TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2010/034 AND HCVAP 2011/001 (CONSOLIDATED)

In the matter of a claim for breach of contract and rectification of the register of members of Nilon Limited

and

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

BETWEEN:

[1] ROYAL WESTMINSTER INVESTMENTS S.A.
[2] BHAGWAN MAHTANI
[3] SUNDER DALAMAL
[4] NARI DALAMAL

Appellants

and

[1] NILON LIMITED
[2] MANMOHAN VARMA

Respondents

Before:

The Hon. Mr. Hugh A. Rawlins	Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Sydney A. Bennett, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Philip Marshall, QC and Mr. John Carrington for the Appellants
Mr. Scott M. Cruickshank for the First Respondent Company
Mr. Richard Snowden, QC and Mr. Ray Ng for the Second Respondent

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2011: May 3, 4;
2012: January 16.

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Civil appeal – Oral joint venture agreement made in another jurisdiction – Rectification of share register – Section 43 of the BVI Business Companies Act, 2004, Act No. 16 of 2004, Laws of the Virgin Islands – Section 359 of the English Companies Act 1985 – The effect

of subsection 3 of section 359 of the Companies Act 1985 – Whether the appellants' claim against the first respondent as pleaded raises a 'real issue' between them which it would be reasonable for the court to try – Whether the appellants have a viable cause of action for rectification – Rule 7.3(2)(a) of the Civil Procedure Rules 2000 – Service of claim form on another person who is outside the jurisdiction and who is a necessary and proper party to the claim – Whether the second respondent is a necessary and proper party to the claim – Whether rectification proceedings would be suitable for trial of the disputes between the appellants and the second respondent – Forum non conveniens – Whether the BVI is the appropriate forum for trial of this matter

On 26th October 2002, the second, third and fourth appellants entered into an oral joint venture agreement ("the JVA") with the second respondent, Manmohan Varma ("Varma"), to carry on the business of importing and selling rice in Nigeria. This agreement was made at Rochester, Kent, in England. Under the terms of the JVA, the business was to be carried out through the facility of the first respondent company, Nilon Limited ("Nilon"), incorporated in the British Virgin Islands as a holding company. Each of the appellants involved in the JVA ("the joint venturers") was to contribute to the capital of and to subscribe for shares in that company in certain agreed proportions. The company was to be managed by Varma, who undertook to procure the issue of shares in the company to the joint venturers in the agreed proportions.

Varma arranged the incorporation of Nilon on 7th November 2002 in the BVI and business was subsequently carried out under his management. All three joint venturers, as well as the first respondent company,[1] contributed capital to Nilon and received payments simulating dividends. However, the appellants contended that unknown to them, and in breach in the terms of the JVA, Varma procured that shares in Nilon were allotted only to himself; none of the appellants had been issued any shares in Nilon or its subsidiary companies or had any right to participate in its management.

The appellants initially brought a claim against the respondents in the BVI, seeking rectification of Nilon's register of members on the basis that they were entitled to be registered as holders of shares in the company. On 5th May 2010, the appellants sought permission under rule 7.3(2)(a) of the Civil Procedure Rules 2000 ("CPR") to serve the claim out on Varma, who resided in England. However, at the hearing held on that date, the trial judge pointed out that as the pleading then stood, there was no 'real issue' between themselves and Nilon which it was reasonable for the court to try and to which Varma could be a necessary and proper party. Permission to serve out was refused. The appellants reformulated their pleadings, and on the basis of the amended claim, the judge gave orders for them to serve the claim out of the jurisdiction on Varma in England. On 11th May 2010, the appellants issued proceedings against Nilon and Varma and they were served on Nilon in the territory as of right. On 7th June 2010, service was effected on Varma in England.

On 5th July 2010, Nilon filed an application for a declaration that the court should not exercise its jurisdiction in respect of the claim against it. Alternatively, it sought an order

[1] Royal Westminster Investments S.A. belonged to the second appellant, Bhagwan Mahtani.

that the proceedings against it be stayed on the ground of *forum non conveniens*. Also, on 6th August 2010, Varma applied to the court to have service upon him set aside, arguing that there was no serious issue between the appellants and Nilon to which he could be a necessary and proper party. He argued, in the alternative, that service should be set aside because the BVI was not the appropriate and proper forum.

By judgment delivered on 21st October 2010, the trial judge rejected Nilon's application that the court should decline to exercise its jurisdiction in respect of the claim. He concluded however, that the claim as pleaded did not demonstrate that there was a real issue which it was reasonable for the court to try as between the appellants and Nilon, so that the threshold provided by CPR 7.3(2)(a)(i) was not met and service on Varma out of the jurisdiction should be set aside. Moreover, he concluded that even if the appellants could have shown a plausible claim against Nilon, Varma could not be a necessary and proper party to that claim.

Nilon subsequently applied to strike out the appellants' amended claim against it, or alternatively, for summary judgment on that claim. The appellants argued in opposition to this application, stating that they had a cause of action against Nilon for rectification of its register pursuant to section 43 of the BVI Business Companies Act, 2004[2] ("the BVI Act"). By judgment delivered on 21st December 2010, the judge rejected the appellants' argument, holding that none of the appellants could show that they had a viable cause of action against Nilon under section 43. Nilon's application was granted, and costs were awarded to the company. The appellants appealed.

Held: allowing the appeal; setting aside the order of the trial judge made on 21st December 2010 as well as his decision made on the same date striking out the appellants' claim in this action against the first respondent; deeming the appellants' service of the claim form upon the second respondent in England proper and effective service and restoring the appellants' claim against the first respondent; ordering that the respondents pay the appellants' full costs in this court and the court below, with costs to be assessed unless agreed within twenty one days of the date of this order; and remitting the matter to the Commercial Court for directions for the further conduct of the matter, that:

1. The effect of section 359(3) of the English Companies Act 1985 is to give the court a wide discretion as to the scope of the circumstances in which it can be demonstrated that the inclusion or omission is 'without sufficient cause'. The discretion is broad enough to permit inquiry into the substantive cause for the inclusion or omission.

   Re Hoicrest Ltd. [2000] 1 B.C.L.C. 194 applied.

2. In the instant case, the court would have jurisdiction to rectify the register where questions concerning the applicant's right to have his name entered on it have arisen between the members or alleged members inter se without involving the company. It is not necessary for the company to be in breach of any of its

[2] Act No. 16 of 2004, Laws of the Virgin Islands.

obligations to the applicant for the court to exercise its jurisdiction under section 43 of the BVI Act. The Court may rectify the register notwithstanding that the company is not responsible for the relevant omission or inaccurate entry.

3. The discretion conferred on the court by section 43(2) of the BVI Act, to determine any question relating to the right of a party to rectification proceedings to have his name entered in or omitted from the register of members, even if that question arises between the members or alleged members and does not involve the company, requires the court in such proceedings to have regard to equitable as well as legal rights vested in such a party. If the court finds that the applicant has established a beneficial interest to the shares in question, it is empowered to give effect to that interest by declaration and by rectification of the register to accord with the declared entitlement of the appellant to registration as legal owner of the shares.

4. Although the information required by section 41 of the BVI Act comprises the names and addresses of persons who hold or are immediately entitled to hold legal title to registered shares in the company, the court is not obliged to strike out an application for rectification of the register where the party claiming such relief is unable to assert a present entitlement to registration.

   Re Starlight Developers Limited [2007] B.C.C. 929 applied;

5. To obtain a judgment for rectification, the appellants will have to establish their beneficial ownership of the percentages of issued shares in the first respondent company which are the subject of the claim. Although the outcome of the rectification proceedings will turn on the resolution of a question arising between the appellants and the second respondent, those proceedings will involve an issue to be tried between the appellants and the company: a claim for rectification is primarily against the company and the registered holders of the shares whose registration is in question, if not the applicant.

   Morgan v Morgan Insurance Brokers Ltd. and Others [1993] B.C.C. 145 applied.

6. Although there may be some evidential and practical difficulties in the way of the appellants in establishing their claim, it cannot be said at this stage that their prospects for obtaining an order for rectification are merely fanciful. There is between the appellants and Nilon a real issue which it is reasonable for the court to try, that issue being the appellants' claim against Nilon for rectification of its register of members.

7. The second respondent is the registered holder of the shares whose registration is in question and is thus, along with the company, the proper defendant on an application to rectify the register. Thus, the second respondent is a necessary and proper party to the claim brought by the appellants against Nilon for rectification of its register.
Morgan v Morgan Insurance Brokers Ltd. and Others [1993] B.C.C. 145 cited.

8. The rectification proceedings would be suitable for trial of the disputes between the appellants and the second respondent. The claim for rectification in this case has from its inception been conducted by the formal procedures provided for in the CPR. It was commenced by claim form and an amended statement of claim has been served. All the facilities of CPR for full and effective trial of all issues of fact and law involved in the case are available in these proceedings.

9. The dispute as to the rectification of Nilon's register of members has its closest and most real connection with the BVI. Thus, the BVI is clearly the appropriate forum for trial as a preliminary issue of the questions arising between the members and alleged members of Nilon, which concern the appellants' rights to registration as holders of shares in Nilon. The interests of the parties and the ends of justice require that those questions should be heard and determined in the proceedings commenced and ongoing in the BVI.

10. The appellants are not precluded from obtaining permission to serve out on the basis on which they seek to do so in this appeal. At the time that the second respondent decided how to respond to service of the claim form and statement of case for which permission to serve out was given, he would have been informed by the documents that that the claim against Nilon for rectification was one of the bases on which the appellants sought to have him joined to the suit. He is not, by reason of some late amendment, being faced with that claim as a new and previously unpleaded cause of action asserted for the first time in answer to his challenge to the order for service out.

Metall und Rohstoff A.G. v Donaldson Lufkin & Jenrette Inc. and Another [1990] 1 Q.B. 391 applied.

JUDGMENT

[1] BENNETT, J.A. [AG.]: This is an appeal against the decision of Bannister, J. [Ag.] made on 21st December 2010, setting aside his order made in this action on 10th May 2010. By the Order of 10th May 2010, the above appellants were given permission to serve the claim form in the action upon the second respondent Manmohan Varma at an address in England. This is also an appeal against the

decision of Bannister, J. made on 21st December 2010 striking out the appellants' claim in this action against the first respondent company, Nilon Limited.

Background

[2] The background to this dispute lies in the assertion by the above-named appellants that on 26th October 2002, at Rochester, Kent, in England, the second appellant Bhagwan Mahtani ("Mahtani"), the third appellant Sunder Dalamal ("S. Dalamal"), the fourth appellant Nari Dalamal ("N. Dalamal") and the second respondent Manmohan Varma ("Varma") ("the joint venturers") entered into an oral joint venture agreement ("the JVA") to carry on the business of importing and selling rice in Nigeria. Under the terms of that agreement the business was to be carried out through the facility of a company which was to be incorporated in the British Virgin Islands ("the BVI") as a holding company. Each joint venturer was to contribute to the capital of and to subscribe for shares in that company in certain agreed proportions. The company was to be managed by respondent Varma, who undertook to procure the issue of shares in the company to the joint venturers in the agreed proportions.

[3] Eleven days after the making of the JVA (and in furtherance of it), on 7th November 2002, Varma arranged the incorporation of the first respondent company, Nilon Limited. ("Nilon") in the BVI. Subsequently the business was carried out under the management of Varma; Mahtani, his company, the first appellant Royal Westminster Investments S.A. ("Royal Westminster"), the other joint venturers N. Dalamal and S. Dalamal subsequently contributed capital and received payments simulating dividends. The appellants say that unknown to them, and in breach of the terms of the JVA, Varma procured that shares in Nilon were allotted only to himself. Thus, none of the appellants have been issued any shares in Nilon, or its subsidiary companies or has any right to participate in its management.

[4] On 5th May 2010, Royal Westminster and the alleged joint venturers Mahtani, N. Dalamal and S. Dalamal sought permission under rule 7.3(2)(a) of the Civil Procedure Rules 2000 ("CPR") to serve the claim out on Varma, who resides in England. In that claim they sought, inter alia, rectification of Nilon's register of members on the basis that they were entitled to be registered as holders of shares in Nilon. CPR 7.3(2)(a) provides for service on a person who is outside the jurisdiction, with the permission of the Court, if there is a real issue which it is reasonable for the Court to try between the intended claimant and someone on whom the claim form has been served as of right within the jurisdiction, and if the person sought to be served outside the jurisdiction is a necessary and proper party to that claim. The appellants sought to join Varma as a necessary and proper party to their claim against Nilon. At the hearing on 5th May 2010, Bannister J. pointed out that as the pleading then stood, there was no real issue to be tried between the appellants and Nilon. The appellants did not allege that Nilon had, or was in breach of any statutory or contractual obligation to them. In the absence of such an assertion, the judge said, there was no 'real issue' between themselves and Nilon which it was reasonable for the court to try and to which Varma could be a necessary and proper party. Since they were not holders of registered shares in Nilon and had no present right to registration as such, they were not entitled to the declaration sought and could not be entitled to rectification of the register on that basis.

[5] Accordingly, the judge refused permission to serve out. In doing so, however, he indicated that if the appellants could reformulate their pleadings to assert a viable claim against Nilon, to which Varma was a necessary and proper party, as distinct from a viable claim against Varma, he would consider the application to serve out in light of that reformulated claim. Against that background, the appellants returned on 10th May 2010 with an amended pleading. The substance of the amendment was an assertion on the part of the appellants that in order to give business efficacy to the JVA, it was necessary to imply that upon Nilon's incorporation an agreement and warranty collateral to the JVA came into being, to the effect that Nilon would issue and allot voting shares to the joint venturers or

their nominees as provided for in the joint venture agreement. This implied agreement was said to be binding on Nilon because it was under the control of Varma, its sole director: because the appellants, relying upon the expectations created by this implied agreement, had made payments and otherwise acted in furtherance of the joint venture, Nilon was estopped from denying that it was bound thereby.

[6] On the basis of the amended claim, the judge gave orders for the appellants to serve the claim out of the jurisdiction on the respondent Varma, in England.

[7] On 11th May 2010, the appellants issued these proceedings against Nilon and Varma claiming declarations that Westminster and the alleged joint venturers N. Dalamal and S. Dalamal are owners of shares in Nilon in the proportions agreed under the Joint Venture Agreement; rectification of Nilon's register of members to conform with this declared position; and for specific performance of Varma's alleged obligation under the JVA to procure the registration of Westminster and the Dalamals as shareholders in Nilon in the agreed proportions.

[8] The proceedings were served on the respondent Nilon in the Territory as of right. On 7th June 2010, service was effected on the respondent Varma in England.

[9] On 5th July 2010, Nilon filed an application under CPR 9.7(1)(b) for a declaration pursuant to that rule, that the court should not exercise its jurisdiction in respect of the claim against it. Alternatively, it sought an order that the proceedings against it be stayed on the ground of *forum non conveniens*.

[10] On 6th August 2010, Varma applied under CPR 9.7 to set aside service upon him. He argued that there was no serious issue between the appellants and Nilon to which he could be a necessary and proper party. He argued, alternatively, that service should be set aside because the BVI was not the appropriate and proper forum.

The Set Aside Judgment

[11] By judgment delivered on 21st October 2010 ("the Set Aside Judgment"), Bannister J. rejected the application by Nilon that the court should decline to exercise its jurisdiction in respect of the claim: Nilon was resident in the BVI and thus could not challenge the jurisdiction of the BVI court to subject it to its processes. Further, the court rejected the contention that the action should be stayed on the basis of *forum non conveniens*, holding that the BVI is pre-eminently the natural forum for the trial of what the court held to be the relevant issue, i.e. whether a BVI incorporated company had contracted to allot shares in its capital to the appellants.

[12] The court, however, concluded that the claim as pleaded did not demonstrate that there was a real issue which it was reasonable for the court to try as between the appellants and Nilon, so that the threshold provided by CPR 7.3(2)(a)(i) was not met.

[13] The appellants had framed their claim against Nilon on the basis that Nilon was party to an agreement, collateral to the JVA whereby it became obligated to allot shares in its capital to the appellants in the proportions stipulated in that agreement. They sought to give substance to this implied agreement by showing that they or persons acting on their behalf had made payments to Nilon pursuant to the terms of the JVA and that Nilon had, in turn, made payments to them which could be seen to be equivalent to the payment of dividends. The court was asked to deduce from those circumstances an agreement on the part of Nilon to allot shares to the appellants. The court did not accept that the demonstrated payments bore that implication. Neither did it accept that the alleged 'subscription' payments or the alleged 'dividend' payments bore any proportional relationship to the alleged allotment. The court concluded that the pleaded case showed no factual basis for the claim against Nilon.

[14] Moreover, the judge concluded that even if the appellants could have shown a plausible claim against Nilon, Varma could not be a necessary or proper party to

that claim. Nilon's liability could only arise if, contrary to the court's view, it was bound by a post incorporation contract to allot shares to the appellants. Varma could not be a party to that claim; his liability was alleged to have arisen under the pre-incorporation JVA. There was no connection between the claims. The mere fact that the claims could be conveniently tried together was no reason to exercise the jurisdiction to permit the proceedings to be served on a foreigner.

The Strike Out Judgment

[15] Encouraged by the Set Aside Judgment of 21st October 2010, Nilon applied to strike out the appellants' amended claim against it or alternatively for summary judgment on that claim. The hearing of this application took place on 14th December 2010.

[16] The appellants' principal argument in opposition to this application was that they had a cause of action against Nilon for rectification of its register pursuant to section 43 of the BVI Business Companies Act, 2004[3] ("The BVI Act").

[17] In rejecting this argument, by judgment rendered 21st December 2010 ("the Strike Out Judgment"), the judge held:

(a) The purpose of section 43 of the BVI Act is to enable the court to ensure that the company's register of members accurately reflected the state of its membership. It is not there in order to be used to establish title to shares, let alone to determine whether a defendant is in breach of a contract to procure that a company will issue shares.

(b) The right given by section 43(1)(a) of the BVI Act to a member of a company (or any person aggrieved) to apply to the court to have the register of members rectified is exercisable only if the information required by section 41 to be entered on the register was omitted from, or inaccurately entered on it, or if there was unreasonable delay in entering that information;

[3] Act No. 16 of 2004, Laws of the Virgin Islands.

(c) Unless and until Nilon actually allotted shares to the appellants and then neglected to register them as holders of such shares, it will not be the case that the names of any holders of registered shares in Nilon, or any other information required under section 41 to be entered on the register of members will have been so omitted;

(d) Since no allotment had in fact been made, the appellants had no right to assert present ownership of shares in Nilon, and thus no right to apply for rectification of Nilon's register of members. On the present facts the register correctly showed the membership of the company and there was no omission to be rectified.

(e) Even if the appellants were to prove their contractual entitlement to be issued shares in Nilon in consequence of the terms of the JVA they would obtain, not a present right to be registered as holders of shares in Nilon but an order in personam against Varma compelling him to perform the JVA by procuring Nilon to allot and issue the shares. Only upon Varma's compliance with such an order would the appellants have a right to rectification of the companies register of members.

(f) Although section 43(2) of the Act permitted the court to decide disputed questions of title and generally to determine any question that it may be necessary to decide for the purposes of rectification, this discretion arose only in proceedings under subsection 43(1), that is to say in circumstances where the rights of persons asserting a present right to registration as transferees or allottees of shares were disputed. Since the appellants had no right to bring proceedings under section 43(1), the occasion for the Court to use its discretion under subsection 43(2) did not arise;

(g) For the foregoing reasons none of the appellants could show that they had a viable cause of action against Nilon under section 43.

The appeal

[18] The appellants have appealed against the decision in the Set Aside Judgment of 21st October 2010 and against the decision in the Strike Out Judgment delivered 21st December 2010. The central issue raised in the appeal against the Set Aside Judgment is whether the appellants' claim against Nilon as pleaded raises a 'real issue' between themselves and Nilon which it would be reasonable for the court to try. There will not be a 'real issue' which it is reasonable for the court to try unless it can be shown that the appellants have a viable cause of action against Nilon with reasonable prospects of obtaining rectification. Thus, this issue also goes to the essential reason for the striking out of the appellants' claims against Nilon, namely the judge's view that they had no cause of action against that respondent.

'Real issue which it is reasonable for the Court to try'

[19] CPR 7.3(2)(a) provides –

> "(2) A claim form may be served out of the jurisdiction if a claim is made –
>
> (a) against someone on whom the claim form has been or will be served, and –
>
> (i) there is between the claimant and that person a real issue which it is reasonable for the court to try; and
>
> (ii) the claimant now wishes to serve the claim form on another person who is outside the jurisdiction and who is a necessary and proper party to that claim"

[20] Where an application is made under CPR 7.3(2)(a), that is, where a foreigner resident abroad is sought to be joined as a necessary and proper party to an action commenced against a defendant within the jurisdiction, the minimum criterion to be satisfied by the intended claimant is that the claim against the person resident within the jurisdiction must be brought bona fide and constitutes a

good cause of action, see: Credit Agricole Indosuez v Unicof Ltd. & Others[4] per Cook J:[5]

> "…where a cause of action exists against an English defendant, the claim is properly brought even if the predominant reason for including that person as a defendant is to found an application to join a foreign defendant, provided that the claim against the English defendant is *bona fide* and constitutes a good cause of action."

[21] The requirement that there should be between the claimant and the person served locally a 'real issue which it is reasonable for the court to try' is intended to prevent a claimant from mounting a spurious claim against someone amenable to the jurisdiction and then using the fact that that person has been served as a device to bring in the foreigner as the real defendant.[6].

[22] Thus the cause of action against the party served within the jurisdiction must be plausible and have a realistic chance of success, see: Owusu v Jackson[7] per Brooke LJ, where he stated:[8]

> "…There will not be a "real issue which is reasonable for the court to try" if the claimant "has no real prospect of succeeding" on that issue. This introduces the language of CPR 24.2(a)(i), and this court has held that "real" in that context is to be contrasted with "fanciful" (Swain v Hillman [2001] 1 All E.R. 91 at [10])".

[23] In this case, the appellants complain that in the judgment of 21st October 2010, the judge concluded that there was no real issue between themselves and Nilon which it was reasonable for the court to try, based largely on the view taken by him as to the existence of a collateral agreement between themselves and Nilon. They identified the real issue between themselves and Nilon, which the judge did not substantially address, as being the determination of their rights as against Nilon for rectification of its register of members. They argued that since Nilon defends

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[4] [2003] EWHC 2676 (Comm); [2004] 1 Lloyd's Rep. 196.
[5] At para. 15.
[6] See MB Pyramid Sound N.V. v Briese Schiffahrts GmbH & Co. KG MS Sina (The Ines) (No. 1)[1993] 2 Lloyds Rep 492 per Mr. Justice Saville at p. 493; Konamaneni & Ors v Rolls-Royce Industrial Power (India) Ltd. & Ors [2003] B.C.C. 790 per Lawrence Collins J. at p. 801, para 44.
[7] [2003] P.I.Q.R. P186.
[8] At para. 32.

against this claim, a real issue exists between the parties as to the appellants entitlement to the rectification sought.

[24] To put this complaint in proper perspective it must be noted that the appellants did not, at the hearing of the application to set aside service upon Varma, identify the real issue between themselves and Nilon as being their claim for rectification: this was probably because the judge had already indicated his disinclination to permit service out on that basis. The arguments on their behalf were directed to the question whether Nilon had, by reason of its dealings subsequent to the JVA, adopted or become bound by the terms of that agreement, or by some implied agreement collateral to it and had thus become obligated to the appellants to perform its terms. In those circumstances it is not surprising that the judge did not focus on the claim for rectification in the Set Aside Judgment of 21st October 2010. Nonetheless, the question remains whether the appellants' claim for rectification constitutes a plausible cause of action against Nilon on which they have a real, as opposed to fanciful prospect of succeeding.

The claim for rectification

[25] The claim for rectification in this case is brought under section 43 of the BVI Act. Section 43 of that Act provides

> "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,
>
> 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 grant or 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."

[26] Section 41(1) of the BVI Act provides, inter alia

"41. (1) A company shall keep a register of members containing, as appropriate for the company,

(a) the names and addresses of the persons who hold registered shares in the company;
(b) the number of each class and series of registered shares held by each shareholder…"

[27] The appellants say that a listing of their names and addresses as persons holding registered shares in Nilon is information that is required by section 41(1)(a) to be entered in the register of members of that company because it reflects the true position resulting from the JVA and from the adoption by Nilon of that agreement as shown by their expenditures and by the subsequent dealings between themselves and that company. They claim entitlement to be issued shares in Nilon in the proportions provided for in the JVA; to the extent that shares have already been issued in Nilon, they claim beneficial ownership of such numbers of those shares as would correspond to the percentages of shareholdings which were agreed to be issued to them under the JVA.

[28] The respondents on the other hand contend that the substance of the appellants' case, as shown on the amended statement of claim dated 11th May 2011 is that Varma breached the JVA by failing to procure the allotment and issue by Nilon of shares to them in return for payments that they had made between 2004 to 2006. Thus, the appellants' real claim is against Varma for specific performance of an agreement to procure the allotment of shares that had yet to be allotted. This assumption underlies the judge's finding at paragraph 30 of the Strike Out Judgment of 21st December 2010 that if the appellants' claims against Varma were

successful those claims could result only in an *in personam* order against Varma which would be ineffective to give the appellants an immediate registerable interest in any shares in Nilon. It is the premise for the respondents' submission, based on the dicta of Harman J. in the case of Re BTR plc.[9] that the appellants could have no claim to rectification in the instant case because the rectification jurisdiction of the court could only be invoked in respect of shares that had already been issued. It also forms the basis on which the respondents say that the instant case can, on its facts be distinguished in principle from the decision of the English Court of Appeal in the case of Re Hoicrest Ltd.[10]

[29] I do not accept this characterization of the case for the appellants. A perusal of the amended statement of claim shows that the appellants' claim is primarily for a beneficial interest in the issued shares; the claim for specific performance of the allotment agreement appears to be an alternative claim.[11] The prayer to the Amended Statement of Claim, partially set out by the judge at paragraph 24 of the judgment and more fully set out under the heading "Summary of Claims" in the Amended Statement of Claim,[12] contains the following terms:

> "CLAIM:
>
> A. A declaration that the First Claimant, as nominee of the Second Claimant, is the owner of 37.5% of the issued shares in the First Defendant, pursuant to the Joint Venture Agreement.
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> B. A declaration that the Third Claimant is the owner of 10% of the issued shares in the First Defendant, pursuant to the Joint Venture Agreement.
>
> C. A declaration that the Fourth Claimant is the owner of 10% of the issued shares in the First Defendant, pursuant to the Joint Venture Agreement.
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> D. An order that the register of members of the First Defendant be rectified forthwith, pursuant to section 43(1)(a) of [the BVI Act], to give effect to the true and proper state of affairs pertaining to it, in

[9] (1988) 4 BCC 45.
[10] [2000] 1 B.C.L.C. 194.
[11] See paras. 20-24 and 26 of the Amended Statement of Claim, Core Bundle, Tab 9.
[12] See Core Bundle, Tab 9.

accordance with the terms of the Joint Venture Agreement and the Collateral Agreement and Warranty, by entering the names and addresses of the First, Third and Fourth Claimants as the legal owners of the relevant number of shares in the First Defendant.

E. An order that the Second Defendant in his capacity as the sole director and/or controller of the First Defendant take all necessary steps to give effect to the said orders.

F. An order for interim and/or final injunctive relief, requiring the First and Second Defendants to give effect to paragraphs A, B, C and D above.

G. Damages or such further or other relief as the court considers just and appropriate, particularly in relation to determination of any issue related to rectification of the register of members of the First Defendant.

FURTHER OR ALTERNATIVELY, the Claimants claim against the Defendants, for the following relief, in connection with the Second Defendant's breach of the Joint Venture Agreement and the First Defendant's breach of the collateral agreement and Warranty:

(1) An order by way of specific performance of the Joint Venture Agreement, that the Second Defendant do procure the allotment and issue to the Claimants of their respective shareholdings in the First Defendant…" etc.

[30] Whether the appellants' claim as set out discloses a viable cause of action depends upon the true construction of section 43 of the BVI Act, and in particular the scope of the inquiry into the question of whether information that is required to be entered in the register of members under section 41 has been omitted.

Decision of English Court of Appeal in Re Hoicrest Ltd.

[31] The appellants say that the judge erred in his construction of section 43 of the BVI Act, and that he ought to have followed the approach of the English Court of Appeal in Re Hoicrest Ltd. a decision in which that court considered a similar question in the context of section 359 of the English Companies Act 1985 ("the English Act"), a provision which they say is materially indistinguishable from

section 43. They contended that that decision directly supports their entitlement to bring their claim against Nilon in the manner in which they seek to do.

[32] In that case K and M who were living together were directors of a company, Hoicrest Ltd., in which they held 1 share each. The company subsequently issued 98 shares, all of which were allotted to M who had lent £38,000 to the company. K alleged that there was an oral agreement between himself and M which provided that M was to hold 49 of those shares in trust for him and as security pending repayment of the loan. The parties' personal relationship later broke down. The loan having been repaid, K requested transfer of the 49 shares to him as was required by the alleged oral agreement. M denied that any such agreement had been entered into and claimed that she was the sole legal and beneficial owner of the shares. K applied under section 359 of the English Act for rectification of the register on the basis that he was the beneficial owner of the shares and entitled to a legal transfer of them. The relevant part of section 359 provides that:

> "(1) If–(a) the name of any person is, without sufficient cause, entered in or omitted from a company's register of members … the person aggrieved, or any member of the company, may apply to the court for the rectification of the register.
> (2) …
> (3) On such application the court may decide any question relating to the title of a person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for the rectification of the register…"

[33] The judge at first instance held that section 359 of the English Act could apply only if K's name had been omitted from the register 'without sufficient cause'. There was in fact sufficient cause for his name to be omitted, because under section 183 of the English Act a company was prohibited from registering a transfer of shares unless a proper instrument of transfer had been delivered to it. K had been unable to produce such a transfer, and accordingly, had no present right to registration, and no right to seek rectification of the register in vindication of that right.

[34] The Court of Appeal held that this approach did not give full effect to the powers of the court under subsection 3 of section 359. That subsection conferred on the court a general discretionary power to decide any question relating to the title of a person who was party to the application for rectification, and generally to decide any question necessary or expedient to be decided for rectification of the register. While K faced evidential and other difficulties in establishing his claim, it could not be said at that stage that he had no reasonable cause of action: he might yet be able to establish beneficial ownership of the shares, and therefore, an entitlement to rectification. The court would not require the company to alter its register of members without production of an instrument of transfer as required by Section 183 of the English Act. However, the court's wide powers of case management under the English Civil Procedure Rules, enabled it to defer a decision on rectification until after the resolution of the dispute concerning K's beneficial ownership of the shares whose registration was in question.

[35] In the Strike Out Judgment of 21st December 2010, Bannister J. considered the case of Re Hoicrest Ltd. He determined that the Court of Appeal in that case had not found that the appellant had a cause of action against the company for rectification; indeed, it had specifically found that he did not. He found that despite this being the position, the Court of Appeal for essentially procedural reasons had gone on to hear and determine the dispute between the alleged members inter se as to beneficial ownership of the shares within the context of a section 359 application for rectification.

[36] From this analysis the judge concluded that the decision of the English Court of Appeal in Re Hoicrest Ltd. could not assist the appellants in establishing a right to relief against Nilon for rectification.

[37] The judge's analysis of this aspect of the Re Hoicrest Ltd. decision, which appeared at paragraph 40 of the Strike Out Judgment of 21st December 2010 was mistaken in one aspect: as was pointed out by Mr. Marshall, QC for the appellants, the passage quoted by the judge as showing that the English Court of Appeal had

found that the applicant K had no cause of action was actually part of the court's recapitulation of the argument of the losing party. In point of fact, the basis on which the judgment of the High Court was reversed in that case, was the conclusion of the Court of Appeal that it could not fairly be said at that stage of the proceedings that K had no reasonable cause of action.

[38] More fundamentally, the judge differed in principle from the English Court of Appeal in an important way. This is apparent at paragraph 42 of the judgment, where he stated –

> "…In Hoicrest it was never going to be established that the company had omitted the applicant's name without sufficient cause because he had never asked to be registered and, more importantly, had no immediate right to be registered. If a rectification application is made by a person clearly having no present right to be registered (as the Court of Appeal accepted was the case in Hoicrest), then the inquiry which subsection 359(1) prompts is answered *in limine*. There is no need in such a case for the Court to go on to resolve ancillary questions, because by definition there are none."

[39] As the judge saw it, Mummery L.J. was wrong to construe subsection 3 of section 359 of the English Act as conferring a free standing general discretionary power to decide 'any questions' relating to the title of a person claiming rectification of the register, even if the question were not directed at the issue of whether or not the person claiming rectification had an immediate legal right to be included in the register.

[40] In my view this criticism is not well made. Under section 359 of the English Act, the court is given permission to rectify the register of members where an applicant's name is included or omitted from the register 'without sufficient cause'. It seems to me that the effect of subsection 3 of that section is to give the court a wide discretion as to the scope of the circumstances in which it can be demonstrated that the inclusion or omission is 'without sufficient cause'. The discretion is broad enough to permit inquiry into the substantive cause for the inclusion or omission.

[41] In Re Hoicrest Ltd., the proximate cause for the omission of K's name from the register was his inability to present an executed transfer to the company; the substantive cause however was M's denial of his entitlement to, and refusal to execute the instrument of transfer as requested. One premise of the decision in Re Hoicrest Ltd. was that if K could succeed in establishing that the substantive cause for the omission of his name from the register of members was the wrongful refusal of M to honour their prior agreement, he would have demonstrated that the omission of his name was 'without sufficient cause'. Indeed, one proposition that was clearly rejected by the English Court of Appeal in Re Hoicrest Ltd. was that stated by the judge at first instance in that case, that it was "…necessary to find the existence of a legal title which the company has failed properly to register before the section operates…". The point of the decision in that case is that if K could succeed in establishing that he had beneficial title to the shares in question and that the reason for the omission of his name from the register of members of the company was the wrongful denial of that title by M, the court had power under section 359(3) to rectify the register so as to give effect to M's unperformed obligation to transfer legal title in the shares to him.

Section 43 of the BVI Act

[42] Under section 43 of the BVI Act, the applicant for rectification must show, not that his name has been included or omitted from the register of members "without sufficient cause" but that "information that is required [by section 41] to be entered in the register" has been omitted, inaccurately entered, or that there has been unreasonable delay in entering the same.

[43] In the instant case, the information which is said to have been omitted from the register and which is required by section 41 to be entered therein comprises "the names and addresses of the persons who hold registered shares in the company". In National Westminster Bank Plc. and Another v Inland Revenue Commissioners[13] Lord Templeman stated[14] that:

[13] [1995] 1 A.C. 119.

> "Every company must maintain a register of members. The register must contain, inter alia, the names of the shareholders, an indication of the shares to which each shareholder is entitled, a statement of the amount paid up on the shares, and the date when the entry was made. No notice of any trust, express, implied or constructive, is to be entered on the register."

[44] See also Re a Company No. 007828 of 1985:[15]

> "The courts, in the Companies Act, are not concerned for a moment with trusts. Companies are required not to pay attention to trusts. The nature of the title to shares in companies with which the company is concerned is at all times that of the registered holder, who has a "legal estate"."

[45] The information which is required by section 41 to be recorded on the register of members are the names and addresses of persons holding or immediately entitled to hold legal title to the shares.

[46] I have nonetheless, after anxious consideration, come to the conclusion that the approach of the English Court of Appeal in Re Hoicrest Ltd. is the appropriate one for applications made under section 43 of the BVI Act. My reasons for this conclusion include the following considerations –

(a) If the interpretation favoured by the learned judge is correct, the Court would have jurisdiction to rectify the register only where the company was in breach of some obligation imposed upon it by section 41 of the BVI Act; thus, as the judge stated at [31] of the Strike Out Judgment of 21st December 2010 that:

> "Even if [the appellants] obtained their order against [Varma] and if [Varma] refused to comply with it (or Nilon refused to allot [the shares]), still the Court could not order rectification of Nilon's register of members, since unless and until Nilon actually allots shares to [the appellants] and then neglects to register them as holders of such shares, it will not be the case that the name of any holder of shares in Nilon will have been omitted from its register of members."

And further at [32]:

> "…no breach of subsection 41(1) requiring rectification of Nilon's register of members under section 43(1) would occur unless and

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[14] At p. 124.
[15] (1986) 2 B.C.C. 98951 per Harman J. at 98954.

> until Nilon had neglected to rectify its register of members to record the fact that allotments had been made."

Where the party claiming rectification has legal title to the shares the registration of which is in issue, the question which arises will generally be between himself and the company concerning the company's failure to register his title to those shares. It is however, plain from section 43(2) that the section could operate and the Court would have jurisdiction to rectify the register where questions concerning the applicant's right to have his name entered on the register arose between the members or alleged members inter se without involving the company. It therefore seems to me that it is not necessary for the company to be in breach of any of its obligations to the applicant for the court to exercise its jurisdiction under section 43. The court may rectify the register notwithstanding that the company is not responsible for the relevant omission or inaccurate entry.

(b) It seems to me that the discretion conferred on the court by section 43(2) to determine any question relating to the right of a party to rectification proceedings to have his name entered in or omitted from the register of members even if that question arises between the members or alleged members and does not involve the company, requires the court in such proceedings to have regard to equitable as well as legal rights vested in such a party. Questions of title arising between members or alleged members inter se, will in most instances involve equitable rather than legal entitlements; such questions typically arise where the holder of the disputed shares refuses to clothe the person claiming rectification with legal title to those shares.

[47] I conclude that although the information required by section 41 comprises the names and addresses of persons who hold or are immediately entitled to hold legal title to registered shares in the company, the court is not obliged to strike out an application for rectification of the register where the party claiming such relief is

unable to assert a present entitlement to registration. As was pointed out by Briggs J. in the case of Re Starlight Developers Limited:[16]

> "Following the coming into force of the CPR, Re Hoicrest points to a possibly greater incentive to fashion a case management solution to the resolution of disputes which, although not raised by an appropriate form of proceedings, need to be resolved, and a case management solution falling short of the striking out or the dismissal of the inappropriate proceedings if some other solution would avoid an unnecessary increase in costs."

[48] Just as in Re Hoicrest Ltd. the court would not order the company to record a transfer of shares in breach of section 183 of the English Act, so in the instant case the court would not order rectification where the appellants were not in a position to assert legal title to the shares in dispute. However, section 43(2) of the Act permits the court, where appropriate, to decide relevant disputes concerning entitlement to registration and the court has ample powers of case management under CPR which enable it to determine any such dispute prior to deciding whether or not to permit rectification of the company's register of members. If the court finds that the applicant has established a beneficial interest to the shares in question, it is empowered to give effect to that interest by declaration and by rectification of the register to accord with the declared entitlement of the appellant to registration as legal owner of the shares.

[49] The judge expressed the view that this power can be exercised only "in proceedings under subsection 43(1)'.[17] In my judgment, however, subsection 2 of section 43 clarifies the ambit of the discretion afforded to the courts in their exercise of the jurisdiction conferred by subsection 1: it indicates the expansive nature of the inquiry permitted and the extensive powers available to the court in proceedings conducted under that provision.

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[16] [2007] B.C.C. 929 at para. 19.
[17] See para. 29 of the Strike Out Judgment, dated 21st December 2010.

Whether the appellants have a viable cause of action for rectification

[50] A cause of action is classically defined as "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court."[18] The question whether the appellants have a viable cause of action for rectification in these proceedings will be conclusively answered only upon resolution of the issues arising between the appellants and Varma. To obtain a judgment for rectification, the appellants will have to establish their beneficial ownership of the percentages of issued shares in Nilon which are the subject of the claim. In that event the court will have power under section 43 of the BVI Act to grant a declaration as to their beneficial title to the shares, to order the appropriate transfers of shares to be effected, and treating as done that which ought to have been done, to order rectification of Nilon's register notwithstanding that that company is not in breach of any of its obligations under section 41 of the BVI Act, or under any contract with them. Although the outcome of the rectification proceedings will turn on the resolution of a question arising between the appellants and Varma, those proceedings will involve an issue to be tried between the appellants and Nilon: a claim for rectification is primarily against the company and the registered holders of the shares whose registration is in question, if not the applicant.[19]

[51] There are, it seems, some evidential and practical difficulties in the way of the appellants in establishing their claim. It cannot, however, be said at this stage that their prospects for obtaining an order for rectification are merely fanciful. I hold that there is between the appellants and Nilon a real issue which it is reasonable for the court to try, that issue being the appellants' claim against Nilon for rectification of its register of members.

[18] Coburn v Colledge [1897] 1 Q.B. 702 per Lord Esher M.R. at 706.
[19] See Morgan v Morgan Insurance Brokers Ltd. and Others [1993] B.C.C. 145 per Millett J. at 146.

Necessary and proper party

[52] Where there is such an issue between a claimant and the party served locally as of right, CPR 7.3(2)(a)(ii) provides for service of the claim form on another person who is outside the jurisdiction and who is a necessary and proper party to that claim. The appellants claim for rectification of Nilon's register cannot be determined without the court hearing from Varma. That is because it will be necessary for the court to determine, prior to deciding whether or not to rectify Nilon's register of members, a question concerning the appellants' right to have their names placed on the register, and this question arises between those appellants and Varma. As was pointed out by Lawrence Collins, J. in Greenwich Millennium Exhibition Ltd. v New Millennium Experience Co. Ltd.;[20]

> "If … rectification of the register would directly affect the legal rights of another person, then the court may not order rectification without hearing that other person."

Varma is the registered holder of the shares whose registration is in question and is thus, along with the company, the proper defendant on an application to rectify the register.[21] For these reasons, I hold that Varma is a necessary and proper party to the claim brought by the appellants against Nilon for rectification of its register.

Suitability of rectification proceedings for trial of the disputes between the appellants and Varma

[53] The respondents say that the determination of the appellants' rectification claim would involve a trial of the questions arising between the appellants and Varma as to Varma's obligation under the JVA, and as to whether in consequence of the terms of the JVA and/or the facts and circumstances asserted by the appellants, the appellants were beneficial owners of a number of the shares issued by Nilon and currently registered in Varma's name. Firstly, the respondents say that it would not be reasonable for the court to give directions for trial of these issues in the course of the rectification proceedings because the summary procedure for

[20] [2003] EWHC 1823 (Ch) at para. 85.
[21] Morgan v Morgan Insurance Brokers Ltd. and Others [1993] B.C.C. 145 per Millett J. at 146D-E.

rectification is unsuitable for inquiry into and determination of the complicated issues of fact that are likely to arise on inquiry into the parties negotiation of the JVA and their subsequent dealings.

[54] I reject this submission. The claim for rectification in this case has from its inception been conducted by the formal procedures provided for in the CPR. It was commenced by claim form and an amended statement of claim has been served. All the facilities of CPR for full and effective trial of all issues of fact and law involved in the case are available in these proceedings.

Forum conveniens

[55] The respondents further submit that the JVA was purportedly concluded orally in England between 4 persons, 3 of whom are resident there (the fourth being resident in Nigeria) and is accordingly governed by English Law. The only connection that the JVA has with the BVI is that Nilon is incorporated here. Even so, Nilon is managed from Jersey, the joint venture operations involve the importation and sale of rice in Nigeria and is conducted there by Nigerian companies. None of the payments or other events relevant to the appellants claim took place in the BVI. For this reason the BVI is not the appropriate forum for trial of this issue.

[56] I reject this submission also. The claim for rectification of Nilon's register of members involves a determination of the rights of persons claiming to be entitled to registration as the holders of shares in a BVI registered company, and to have the register of members of that company rectified so as to accord with and reflect the true state of its membership. Matters concerning the organization and administration of a company are generally treated as matters ideally suited to be determined in the location in which the company has been formed.[22] As was stated by the judge in paragraph 34 of the Set Aside Judgment of 21st October 2010, if foreigners incorporate companies here they must expect to have to come

[22] See Dicey, Morris and Collins, The Conflict of Laws, 14th Ed., para. 30-024.

here to litigate disputes going to the membership and administration of such companies.

[57] In this case, in order to resolve the pending claim for rectification against Nilon, the court in the BVI must determine, on a preliminary basis, a question arising between the members or alleged members of the company all of whom reside outside of the jurisdiction. The factors relied on by the respondents in seeking to convince the court not to proceed to hear and determine the dispute in these proceedings are not, in my judgment, persuasive. The determination of the dispute between the members and alleged members of Nilon will largely involve questions of fact concerning the terms, if any, upon which they agreed to participate in the ownership and management of Nilon Limited, a BVI company which formed part of the corporate, contractual and financial arrangements devised by them to carry on the business of the importation and marketing of rice in Nigeria. Important to a decision on these questions will be evidence as to what was said by the parties at a meeting held between them at Rochester, Kent in England on 26th October 2002. Also important will be evidence of their subsequent dealings inter se, much of which one might expect to be documented in the minutes of the meetings of the company and in its other records. The locations at which these arrangements were made or at which these dealings took place are merely incidental: the venture had little operational connection with either England or the BVI.

[58] Even if it is accepted that the substantive law of the JVA is English Law, this is a factor of little significance. The issues disputed between the appellant and Varma will be decided on the same principles whether the matter is determined in England or in the BVI since on those matters the BVI courts apply principles of English common law. An important consideration is that the aspect of the JVA relevant to the instant proceedings – the incorporation of Nilon and the issue of shares to the alleged joint venturers – was to be performed in the BVI. Since Nilon is a BVI company and the disputed shares are shares in such a company, the BVI Act would govern the modalities of performance of any obligations imposed by the

JVA in relation to the issue or transfer of such shares. Moreover, regardless of the forum in which the factual dispute between the appellants and Varma is resolved, the remedy sought, that is rectification of Nilon's register of members, will ultimately require the intervention of the BVI Court.

[59] If, on the other hand, the court was to strike out or stay the appellants claim for rectification so as to permit the relevant question to be decided in England this would involve a waste of the considerable time, effort and resources already committed to the pursuit of these proceedings. There is little justification for the duplication and increased cost that would be involved in discontinuing the current proceedings and re-litigating this aspect of the claim elsewhere.

[60] I conclude that the dispute as to the rectification of Nilon's register of members has its closest and most real connection with the BVI, that the BVI is clearly the appropriate forum for trial as a preliminary issue of the questions arising between the members and alleged members of Nilon which concern the appellants' rights to registration as holders of shares in Nilon; and that the interests of the parties and the ends of justice require that those questions should be heard and determined in the proceedings commenced and ongoing in the BVI.

Principle in Metall und Rohstoff A.G. v Donaldson Lufkin & Jenrette Inc. and Another

[61] Finally, the respondents say that, by this appeal, the appellants are attempting to justify the order for service on grounds that they did not rely on in their application for permission to effect such service; they say the appellants are precluded by the principles enunciated by Slade L.J. in the case of Metall und Rohstoff A.G. v Donaldson Lufkin & Jenrette Inc. and Another[23] from doing so.

[62] The factual premise for this contention is that on 5th May 2010, the appellants sought permission to serve out on the ground that there was a real issue between themselves and Nilon in relation to their application under section 43 of the BVI

[23] [1990] 1 Q.B. 391.

Act to rectify Nilon's register of members, and that Varma was a necessary and proper party to that claim. The judge was not prepared to order service out on that ground, so the appellants amended their claim to add an additional claim against Nilon, namely that it was in breach of its obligations to them under an implied collateral contract. The respondents say that is was on the basis of this latter claim that permission was given to serve out, and the appellants are not permitted to seek to justify service out on any other basis.[24]

[63] In my judgment this contention is misconceived. The principle articulated by Slade L.J. in Metall und Rohstoff A.G. v Donaldson Lufkin & Jenrette Inc. rests on the consideration that a foreigner is not lightly to be subjected to what is to him a foreign jurisdiction: if, therefore, an application is made without notice for permission to serve the claim upon him out of the jurisdiction the court must be fully and clearly appraised as to the nature of the legal claim in respect of which it is asked to assume jurisdiction. The foreigner must also be clearly informed as to the legal basis of the claim against him, so that he can decide whether to submit to the jurisdiction, submit for the limited basis of challenging jurisdiction, or to ignore the order giving permission altogether.[25] For these reasons a party seeking permission to serve out of the jurisdiction must clearly state in the statement of case and in the affidavits filed in support of the application, the basis on which the claim is made, and on which permission to serve out is sought. The court will, in determining the application for service out consider only those causes of action which have been specifically pleaded; if an applicant explicitly spells out in his statement of case the legal result of what he has pleaded, the court will consider his application in light of the identified cause of action only and will not permit him to seek to justify service out on some other basis.[26]

[64] To determine whether service abroad is permissible one must look at the causes of action set out in the claim form and statement of case sought to be served out,

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[24] Metall und Rohstoff A.G. v Donaldson Lufkin & Jenrette Inc. and Another [1990] 1 Q.B. 391.
[25] See Metall und Rohstoff A.G. v Donaldson Lufkin & Jenrette Inc. and Another [1990] 1 Q.B. 391 at 456E-F.
[26] See Metall und Rohstoff A.G. v Donaldson Lufkin & Jenrette Inc. and Another [1990] 1 Q.B. 391 at 436C-D.

see: Excess Insurance Company Limited v Astra S.A. Insurance and Reinsurance Company[27] In that case Neill L.J., using the pre-CPR terminology of 'writ', stated[28] that:

> "The cause or causes of action to which the court and the defendant are to have regard are those set out in the writ. It is the writ for which leave to serve is sought and granted."

[65] In the instant case the appellants claim to be entitled to serve the claim form and statement of claim out on Varma on the ground that he was a necessary and proper party to the claim being pursued against Nilon under section 43 of the BVI Act. The basis for this claimed entitlement is that the claim form and statement of case for which permission to serve out was given, and which was the subject of Varma's jurisdictional challenge, included as one cause of action the claim against Nilon for rectification. At the time that he decided upon his response to the service of those documents upon him, Varma would have been informed by the documents that that cause of action was one of the bases on which the appellants sought to have him joined to the suit. He is not, by reason of some late amendment, being faced with that claim as a new and previously unpleaded cause of action asserted for the first time in answer to his challenge to the order for service out. I accordingly reject the submission that the appellants are precluded from obtaining permission to serve out on the basis on which they seek to do so in this appeal.

Disposition

[66] On the foregoing reasoning and findings, I make the following orders –

(1) The appeal is allowed, and, accordingly, the decision of Bannister J. made on 21st December 2010 setting aside his order made in this action on 10th May 2010, which permitted the appellants to serve the claim form in the action upon the second respondent Manmohan Varma at an address in England, is set aside. Additionally, the decision of Bannister J. made on

[27] [1996] 5 Re. L.R. 471.
[28] At p. 476.

21st December 2010 striking out the appellants' claim in this action against the first respondent company, Nilon Limited, is also set aside.

(2) Consequent upon paragraph 1 of this judgment, the appellants' service of the claim form in the action upon the second respondent Manmohan Varma in England is confirmed to have been proper and effective service, and the appellants' claim against the respondent company, Nilon Limited, is restored.

(3) The respondents are to pay the appellants' costs in this court and in the court below. The costs are to be assessed unless agreed within twenty one (21) days of the date of this order.

(4) The matter is remitted to the Commercial Court for directions for the further conduct of the matter.

Sydney A. Bennett, QC
Justice of Appeal [Ag.]

I concur.

Hugh A. Rawlins
Chief Justice

I concur.

Davidson K. Baptiste
Justice of Appeal