

BRITISH VIRGIN ISLANDS

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim No. BVIHCV2011/0139

In the Matter of SUMMERIES LIMITED

AND

In the matter of section 43 of the BVI Business Companies Act, 2004

BETWEEN

ARTI ASSETS LTD

Claimant

-and-

SUMERIES LIMITED

Defendant

Appearances:

Ms. Dawn Smith and Ms. Monique Peters of Conyers Dill & Pearman for the Claimant
Ms. Tana'ania Small-Davis of Farara Kerins for the Defendant

2011: July 19
2012: January 04:

JUDGMENT

- [1] **HARIPRASHAD-CHARLES J:** One would have thought that with the advent of the Civil Procedure Rules 2000, issues of costs would be unheard of. However, this present application has proven otherwise despite the fact that the parties have more or less amicably resolved their main grievances.

Chronology of events

- [2] On 30 May 2011, Arti Assets Limited ("the claimant") became the beneficial owner of 630838 shares when it purchased them from the registered owners. That same day, acting

through its attorneys in the British Virgin Islands, the claimant made a request to the directors to approve the transfer and update the share register to reflect their interest.

- [3] On 2 June 2011, attorneys for the claimant received an email from the registered agent stating "*our client has requested Due Diligence for the company Arti Assets Ltd.*" Attorneys for the claimant immediately provided the necessary documents.
- [4] On 6 June 2011, the registered agent relayed a request for 'a declaration of trust showing the ultimate beneficial owner[s] and certified true copies of passport, utility bill and bank reference letter of beneficial owner(s). There was no indication that the share transfer had been approved by the director of the Company and attorneys for the claimant then inquired as follows:

"We assume from your request for due diligence on 2 June 2011 and your request today for a declaration of trust and other information that the share transfer has been approved and that you are in the process of updating the register of members to reflect the shareholding of Sumeries Limited [sic]. Please confirm."

- [5] On 6 June 2011, the registered agent responded that they had not "yet received back the signed resolutions effecting the transfer." Attorneys for the claimant again sought confirmation that the share transfer had been approved by the director.¹
- [6] By 9 June 2011, there still had been no indication whatsoever whether the share transfer had been approved. Thus, on the same day, the claimant issued a Fixed Date Claim Form alleging that there has been an unreasonable delay by Sumeries Limited ("the defendant") in entering its name and address in the defendant's register of members as the holder of 630838 registered shares. Pursuant to section 43(1)(b) of the BVI Business Companies Act, 2004, the claimant applied, amongst other things, (1) an order that its name and address be immediately entered in the register of members of the defendant. It also applied for other consequential orders including costs.

¹ See page 97 of the Exhibit MJPI.

- [7] The first hearing of the Fixed Date Claim Form was set for 22 June 2011. An acknowledgement of service was filed on 17 June 2011 indicating the defendant's intention to contest the claim.
- [8] The hearing was adjourned for report on two subsequent occasions (22 June and 5 July 2011) and finally on 12 July 2011. On 12 July 2011, the parties reported a settlement of their matter and subsequently produced a consent order. However, the issue of costs remained outstanding and was adjourned to 19 July 2011 for a hearing if the parties still could not agree.
- [9] On 19 July 2011, the issue of costs was bitterly contested by both parties, each vociferously arguing that the other was responsible for the allegedly unreasonable behaviour which resulted in unnecessary costs being incurred.

General Principles - CPR 64.6

- [10] As a general rule, the unsuccessful party should pay the costs of the successful party. Costs are in the discretion of the Court. The Judge is required to exercise his discretion judicially i.e. in accordance with established principles and in relation to the facts of the case and on relevant grounds connected with the case, which included any matter relating to the litigation; the parties' conduct in it and the circumstances leading to the litigation, but nothing else: see Buckley L.J. in **Scherer v Counting Instruments Ltd.**²
- [11] CPR 64.6(6) speaks to the matters that the court must have regard to namely:
- (a) the conduct of the parties both before and during the proceedings;
 - (b) the manner in which a party has pursued-
 - (i) a particular allegation;
 - (ii) a particular issue; or
 - (iii) the case;
 - (c) whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings;

² [1986] 2 All ER 529 at pages 536-537.

(d) whether it was reasonable for a party –

- (i) to pursue a particular allegation; and/or
- (ii) to raise a particular issue; and

(e) whether the claimant gave reasonable notice of intention to issue a claim.”

[12] It is against these general principles that I consider the present application for costs.

Application for costs

[13] The claimant alleges that because the defendant has refused to effect the transfer of shares and/or there has been an unreasonable delay in doing so, it had to file the present claim. The claimant further alleges that since a consent order was arrived at, it was the successful party. The defendant says that the filing of the claim was precipitous and was an unnecessary recourse to take given that at no time was there the slightest of intimation that the director refuse to effect the transfers and that the period between 31 May and 9 June 2011 does not constitute unreasonable delay in registration of even properly executed instruments of transfer.

[14] Both parties claimed to have been successful in their own right. The claimant says that it was successful in its claim because if it had not done so, the defendant would not have carried out its request.

[15] The question is: did the claimant act unreasonably or precipitously in filing this claim? Turning back to the facts of this case. On 6 June 2011, the registered agent responded that they had not “yet received back the signed resolutions effecting the transfer.” The claimant’s attorneys again sought confirmation that the share transfer had been approved by the director. When there was no such indication by 9 June 2011, the claimant instituted this claim. Should the claimant have given notice of its intention to issue the claim in accordance with the provisions of CPR 64.6(6)(e)?

[16] In my opinion, the short answer is yes. I am of the view that even in this busy and demanding commercial jurisdiction where time is of the essence to get transactions completed, the claimant should still have given notice of its intention to issue a claim if the

defendant fails and/or refuses to enter its name and address in the defendant's register, and possibly, to stipulate a deadline to do so. This could have been communicated by the same medium of sending an email. If this was done and the defendant did not comply by the stipulated date, then I believe that the claimant would have been within its rights to issue a claim.

[17] Now, having issued the claim, was there an unreasonable delay by the defendant in entering in its register of members, the claimant as the holder of the shares?

[18] Mrs. Small-Davis submitted that the defendant made plain to the claimant that it had no difficulty in registering proper instruments of transfer but that it required the defects in the current instruments to be corrected namely by (a) the insertion of the transferee's address; (b) the proper execution of the instrument of transfer as prepared by the parties to the transaction and (c) receipt of originals. She argued that this was orally communicated to Ms. Smith, Counsel for the claimant, immediately prior to the hearing on 22 June 2011 and in writing on 23 June 2011.

[19] According to Mrs. Small-Davis, rather than simply complying with the request, the claimant chose to prolong matters in a battle over the efficacy of documents that it had created and steadfastly opposed each of the points raised on behalf of the defendant.³ Mrs. Small-Davis submitted that one instance of the unreasonable stance taken by the claimant was its absolute refusal to agree to even produce originals, stating that "in this day and age share transfers are routinely approved and registered on the basis of copy documents." The defendant's position was reiterated in a letter dated 28 June 2011. The essence of the letter is the defendant's request for original documents. At the end, the letter states:

"We wish to make clear:

1. Sumeries will effect transfer of shares from Messrs. Saganelidze and Kintsurashvilli to Arti Assets Ltd upon receipt of the original instruments of Transfer properly executed;
2. The directors of Sumeries Limited will allow inspection of the Register of Members to Messrs. Saganelidze and Kintsurashvilli or their duly appointed agent."

³ See Conyers' letter dated 24 June 2011.

- [20] The defendant made a number of other submissions.⁴ Mrs. Small-Davis submitted that at no time did the defendant indicate that it was not going to effect the transfers and in fact clearly set out what was required to satisfy the director and meet the Company's regulations and the law.
- [21] The claimant filed the second affidavit of Monique Peters which was a response to the affidavit of Christoforou Costas in these proceedings. The affidavit challenged the assertions made by Mr. Costas. At paragraph 5, Ms. Peters stated that "Mr. Costas states that the Instruments of Transfer were defective in that they did not contain the address of the Transferee and that the signatures of the Transferors were not witnessed. He also states that he was not familiar with the signatures of the transferor." Ms. Peters stated that this is far from the truth and she exhibited copies of the instruments of transfer which she alleged were used to transfer the shares from the previous owners to the current transferors – Messrs. Saganelidze and Kintsurashvili. She noted that the Instruments of Transfer are identical to those submitted to the Company in support of the claimant's request on 30 May 2011 for the share register to be updated to reflect its interest: [MJP 1 pages 37, 48].
- [22] At paragraph 6, Ms. Peters stated that "at no time shortly before the initial hearing on 22 June 2011, did anyone acting on behalf of the company indicate to our firm that there was an issue with the transfer documents, request original documents or provide any timetable to the claimant for reverting as to the status of the request. The only request that was made was for due diligence information and that was provided within hours of the request being made.
- [23] At paragraph 7, Ms. Peters opined that "without proceedings forcing this issue, what we have now successfully achieved would not have been achieved by now or possibly at all."
- [24] I find that even though time is critical in transactions of this nature, the claimant should have given notice of its intention to issue a claim and if the defendant still did not comply, then it would have been vindicated in filing this claim. The next question which arises: was

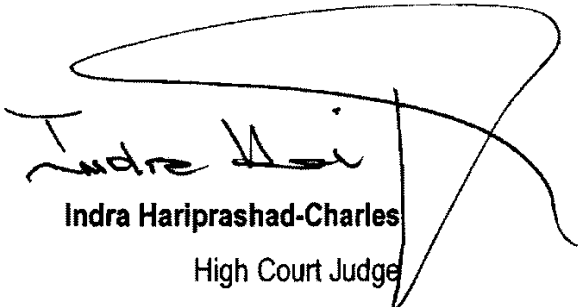
⁴ See paragraphs 11- 13 of defendant's unfiled submissions dated 15 July 2011.

the defendant unreasonable in its request prior to or during the proceedings. The defendant has a fiduciary duty towards both the company and to the shareholders and are entitled to seek proper documentation. However, I am of the opinion that the requests, as stipulated at paragraphs 5 and 6 of Ms. Peters' second affidavit, are unreasonable. There was no need for that when it appears that there was a long history of relationship between the parties.

[25] That said, I am of the opinion that both parties are responsible for the delay in entering the claimant's name and address in the defendant's register of members as the holder of the 630838 registered shares. It strikes me that if the claimant has not initiated this claim, the defendant might have quicker complied with an email giving a deadline to effect this change. I also believe that the defendant was making it difficult for the claimant and this could have been because neither party would budge.

[26] Against these factual findings, I believe that this matter could have come to an amicable resolution without the need to trouble this court. As I mentioned earlier, some of the requests, for example, the address of the Transferee and that the signatures of the Transferors were not witnessed (when he was familiar or should have been familiar with the signatures) were unreasonable in the circumstances. These contributed to the delay and costs being incurred.

[27] In the circumstances, I will award costs to the claimant in the sum of \$5,000. There will be no costs associated with this application.


Indra Hariprashad-Charles
High Court Judge