EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
COMMERCIAL DIVISION

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHC (Com) No. 45 of 2013

In the Matter of the BVI Business Companies Act, 2004 (the Act)

And

In the Matter of an Application by Comodo Holdings Limited (the Company)

BETWEEN:

COMODO HOLDINGS LIMITED

Claimants

and

[1] RENAISSANCE VENTURES LIMITED

First Defendant

[2] JOSEPH KATZ (as EXECUTOR FOR THE ESTATE of the late ERIC D EMANUEL DECEASED)

Second Defendant

Appearances: Mr David Fisher and Mr Robert Christie for the Applicant First Defendant
Mr Stephen Moverley-Smith QC and Ms Hazel-Ann Hannaway-Boreland for the Respondent Claimant

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2014: 4, 15 December
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JUDGMENT

(Application for summary judgment for rectification of register of members – whether shares issued partly paid for purposes of s. 18 International Business Companies Act 1984 – s. 18 considered – whether application by allottee under s. 43 Business Companies Act, 2004 for rectification of register of members amounts to application for specific performance of contract of allotment – whether application under s.43 capable of being statute barred)

[1] **Bannister J [Ag]:** I have to decide an application for summary judgment made by the first Defendant to this claim, Renaissance Ventures Limited ('Renaissance'). In these proceedings the claimant, Comodo Holdings Limited, a company formed under the International Business Companies Act, 1984 ('Comodo,' 'the IBCA'), seeks declarations that neither Renaissance nor the second Defendant (the estate of the late Eric D. Emanuel ('Mr Emanuel' and 'the estate'), is a member of Comodo. That is presently the case, but each of Renaissance and the estate has counterclaimed for rectification of Comodo's register of members to show them as such. Renaissance has sought summary judgment on its counterclaim for Comodo's register of members to be rectified to show Renaissance as proprietor of 100,000,000 US$0.000125 shares, fully paid in the sum of US$12,500 ('the Shares'), as evidenced by a Comodo share certificate numbered 6 ('the certificate'). The estate has not made any application for summary judgment.

[2] The certificate was issued by Comodo on 28 October 2000 and is impressed with Comodo's seal. It is given under the hand of its director, Melih Abdulhayoglu ('Mr Abdulhayoglu') and secretary, Michael Whittam. It certifies that Renaissance is the registered holder of the Shares, fully paid.

[3] Renaissance claims to have acquired the Shares as the result of two separate allotments. The first was made pursuant to a written subscription agreement entered into between Comodo and Renaissance on 28 January 1999, signed by Mr Emanuel for Renaissance and by Mr Abdulhayoglu for Comodo ('the subscription agreement'). It provided for the issue by Comodo to Renaissance of 50 ordinary shares of US$1 each in the capital of Comodo ('the initial shares') at a price of US$750,000. The second alleged allotment was made pursuant to a written resolution of 28 October 2000, signed by Mr Abdulhayoglu as Comodo's sole director ('the resolution'). Having provided that 50 ordinary shares standing in Mr Abdulhayoglu's name might be transferred to a nominee company of his (Opal Cavern Limited – 'Opal'), it was resolved that 12,450 shares be issued to each of Opal, Renaissance and a company called Owls Nest Limited, which was also the holder of 50 US$1 shares. The resolution did not provide expressly for any consideration to be paid by the allottees of any of those 37,350 shares. The resolution then purported to divide Comodo's resulting issued share capital (37,500 ordinary shares of US$1 each), together with the remaining 12,500 unissued shares of US$1 each, into 400 million ordinary shares of US$0.000125 each. The secretary of the company was instructed to reflect these dispositions in Comodo's register of members. The result of the resolution, if valid, was that Renaissance became the holder and entitled to registration of the 100 million shares comprised in the certificate, which was issued, as I have said, on the same

day. I shall refer to the shares allegedly allotted pursuant to the resolution as 'the fractional shares.'

[4] Comodo's reply and defence to counterclaim, to the extent that it was permitted to be amended pursuant to an order made on 4 December 2014 immediately before the hearing of Renaissance's summary judgment application, takes a number of points in opposition to Renaissance's claim to have the register rectified.

[5] The first point is that Renaissance has not pleaded that it paid any consideration for the issue of the shares. That does not seem to me to be a good point. The counterclaim relies upon the certificate, a document issued by Comodo informing all the world that Renaissance is the registered holder of the 100 million shares. A person relying upon such a document as against the company which issued it does not have to plead the arrangements under which the entitlement acknowledged by the certificate came into existence. It is prima facie entitled to be registered as and for all purposes treated as the owner of the shares comprised in the certificate.

[6] In respect of the initial shares issued pursuant to the subscription agreement, Comodo relies upon a submission that they were issued partly paid and thus fell foul of the provisions of section 18 of the IBCA ('section 18'). The reason why the initial shares are said to have been partly paid is because the terms of the subscription agreement provided that the price of US$750,000 should be paid as to US$250,000 on completion (defined as the completion of the allotment and issue of the shares), and as to the balance of US$500,000 on successive dates between 28 April 1999 and 28 January 2000. Although there is a dispute about the source of the money, there is no doubt that Renaissance paid the initial US$250,000 in early March 1999 and was issued with a certificate for the initial shares on 4 April 1999.

[7] Section 18 provides that:

> 18. No share in a company incorporated under this Ordinance may be issued until the consideration in respect of the share is fully paid, and when issued the share is for all purposes fully paid and non-assessable *save that a share issued for a promissory note or other written obligation for payment of a debt may be issued subject to forfeiture in the manner prescribed in section 19A* [italics added]

[8] Section 18 cannot be understood without taking into account the provisions of sections 19 and 19A(1) of the IBCA ('section 19' and 'section 19A(1)'):

> 19. Subject to any limitations in the memorandum or articles, each share in a company incorporated under this Ordinance shall be issued for money, services rendered, personal property (including other shares, debt obligations or other securities in the company), an estate in real property, a promissory note or other binding obligation to contribute money or property, or any combination thereof.
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> 19.A(1) The memorandum or articles, or an agreement for the subscription of shares of a company incorporated under this Act may contain provisions for the forfeiture of shares for which payment is not made pursuant to a promissory note or other written binding obligation for payment of a debt.

[9] Mr Moverley-Smith QC, who appeared, together with Mrs Hazel-Ann Hannaway-Boreland, for Comodo, argued that the proviso to section 18, italicized in paragraph [7] above, is an exception to a general prohibition contained within section 18 against issuing partly paid shares, which works by permitting a company to issue partly paid shares, but only if the agreement for their issue (a) provides for the unpaid consideration to be in the form of a promissory note or other promise to pay in future **and** (b) contains a proviso for forfeiture in the event of non-payment. He says, rightly, that there was no such provision in the subscription agreement and submits that the absence of such a provision means that the agreement infringed section 18, with the consequence that any issue of the initial shares would be *ultra vires* and void.

[10] I do not think that this argument is sound. It is clear from section 19 that shares in an IBCA company might be issued in return for a promise to pay in the future. Such a promise, when accepted by the company, constituted payment (or part payment) for the shares, as section 18 explicitly contemplates. The proviso to section 18 is a qualification to permit forfeiture when an executory promise to pay is not fulfilled. Even though a share is fully paid within the meaning of section 18 (because the promise constituted payment) it may nevertheless be forfeited in accordance with section 19A(1) of the IBCA if the agreement pursuant to which the share was issued (and the company's articles of association) so provide and permit. The fallacy in the argument lies in its failure to recognize that an executory promise to pay is capable, for the purposes of the IBCA, of amounting to payment for the shares in question.

[11] The initial shares are thus fully paid within the meaning of sections 18 and 19. Their issue would not be *ultra vires* or void.

[12] Mr Moverley-Smith's next submission was that the money (or some of the money) received by Comodo from Renaissance as consideration for the initial shares was in fact provided to Renaissance by persons who had been told by Mr Emanuel, the principal behind Renaissance (which had acted as a promoter of Comodo shares), that their money would be used to purchase shares in Comodo in their own names. It seems that that may well have been so with regard to some of the money paid for the initial shares. For the reasons which I have already given, however, that would not alter the fact that the initial shares are fully paid, any more than would the fact that money representing the balance of US$500,000 had never been received by Comodo at all.

[13] Even if it is necessary (which in my judgment it is not) for Renaissance to show that the whole of the balance of US$500,000 has been paid in cash to Comodo, I do not think that the fact that Renaissance used other people's money to make the payments would mean that the initial shares were not fully paid. While, in the cases where that was the position, the provider of the money might have a claim against Renaissance and might, if certain conditions were met, be able to follow or trace their money into Renaissance's assets (including the Shares), it is not suggested that the money was accepted by Comodo in bad faith or that Comodo had any reason to believe that it represented third party money being misapplied by Comodo. Comodo gave valuable consideration for its receipt of the funds by allotting the initial shares and is thus immune from any claim to restitution by the original provider(s) of those funds. As between Comodo and Renaissance, the payments (whatever their original source) clearly discharged the obligations of Renaissance under the subscription agreement.

[14] As for the fractional shares, Mr Moverley-Smith's point is that the resolution purporting to allot them made no provision for payment at all, let alone for payment of any specific consideration, so that there is no evidence that the fractional shares were ever agreed to be paid for, let alone actually paid for. I do not think that this point is a sound one, either. Section 20(1) of the IBCA provided that shares might be issued for any price determined by the directors, provided that, in the case of shares having a par value, the price must not be less than that value. Mr Abdulhayoglu is to be taken to have understood that at least the par value of the fractional shares must be paid. It seems to me that in the absence of mention of a any premium payable on the issue of the fractional shares, it is necessarily to be inferred that the price was intended to be their par value.

[15] Comodo had its financial statements for the year ended 30 June 2000 audited by Ernst & Young, although the version included in evidence ('the draft accounts'), while containing a draft unqualified auditor's report, is not signed off. Pursuant to

a provision in the English companies legislation,[1] Ernst & Young were deemed reappointed as Comodo's auditors until dismissed. A draft Confidential Information Memorandum dated 12 November 2000 (to which the draft accounts were annexed) included a statement by Comodo to the effect that Renaissance was the holder of 100 million shares out of a total issued share capital of 300 million. The draft accounts show a share premium account standing as at 30 June 2000 in the sum of some GBP 458,799. The overwhelming probability is that the fractional shares were allotted on the basis that they would be paid for out of the share premium account, which is also the most likely reason why the resolution makes no specific mention of any acquisition price. They were, in other words, allotted by way of bonus issue, which is consistent with the language of the resolution itself.

[16] Whether that was so or not, Comodo was clearly receiving expert professional advice at this time. The resolution itself, like the Confidential Information Memorandum, was obviously professionally drafted and Comodo was looking to place shares with a view to raising further capital. I find it inconceivable that, whatever payment method was adopted, Comodo and those advising it would have relied in a Confidential Information Memorandum upon an issue of shares which infringed Article 4.2[2] of Comodo's Articles of Association as well as the provisions of the IBCA. In any event, Comodo has led no evidence to show that the fractional shares were allotted in such a manner. In the absence of any such evidence, the presumption must be that they are fully paid up.

[17] For all of these reasons I regard any contention that the fractional shares are unpaid as fanciful. The IBCA therefore presents no obstacle to the perfection of the issue of the Shares by registration. The allotments were validly made and, together, entitled Renaissance to be registered as proprietor of the Shares.

[18] Comodo's next objection is that, if Renaissance did acquire rights to the Shares under the subscription agreement and resolution, it is now too late for it to enforce those rights, by reason of section 4 of the Limitation Act 1961. The objection is unfounded. Renaissance is not, in these proceedings, seeking specific performance of anything. Given that it is in possession of the certificate, it has no need to take any proceedings for specific performance and if it sought to do so those proceedings would be liable to be struck out as an abuse of the Court's processes. Renaissance is applying under the summary provisions of section 43 of the Business Companies Act, 2004 ('the BCA') for rectification of the register of

[1] It is to be inferred that Comodo was a registered foreign company for the purposes of the UK Companies legislation, which would require it to produce and file audited annual financial statements

[2] which precluded the issue of shares until they were fully paid up

members of Comodo on the grounds that its name and shareholding, which should have been included in that book, have been omitted from it. By making such an application Renaissance is not seeking enforcement of a contract between itself and Comodo, any more than a transferee for value of shares which a company wrongly fails to register in his name is seeking, when he asks for rectification of the register, specific performance of the contract between himself and the transferor. Renaissance is doing no more than ask for an order that Comodo make its books compliant with section 41 of the BCA.[3] There is no limitation period for such an application.

[19] Finally, it is submitted that after acquiring the Shares Renaissance has, or may have, purported to transfer some of them to third parties. This is not a valid objection to the registration of Renaissance's entitlements under the subscription agreement and resolution. If, following registration of Renaissance's title, such third parties come forward and present valid transfers from Renaissance, then the register of members will have to be rectified again to reflect them.

[20] For these reasons, I am satisfied that Comodo has no prospect of successfully defending Renaissance's counterclaim. There will be judgment accordingly.

Commercial Court Judge
15 December 2014

[3] section 41 requires a company to maintain an accurate register of members