidence before me to show that PMG, when it dealt with Mr Song, was having actual dealings with anyone other than Mr Song or that he was taking part in the management of the affairs of GST Management as a *de facto* director in September 2010. Unless either of those situations then obtained it is difficult to see how, if it should turn out that Mr Song was not validly appointed, it could be said that GST Management had held him out as having authority to transact the subscription agreement.

[25] Subsection 31(1)(d) deals with the extent of ostensible authority. Were this case to go to trial, it seems unlikely that it would be engaged.

[26] Subsection 31(1)(e) applies when a company seeks to challenge the validity of a document issued by a director with actual or usual authority to issue such a document. It will be engaged, in my judgment, only in the limited set of circumstances where a person who is a director and who has actual or usual authority to do so issues a document. It will not save a document such as the subscription agreement or share certificate should those documents turn out to have been executed by persons who were not at the time directors of GST Management. It applies to

¹ Update 66, paragraph 8[20] footnote 15

² (1875) LR HL 869 at 881-883

documents issued by directors *de jure* or *de facto*³ but not to documents issued by impostors. If it should turn out that Mr Song was not a director *de jure* or *de facto* on 10 September 2010, subsection 31(1)(e) would not prevent GST Management, by its properly constituted board, from challenging the transaction.

- [27] Subsection 31(2) extends (subject to a saving for actual knowledge) the provisions of subsection 31(1) to forgeries executed by persons specified under subsections 31(1)(b) to (e). In other words, it saves forgeries executed by persons named in a company's register of directors or by persons held out by a company as its officers and agents. It will not save forgeries by, for example, impostors unless the name of such impostor is included in the company's register of directors as a director – an unlikely but not wholly impossible situation.

Conclusions on section 31

- [28] Reminding myself that the question for the Court on this application is whether it considers that GST Management has no real prospect of successfully defending PMG's claim, it seem to me that section 31 is not on its own determinative of that question. Section 31 provides a person dealing with a BVI registered company with a series of statutory defences to particular specific attacks that may be made by the company on the validity of transactions by which it is *prima facie* bound. The converse does not apply. Section 31 does not, in other words, provide that a company cannot in any circumstances successfully challenge the validity of a transaction by which it is *prima facie* bound. It seems to me to follow from that that I cannot, merely because certain yet to be identified defences which might be raised by GST Management at some time in the future might be defeated by one or more of the provisions of section 31, conclude on those grounds that GST Management has no real prospect of defending the claim. Indeed, as I have endeavoured to show earlier in this judgment, it is far from clear to me that PMG would have defences under particular subsections of section 31, at any rate without much more evidence than that which has been put before the Court so far. These considerations preclude me from giving judgment for PMG on the merits, i.e. under CPR Part 15.

³ section 2 BCA

Conclusion generally

[29] In my judgment the problem that has arisen here is the result of the procedural route which PMG has chosen to follow. In seeking judgment on the merits it has set itself an almost impossible task in a situation where a claim is undefended. Where a claim is defended, the points taken by way of defence will define the issues and excuse the Court from considering any possible defences not identified by the defendant. Where a claim is undefended, the claimant seeking a judgment on the merits will have to leap the very high hurdle of proving a negative – that the absent defendant has no real prospect of defending the claim. There may be cases where this can be done even in the absence of a defendant but in my judgment this is not one of them. PGM has, rightly, identified the nature of the dispute in the Hong Kong proceedings, so that the Court is aware from PMG's own pleading and evidence that the right of Mr Song to have entered into the September 2010 transactions is potentially under challenge. That means that it is impossible for the Court to reach the conclusion that GST Management has no real prospect of defending PMG's claim for declaratory relief so as to entitle the Court to give judgment for PMG on the evidence before it by way of a judgment on the merits.

[30] These considerations seem to me to point to the conclusion that the better course in situations such as these will normally be to apply for judgment in default.

[31] It is not, therefore, necessary for me to refer further to the Hong Kong proceedings except to observe, what seems to me to be an important point, that no decision made in those proceedings as to the proper constitution of the board of GST Management will be binding as an estoppel *per rem judicatam* on PMG, either here in the British Virgin Islands or anywhere else.

[32] For the reasons given above, this application is dismissed.



Commercial Court Judge

22 December 2011