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

CLAIM NO: BVIHC (COM) 32 OF 2012

BETWEEN:

AMALIA INVESTMENTS LIMITED

Claimant/Applicant

and

VIRGTEL LIMITED
VISCAYA ARMADORA SA

Defendants/Respondents

Appearances: Mr John Carrington for the Claimant/Applicant
Mr Paul Dennis and Ms Nadine Whyte for the Defendants/Respondents

JUDGMENT

[2012: 26 March; 13, 23 April]

(Claim arising out of subject matter previously adjudicated upon by Court in other proceedings - whether barred by *res judicata* principle – whether abuse of process – whether injunction to be granted)

[1] **Bannister J [ag]:** This is an application for an interim injunction. It is another round in the ongoing dispute between Mr Hendrik van Leeuwen ('Mr van Leeuwen'), who is the principal behind the second defendant ('VPanama'), and Mr Harvey Zabusky ('Mr Zabusky') who is the principal behind the claimant ('Amalia'). For a detailed account of the origins and progress of the dispute, the reader is referred to my judgment of 14 October 2011, given in proceedings[1] in which another of Mr van Leeuwen's companies ('VAnguilla') was claimant and the first Defendant in these proceedings ('Virgtel') and Mr Zabusky were the defendants. I shall refer to those proceedings as 'the first proceedings.'

[2] In the first proceedings Mr van Leeuwen's object was to restrain Mr Zabusky, a director of Virgtel, from holding himself out, as he had been doing, as solely entitled to give instructions on behalf of Virgtel. In those proceedings Mr van Leeuwen asserted that VAnguilla was the majority shareholder and thus controller of Virgtel. Since it transpired that VAnguilla had not been entered in Virgtel's register of members, it could not, as a matter of company law, be a member of Virgtel, but since it held a transfer from its predecessor, VPanama, I found that VAnguilla was entitled to be

[1] **BVIHCOM 2010/54**

registered as majority shareholder. In resisting this conclusion, Mr Zabusky took a number of points. These turned in the main upon a meticulous analysis of the chain of ownership by which VAnguilla had reached the position of being the beneficial owner of a majority shareholding in Virgtel and it is necessary for me briefly to summarise that chain and the criticisms made of it in the first proceedings in order that this judgment can be understood.

[3] In May 2009 the 600,000 issued shares of Virgtel were held as to 50% by a company called White Owl Limited ('WOL'), 40% by Amalia and 10% by a company called BZ Investments Limited ('BZ'). These parties had entered into a shareholders agreement ('the SHA'), to which Virgtel was also party. The SHA contained common form pre-emption provisions.

[4] Of importance for present purposes are the provisions of the SHA governing the constitution of Virgtel's board. Under clause 6 of the SHA the board was to consist of no more than five members. Each of Amalia and WOL was entitled at all times to have an equal number of directors and each was entitled to nominate two directors. The quorum for directors meetings was two, of which one had to be a representative of WOL and one had to be the representative of Amalia. By clause 6.6 of the SHA all decisions of Virgtel's board were required to be unanimous.

[5] It will be seen that for so long as WOL had no more than 50% of the votes in general meeting, Amalia and BZ together could prevent WOL from appointing its nominee to the fifth seat on the board and thus obtaining a majority in directors' meetings.

[6] In October 1999 Amalia agreed to transfer one share to WOL, against a promise by WOL to come up with further finance for Virgtel. WOL failed to do this. In autumn 2000 Mr van Leeuwen appeared as a white knight and Amalia agreed that he should take over WOL's majority holding of 300,001 shares. This was to be done using the vehicle of VPanama, the second defendant to the present proceedings. To enable this transaction to complete Amalia gave its written consent under Mr Zabusky's hand and waived its rights of pre-emption and all other of its rights under the SHA which might be in conflict with VPanama's acquisition of the WOL holding .

[7] In the first proceedings I held that the effect of the transaction was to give VPanama a beneficial as well as a legal interest in all the 300,001 shares. No offer was made by WOL to BZ pursuant to the SHA when it sold its shares to VPanama. BZ has never complained about this and had clearly lost any right to do so by the time the first proceedings were commenced, but Mr Zabusky used the fact to found an argument that the transfer from WOL to VPanama was vitiated as a result. In the course of dismissing that argument I held that Mr Zabusky had no *locus* to raise the point since he had never been a party to the SHA.

[8] A consequence of the transfer from WOL to VPanama of its majority holding was that Amalia lost the opportunity (in conjunction with BZ) to prevent VPanama from appointing a nominee to the fifth position on Virgtel's board and thus lost its entrenched right (acting in concert with BZ) under the SHA to an equality of representation.

[9] In January 2001 BZ sold 18,000 shares out of its holding to VP. No offer of those shares was made by BZ to Amalia before the sale completed. I dismissed Mr Zabusky's complaint about this on similar grounds to those upon which I had dismissed his complaint about the failure of WOL to comply with the pre-emption provisions in the SHA on its transfer to VPanama in October 2000.

[10] On 7 August 2009 VPanama transferred its majority holding to VAnguilla. In referring to that fact in my judgment in the first proceedings I remarked in passing that VPanama had not offerred Amalia or BZ the opportunity to exercise their pre-emptive rights under the SHA. I said that this was not surprising, since VPanama was not a party to the SHA. That observation was not *obiter*. It was critical to establishing VAnguilla's beneficial entitlement to the majority holding clear of any competing rights under the SHA and was made after a hearing at which no attempt had been made to establish the novation for which Amalia contends in the present proceedings.

[11] My conclusions in the first proceedings were that VAnguilla was not a majority shareholder, within the meaning of section 78 of the Business Companies Act, 2004 ('the BCA') although it was entitled to be so registered. I also held that the board of directors of Virgtel consisted of Mr van Leeuwen and Mr Zabusky.

Subsequent events

[12] At a meeting of Virgtel's members held on 10 January 2012 Mr Zabusky was removed as a director. Amalia complains that this was a breach of the terms of the SHA, by which, it contends, VPanama is bound. It also make makes various unconnected complaints as to what it says are procedural deficiencies in the manner in which Mr Zabusky's removal was carried out.

[13] On 7 February 2012 Amalia commenced the present proceedings in the High Court. The defendants are Virgtel and VPanama. Mr Zabusky is not a party. The Court is invited to order the holding of a meeting of the board of Virgtel at which resolutions are to be passed that each of Amalia and VPanama has equality of representation. The relief sought includes declarations that each of Virgtel and VPanama is bound by the SHA as well as orders that Virgtel does not carry out any acts otherwise than through a board comprising an equal number of Amalia and VPanama directors. The essence of the claim is that on acquiring its shares from WOL VPanama became bound by the SHA as a result of an implied novation and is therefore bound (as, so it is claimed, is Virgtel) to procure or permit the passing of resolutions necessary to bring this about.

The present application

[14] Also on 7 February 2012 Amalia issued the present application for interim relief. It seeks an order that for the future Virgtel act only upon resolutions of a board with equal representation for each of Amalia and VPanama and that all decisions taken by a board not so constituted be set aside. The grounds for the application are that there is a serious issue to be tried whether the defendants are bound by the SHA and whether, by refusing Amalia any representation on the Virgtel board, Virgtel and VPanama are in breach of its provisions. It is submitted that the order sought will maintain the *status quo* pending determination at trial.

Adherence to the SHA

[15] The SHA is expressed to be governed by the law of the Commonwealth of Australia. In the first proceedings Mr Zabusky attempted to introduce evidence of Australian law for the purpose of establishing that upon accepting a transfer of a share in a company whose shareholders' rights are

governed by a shareholders agreement, the transferee becomes bound, or may be held to have become bound, by the terms of the shareholders agreement by a process of implied novation and without any need for it to have entered into an agreement of adherence. I refused to allow that evidence to be adduced for reasons not relevant to the present application. Although an amended pleading was produced seeking to make the same points without reference to Australian law, the issue was not pursued at trial. I should add that the purpose of relying upon the supposed novation in the first proceedings was to demonstrate that VPanama became bound by the pre-emption provisions of the SHA. It was not argued in the first proceedings that a further consequence would be that it was bound by the provisions dealing with the constitution of Virgtel's board and the provisions governing the conduct of meetings of directors. These points were never raised.

[16] Australian law is, however, pleaded in the present proceedings. In support of its contention Amalia produces an opinion, dated 11 August 2011, from Australian Solicitors acting for (among others) Mr and Mrs Zabusky in proceedings in Queensland which are being brought in Virgtel's name by way of a derivative action on behalf of a Nigerian incorporated company called Virgin Technologies Limited ('Virgin,' 'the Australian proceedings'). It is the contention of Mr van Leeuwen in the Australian proceedings that Virgtel holds 85% of Virgin's shares. The Australian proceedings, whose constitution has been upheld by the Supreme Court of the State of Queensland, seek the recovery from Mr Zabusky and members of his family of some US$12 million alleged to have been misappropriated by them from Virgin. The same Solicitors also act for Amalia in proceedings brought by Amalia and Mr and Mrs Zabusky in the Federal Court of Australia.

The Claimant's submissions

[17] Mr Carrington, for Amalia, submits that there is a serious issue of Australian law to be tried on the implied novation point. He accepts that he has no separate claim for an interim injunction based upon the alleged defects in the resolutions by which Mr Zabusky was removed, since unless he is right on the adherence point the procedure can simply be repeated until it is got right, making it futile, on ordinarily accepted principles, to grant interim relief.

[18] Mr Carrington submits that damages cannot be an adequate remedy for exclusion from an entitlement to participate in management and that the balance of convenience lies with maintaining the *status quo*, which, he says, is represented by the position as it stood after the first proceedings were decided, with a two member board consisting of Mr van Leeuwen and Mr Zabusky.

[19] Mr Dennis, who appeared together with Ms Nadine Whyte for Virgtel and VPanama, submits that there is no serious issue to be tried. Virgtel may have been party to the SHA but it undertook no obligations under it and is not compellable by the shareholder parties to carry out any acts in direct compliance with it. Mr Zabusky failed to get the novation point properly before the Court in the first proceedings and is to be treated as having abandoned it. Given the intimate relationship between himself and Amalia, Amalia should be in no better position. Any attempt now by Amalia to raise the novation point is either barred by an estoppel *per rem judicatam* or constitutes the sort of abuse which arises when a closely connected party attempts to relitigate an issue which has already been decided, or could and should have been decided, in earlier related proceedings. He relies upon my finding that VPanama was not a party to the SHA as decisive of the issues sought to be raised by Amalia in these proceedings. As authority for these propositions Mr Dennis relies upon

Henderson v Henderson,[2] **Gleeson v J Wippel & Co**,[3] **Ashmore v British Coal Corporation**,[4] and **Johnson v Gore Wood**.[5]

[20] I may say immediately that it seems to me to be regrettable that these proceedings have been launched. They are an obvious attempt to circumvent my earlier decision. Having said that, however, it does not seem to me that what I have called the adherence issue was decided in the first proceedings. What I said at paragraph [30] of my judgment was that VPanama was not a party to the SHA. The issue whether it ought to have been treated as if it was a party to it was not gone into at trial. Further, the question of equal representation was not raised at all in the first proceedings. I quite accept that in a perfect world all these issues should have been dealt with in the first proceedings and all possibly interested persons should have been party to them so as to be bound, but they were not (although Amalia was, for a period, made a counterclaiming defendant). Apart from **Henderson v Henderson**[6] itself, however, which the later cases appear to treat as laying down too stringent a test, the authorities do not speak with a particularly clear voice. It is noticeable, for example, that while it was laid down in both **Gleeson v J Wippel**[7] and in **Johnson v Gore Wood**[8] that this type of abuse may arise not only in cases where the parties and the issues are identical, but also where the parties are connected or where the issues may not be precisely identical, in neither of those two cases were the claimants prevented (on abuse grounds) from prosecuting a second claim.

[21] In any case, this is not a strike out application and I am not prepared to refuse interim relief upon the basis (which is what Mr Dennis is really saying) that had a strike out application been made it would have succeeded. The fact is that no such application has been made and the present proceedings remain on foot. In this state of affairs I have to treat this present action as ongoing and the first decision which falls to be made is whether or not the novation issue raises a serious question to be tried. I have no doubt that it does.

[22] Amalia seeks an order that pending trial Virgtel be managed by a board consisting of equal representatives of Amalia on the one hand and VPanama on the other. Mr Carrington says that that will maintain the *status quo.* That is a submission that requires scrutiny. It is a fact that before Mr Zabusky was removed, part of the *status quo* was that Amalia had a representative on the Virgtel board and VPanama had another. But it was also part of the *status quo* that *whether or not it was bound by the SHA,* VPanama had the right to appoint an additional director and thus obtain a majority on the board. There is nothing in the SHA to preclude it from doing so. The SHA was premised on a deadlock situation, buttressed by pre-emption provisions, between WOL, on the one side, and Amalia and BZ on the other. It did not envisage, and made no provision for what was to happen if that deadlock was broken, as it was when VPanama, with Amalia's fully informed consent, acquired its majority holding. The effect of majority voting power was to enable VPanama to outflank the equality of representation provisions in the SHA.

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[2] (1843) 3 Hare 100
[3] [1977] 3 All ER 54
[4] [1990] IRLR 283
[5] [2001] BCLC 313
[6] (supra)
[7] (supra)
[8] (supra)

[23] I was originally of the view that that was sufficient to dispose of this application, because if VPanama could appoint an additional director, then it could obtain board majority without being in breach (assuming that it is bound by it) of the SHA and it would be irrelevant whether or not each of VPanama and Amalia had equal board representation. That conclusion ignored the provisions of clause 6.6 and the unanimity provisions which it imposes, as Mr Carington pointed out at a further hearing held for the purpose of receiving submissions upon the point.[9]

[24] I am satisfied that, for the reasons given by Mr Carrington, the view which I originally took cannot dispose of this application. That makes it necessary to conduct a deeper review of the balance of convenience and of the *status quo* before determining it.

[25] As I have said, it was Mr Carrington's submission that in this case the *status quo* is represented by the position as it stood before Mr Zabusky's removal from the board and that it should be maintained pending judgment in this action by the reconstitution of a board with parity of membership and voting power between Amalia and VPanama.

[26] Mr Dennis, who appeared together with Ms Nadine Whyte for the Respondents, submitted that this anlaysis is a false one. The position before the present proceedings were commenced, he says, was that it had been decided in the first proceedings that VPanama was not a party to the SHA; that Mr Zabusky had, on that basis, legitimately been removed as a director of Virgtel and that that represents the *status quo* for present purposes.

[27] So far as concerns the balance of convenience, which, on general **American Cyanamid**[10] principles, is something which should be considered on the way to and as part of a decision whether or not to maintain the *status quo*, Mr Dennis submitted that to grant the interim relief sought by Amalia would be to paralyse Virgtel and disable it from pursuing its derivative claim in the Australian proceedings. If an injunction is granted as asked by Amalia, the inevitable consequence will be that the Australian proceedings will sooner or later come to a halt through an inability to give instructions. The evidence does not show whether that would result in them being struck out before the present proceedings could be resolved, but no evidence is necessary for it to be inferred that if Virgtel cannot instruct its lawyers in Australia or comply with orders of the Queensland Court its position in the Australian proceedings will risk being seriously prejudiced. Mr Dennis adds that no evidence has been adduced to show that Amalia would be good for an award on any cross undertaking in damages.

[28] The evidence is that the Australian proceedings were commenced in 2005. It seems to me that the position in the present case is covered by the passage from the speech of Lord Diplock in **American Cyanamid**[11] in which he points out that it may be very much more inconvenient to interrupt a party in the prosecution of an established enterprise than to prevent him from embarking upon a new one. In the present case Virgtel, under the control of VPanama/Mr van Leeuwen, has been prosecuting the Australian proceedings for years. I accept that until judgment was given in the first proceedings the true constitution of its board was not correctly appreciated, but it remains the case that it has been free since 2005 to prosecute the Australian proceedings without being

[9] which had not been canvassed at the original hearing
[10] [1975] AC 396
[11] at 408F-H

met by any challenge based upon an alleged inability to give instructions to its lawyers without the concurrence of Amalia. It is that, rather than the precise constitution of Virgtel's board, which seems to me to represent the *status quo* as it stood immediately before the commencement of the present proceedings.

[29] In my judgment the balance of convenience tilts in favour of maintaining that position. If Mr Zabusky and his family[12] are blameless in the matters which are for decision in the Australian proceedings, then they are not prejudiced by a refusal to grant injunctive relief. They will succeed in the Australian proceedings and will no doubt obtain a costs order in their favour from the Court in Queensland. Mr van Leeuwen has already provided security for the Zabusky's costs of those proceedings in the sum of AU$400,000 and on the basis of that evidence there can be no doubt that if the Australian Court considers that further protection is warranted, Mr van Leeuwen will be ordered to provide it. So that the Zabuskys are to be treated as fully protected on that score. If Mr Zabusky and his family are not blameless in the matters which are for decision in the Australian proceedings, then there would seem to be no good reason for equity to assist them by granting injunctive relief, whether on an interim or final basis, here in the BVI, since they will, in those circumstances, be found to have misappropriated funds from Virgtel's 85% subsidiary. If that turns out to be the case, they should, in my judgment, be left to their remedy at law in respect of any breaches of the SHA on the part of the defendants which they may be able to establish in the present proceedings. Amalia/ the Zabuskys, therefore, either do not need, or will turn out never to have been entitled to, the grant of equitable relief in the present proceedings.

[30] If, on the other hand Virgtel is paralysed as a result of an interim order made here in the BVI, there is, in my judgment, a serious risk that Virgtel and, indirectly, VPanama will be irrevocably prejudiced as a result. There is no reason to suppose that the losses which may result would be readily quantifiable and no evidence that they would be compensated for under a cross undertaking imposed[13] upon Amalia.

[31] For these reasons, the balance of convenience lies, in my judgment, in maintaining the current position under which Virgtel's board is free to give instructions to its lawyers without requiring the concurrence of Amalia/the Zabuskys. This application accordingly fails.

Commercial Court Judge
23 April 2012

[12] I take the view that for the purposes of assessing the balance of convenience no distinction is to be drawn based upon the separate legal personalities of Amalia and Mr and Mrs Zabusky. The inquiry requires a consideration of the realities on the ground, rather than a meticulous differentiation between the persons from time to time enlisted by either side to advance their respective positions

[13] none has been offered