**EASTERN CARIBBEAN SUPREME COURT**

**ANTIGUA AND BARBUDA**

**IN THE HIGH COURT OF JUSTICE**

**CLAIM NO. ANUHCV2015/0035**

**BETWEEN:**

**JOSE GILLIS, Lawful Attorney of**

**PIERRE VANDENBROUCKE**

**Claimant**

**And**

**STAR PROPERTIES CORP**

**Defendant**

**Appearances:**

Mr. Lenworth Johnson and Ms. Latoya Letlow for the Claimant

Mr. Kendrickson Kentish and Ms. Kathleen Bennett for the Defendant

2016: January 18; October 31;

2017: August 25

## JUDGMENT

### Introductory

[1] **LANNS, J, [AG]:** In this case, I have to decide whether the claimant, Mr. Pierre Vandenbroucke (Mr Vandenbroucke; or "the claimant"} has standing to bring the claim herein, and if so, whether a special general meeting held in Antigua and Barbuda on the 11th April 2014, that resulted in the exclusion of Mr. Vandenbroucke from the directorship of the defendant Star Properties Corp (the defendant company}, was valid. Additionally, I have to decide whether the appointments of Mr. Amadeo Sabat Nuto, his daughter Eva Cuevas, and Mr. Oscar Bacardit as new directors of the defendant company was valid.

[2] For the reasons set out below, I answer all the questions above in the affirmative, and I dismiss the claimant's claim in its entirety, with costs to the defendant company to be assessed if not agreed.

### Background

[3] The defendant company is an offshore company. It was incorporated in Antigua and Barbuda in January 2000 under the International Business Corporation Act (the IBC Act}, by Mr. Vandenbroucke and one, Mr. Amadeo Sabat Nuto. Its registered office is at CMT Corporate Services, Nevis Street in Antigua. Its sole director was Mr. Vandenbroucke who is described as a businessman based_ in Monaco. Mr. Vandenbroucke remained in the position of sole director until 11th August 2014, when he was purportedly stripped of his directorship and replaced by Mr. Sabat Nuto, his daughter Eva Cuevas, and Mr. Oscar Bacardit who were all purportedly appointed as Directors.

[4] At the time of the incorporation of the defendant company in January 2000, the IBC Act permitted offshore companies like the defendant company to issue bearer shares which allowed the holders of such shares to remain anonymous. Mr. Vandenbroucke was issued 50% bearer shares, and Mr. Sabat Nuto and his company Evalex SL (the Sabat group} based in Spain were issued the next 50% bearer shares. By the year 2010, certain amendments to the IBC Act changed the conditions under which bearer shares were to be held.

[5] Section 139C (1} of the International Business Corporation Act Cap 222 (Amendment Act) No. 3 of 2010, (the Amending Act}1, provides that within a specified time, bearer shares were to be deposited with, and held by a custodian, and were to be exchanged for registered shares, and cancelled and forfeited. After the transition date2, a bearer share held by anyone other than a custodian is disabled, and where a bearer share is disabled, it carries none of the entitlements which it would otherwise carry.

[6] The Sabat group deposited their shares with a custodian, albeit out of time. Mr. Vandenbroucke has never deposited his shares with a custodian, with the result that his shares are disabled by virtue of the Amending Act.

1 SI No 21 of 2011 signed by the Minister of Finance brought the Amending Act into operation from the 29th April 2011 .

2 Transition date is defined in the Amending Act as three months after the commencement of the Act or on such other date as the Commission may determine in accordance with section 139C(4).

[7] It is apparent that the principal assets of the defendant company are a hotel in Brazil, (the lpanema Plaza Hotel), an entity named HMC LLC which is a Delaware Corporation, and a Hotel Management Company. HMC LLC rents the hotel to a Brazilian company called Vansa Hotelaria Ltda. (Vansa). Significantly, the name 'Vansa' is derived from a combination of 'Vandenbroucke' and 'Sabat'. Vansa's shareholders are Pascale Vandenbroucke, (daughter of Pierre· Vandenbroucke) and Ana Soledad Cuevas (the wife of Amadeo Sabat Nuto). Prior to his removal, Mr. Vandenbroucke was the sole director of the Defendant Company and HMC LLC for 13 years. It appears that relations broke down between Mr. Vandenbroucke and the Sabat group. It is said that Mr. Vandenbroucke gave no accountability; paid no dividends since 2009; did not present any financials, and had not convened a shareholders' meeting. Mr. Vandenbroucke denies these allegations.

[8] It is pleaded that on the 11th April, 2014, the defendant company, through proxies of Mr. Sabat Nuto, convened a requisitioned shareholders meeting3 for the purpose of passing, and did pass, the following resolutions:

(a) To remove Mr. Pierre Vandenbroucke as director of the defendant company;

(b) To appoint Mr. Amadeo Sabat Nuto, Ms. Eva Sabat Cuevas and Mr. Osca Bacardit Marica!, [all of specific addresses in Spain], as directors of the defendant company;

(c) To appoint Moore Stephens as auditor of the defendant company;

(d) To amend the By-Laws of the defendant company in the following manner:

i. At Clause 8.1 to read:

Number of directors: Unless and until the company in General Meeting or special Shareholders Meeting shall otherwise determine, the number of directors shall be three (3). Each director shall hold office unless removed as provided in these presents until the next Annual Shareholders meeting and until successor shall have been elected;

ii. At Clause 8.6, to replace the words 'one-half of the number of persons then serving as directors' with the words 'two unless there is only one director in which case the quorum shall be one"

3 It is said, that Mr Vandenbroucke was unaware of the requisitioned meeting.

4 Fifteen orders and declarations sought.

[9] On the 28th January 2015, Mr. Vandenbroucke, through his attorney on record, Mr. Jose Gillis brought this action claiming various orders and declarations4 including a declaration that

Mr. Vandenbroucke was wrongfully removed as sole director of the defendant company; a declaration that Mr. Amadeo Sabat Nuto, Ms. Eva Sabat Cuevas and Mr. Osca Bacardit Mariscal were unlawfully elected as directors; a declaration that all consequential actions arising out of, or flowing from the decision to remove Mr Vandenbroucke are invalid ,null and void; and an order that Mr. Vandenbroucke be reinstated as sole director of the defendant company.

**The claimant's case**

[10] The core of the claimant's pleaded case is that the shareholders' meeting held on 11th April 2014 was unlawfully convened and is invalid, null and void because on 5th February 2014, Mr. Sabat Nuto and Evalex SL who claimed to be beneficial owners of share certificates No. 15 purported to make a deposit of bearer shares No's. 14 and 15 to an authorised custodian, CMT International Limited (CMT). This deposit of shares to CMT is null, void and of no effect as the time for making such deposits under sections 2, 139 A (3) and section 139 C (4) of the IBC Act, as well as under Statutory Instrument No. 21 of 2011, had passed. The claimant asserts that the date for such deposit expired on 29th July 2012. The claimant avers that pursuant to sections 139 B and 139 D of the IBC Act, the bearer shares of the Sabat group are disabled, carry no entitlement to vote, and are subject only to mandatory redemption. According to the statement of claim, the bearer shares of Mr. Vandenbroucke are similarly disabled. The claimant avers that Mr. Vandenbroucke was not advised by CMT Corporate Services Ltd, the registered office and resident agent of the defendant company, of the new law regarding bearer shares, in time to meet the deadline with respect to the deposit of bearer shares. The claimant says that the defendant company holds the proceeds of redemption in trust for the owners of the bearer shares.

[11] Another plank of the claimant's case concerns the issue of notice. Mr. Vandenbroucke avers that proper notice of the meeting was not given to him. The first notice was defective, he says, and could not be cured by the second notice. The claimant says that the purported shareholders

4 Fifteen orders and declarations sought

meeting only came to his attention on the 15th December 2014 when he was so advised by CMT Corporate Services - the registered office and registered agent of the defendant company.

[12] The claimant also contends that the meeting was nvalid as there was no quorum representing a majority of the shareholders of the defendant company, contrary to clause 7.5 of the By-Laws of the defendant company.

[13] Finally, the claimant contends that because of his wrongful and unlawful removal, and the subsequent actions taken by the purported new directors, he has suffered loss and damage.

**The defendant's case**

[14] In summary, the defendant company's pleaded case is that the meeting was lawful and that the removal of Mr. Vandenbroucke was necessary. The defendant company says that the Sabat group followed the advice of their Antigua lawyer Mrs. Stacey Richards Roach, and that their actions were not capricious.

[15] Additionally, the defendant company posits that if as is claimed, the shares held by Mr. Amadeo Sabat Nuto and Evalex SL, were disabled, then Mr. Vandenbroucke has no locus standi qua shareholder to challenge the validity of the status of any other shareholders until the status of his own shares which he concedes are disabled, has been rectified.

[16] The defendant company further states that the FSRC, on 19th February 2014, reinstated the status of the defendant company, fourteen days after the shares held by Mr Amadeo Sabat Nuto and Evalex SL were deposited with a custodian. By reinstating the defendant company, the FSRC had satisfied itself that the compa_nywas in good standing, and in compliance with the applicable laws. The defendant company states that as at 19th February 2014, shares held by Amadeo Sabat Nuto and Evalex SL were no longer disabled.

[17] As regards the issue of notice, the defendant company admits that the first notice was defective, but contended that as at 7th April 2014, the date of the second notice of the requisitioned meeting, Mr. Vandenbroucke had received sufficient notice of the requisitioned meeting. All notices were delivered to Mr. Vandenbroucke's official address prior to the requisitioned meeting and they were both issued by registered mail.

[18] The defendant company says that in any event, Mr. Vandenbroucke was formally convicted and sentenced for smuggling and embezzlement in the 3rd Criminal Federal Court in Rio de Janeiro on the 23rd October 2006, as a consequence of which, his tenure as a director of the defendant company could not continue.

[19] In relation to the issue of quorum, the defendant company denies that there was insufficient quorum of shareholders at the requisitioned meeting. It says that all shareholders entitled to vote at the meeting were present and voted at the said meeting. The defendant company denies that any of the consequential actions following on from the removal of Mr. Vandenbroucke, were illegal, null and void.

[20]The defendant company states that all of the matters pleaded in the statement of claim are properly to be litigated between the shareholders of the defendant company !3nd they do not disclose a cause of action against the defendant company.

[21] In its penultimate paragraph, the defendant company denies that the claimant is entitled to the reliefs sought, and it puts the claimant to strict proof of his claim to the said reliefs. Mr. Vandenbroucke replied.

**The reply**

[22] In his reply, Mr. Vandenbroucke joined issue with the defendant on its defence, and asserts that with respect to the alleged defective notices, he will contend that the defendant company or its agents conspired so that the claimant did not receive the requisition letter of 10th February 2014 and the notices of shareholders meeting dated 11th March 2014 and 71n April 2014 prior to the scheduled meeting of 111n April 2014.

**The issue of standing**

[23] Learned counsel for the claimant, Mr. Lenworth Johnson (Mr. Johnson) submits that section 122 of the IBC Act gives Mr Vandenbroucke standing to bring the claim. He refers to section 122 (1) respecting "Court Review of Controversy". His argument is that section 122(1) provides that a corporation or a shareholder or director thereof may apply to the court to determine any controversy with respect to an election or appointment of a director or auditor of the corporation. In addition, counsel states that undeniably, there is a controversy surrounding the election or appointment of a director or auditor, and Mr Vandenbroucke has sued as the only true and lawful director. In the view of Mr. Johnson, this case meets the criteria outlined in section 122 (1).

[24] Mr. Johnson's fallback position is that Mr. Vandenbroucke, at common law has standing to bring the claim, as he has a sufficient and relevant interest in the matter, and his interests have been adversely affected by what the defendant company has done. For this submission, counsel relies on the Canada case of**The Saskatchewan Liquor and Gaming Authority v 604598 Saskatchewan Ltd (198) Canlii 12308 (SK CA)** where, at paragraph 109, the court stated:

*"Roughly speaking, this place of standing enabling* a *person to appear before and be heard by* a *court in relation to* a *given question, may be acquired in one of two ways: As of right, in reliance upon one's own private interests in the question (private interest standing): or with leave of the court in reliance largely upon the public's interest in the*

*question (public interest standing). And standing may exist, or be granted, in both civil and criminal proceedings, proceedings of one sort and another involving claims of various kinds, including* a *claim that* a *law is unconstitutional."*

[25] Counsel sought to develop his point by stressing that Mr. Vandenbroucke has put $5,250,000 in the defendant company, and must be taken to have a sufficient interest in the matter, which interest gives him standing. *"If Mr Vandenbroucke, who has put US$5,250,000 into the Defendant Corporation, does not have "sufficient interesf'* in this matter, then who does?" asks Mr Kentish, in his written submissions.

[26] Learned counsel for the defendant company, Mr. Kendrickson Kentish (Mr Kentish) prefaced his submissions on the issue of standing with the dictum of Floissac, C.J. in the case of **Frank v Attorney General,** referred to in **Baldwin Spencer v the Attorney General,** Civil Appeal No 20 A of 1997 at page 24:

*''The Court can only declare and protect legally established rights and interests. Except in the case of* a *judicial review of the decision or action of* a *public authority, it is* a *pre condition of such declaration or protection that there was* a *previous or threatened infringement of* a*dispute in regard to those established rights and interests."*

[27] In seeking to apply the dictum of Floissac, C.J. to the claimant's situation, Mr. Kentish submitted that the claimant does not have any legal rights, nor could he have any equitable rights, as bearer shares are creatures of statute and not common law. Counsel was of the view that a conclusion that Mr. Vandenbroucke, despite holding disabled shares has equitable rights as a shareholder, which equitable rights entitle him to bring the claim herein, would clearly be in conflict with the pellucid intention of Parliament. In the end, counsel submitted that Mr Vandenbroucke does not have any locus standi to initiate this claim.

**Finding on the issue of standing**

[28] In Black's Law Dictionary, the term *locus standi* is defined to mean: "a place of standing; standing in court; a right of appearance in a court of justice, or before a legislative body on a given question." As noted by Thomas J in the case of **Derrick Hazel Garvey v Michella Adrien,** Claim No. SKBHCV2013/0009, the term *"on a given questionn* seems to make a distinction as to the different types of standing depending on the nature of the case or the issue.

[29] In the text **Constitutional Law of Canada,** Professor Hogg stated at p 56-3:

*"The question of whether a person has 'standing' or locus standi to bring legal proceedings is a question about whether the person has a sufficient stake in the outcome to invoke the judicial process. The question of standing focuses on the position of the party seeking to sue, not on the issues that the lawsuit is intending to resolve " .*

[30] understand counsel for the defendant company to be submitting that because Mr. Vandenbroucke's shares have been disabled, this restricts his ability to bring a claim; that he has no legal or equitable rights to sue as shareholder because bearer shares have no legal validity. Counsel seems to be fusing the right of access to the court with the right to vote as a shareholder. Counsel does not offer any comment on the argument put forward by counsel for the claimant as to private interest standing, and simply relies on the passage (quoted above) in the Antigua case of **Frank v Attorney General 5** in contending that Mr. Vandenbroucke has no local standi.

[31] I do not think this passage can be seen to have placed the locus standi of the claimant in issue in relation to the question of whether the meeting was a valid and lawful meeting. In fact, I think a distinction has to be made between the instant case and the **Frank v Attorney General** case. The court was not there dealing with a concrete private right or interest. In that case, the claimant brought a representative action seeking various reliefs including an injunction restraining the government of Antigua and Barbuda from granting any interest or right over land in Barbuda (without the consent of the inhabitants of Barbuda signified in a village meeting) in violation of Article 9 of the Constitution. The issue of the claimant's locus standi was argued as a preliminary issue. Nowhere in the supporting affidavit did the claimant allege any infringement or threatened infringement by the government of any legal or equitable right of the claimant or any inhabitant of Barbuda. Nor did the claimant allege any previous dispute between him (or any other inhabitant of Barbuda) and the government in regard to any of the rights or interests sought to be declared. In fact, the claimant admitted that the proprietary rights and interests claimed had not been legally established.

[32] In this case, the claimant must be regarded as having a private interest standing. He has put half of the capital in the company, and is entitled to be given an opportunity to be heard on the questions as to whether the meeting was valid, and whether his legal or equitable rights have been infringed by his purported unlawful removal as Director of the defendant company. The very fact that he is challenging the validity of the meeting; and claiming an order for his reinstatement; suggests that there is a controversy or dispute; and section 122 empowers the court to determine such controversy or dispute. It would seem that the questions can never be answered until the court entertains the action. No one knows at this point and time if the claim will be successful. If

the claim is successful, it would mean that the claimant is still the sole director of the defendant company. Correspondingly, no one knows at this point and time if the claimant was properly notified of the meeting. This is fundamentally a question of fact to be determined with the aid of evidence. If it is found that a resolution is passed at a meeting of which proper notice was not given, Mr. Vandenbroucke would be entitled to a declaration that the meeting was invalid, and perhaps an order for his reinstatement. It would be very odd indeed if Mr. Vandenbroucke had standing for the purpose of being served with notice (as claimed by the defendant company) but none to bring this action.

[33] I can see no basis upon which the court could hold that Mr. Vandenbroucke lacks standing to bring the claim alleging, among other things that he was unlawfully removed as director of the defendant company, having regard to section 122 (1) of the IBC Act, among other things. In the result, I hold that Mr. Vandenbroucke has standing to bring the claim herein.

**The no cause of action issue**

[34] In its statement of defence, and in its written submissions, the defendant company has taken issue with the claimant's pleadings, contending that they disclose no cause of action against the defendant company. Counsel for the claimant has resisted the contention, and posits that the claimant has a cause of action at common law against the defendant company because the special meeting held by members or shareholders is a meeting of the company. In support of his submission, counsel relied on a passage from the text**Shackleton on the Law and Practice of Meetings** where at paragraph 12-02 it is stated:

*"Meetings of members of companies are known as general meetings and the decisions they take are spoken of as having been taken by the company in general meeting ... Other meetings may be called for special purposes and these are called extraordinary general meetings. "*

[35] Counsel pointed out that the Notice of Requisition dated 10th February 2014 and the shareholders notice of meeting dated 11th March 2014; refer to: "Special Meeting of the Company" and 'special shareholders meeting:. Counsel for the claimant also drew the court's attention to the Minutes of Meeting which he said recorded that they were minutes of meeting of the defendant company. Seemingly,. counsel for the defendant company had not, (at the case management conference), applied to strike out the claim against the defendant company on the ground suggested by him i.e. that it discloses no cause of action against the defendant company. Moreover, the issue was never canvassed before me; nor was the issue of joinder raised. In the absence of an application to strike out on the basis that the claimant has no reasonable ground for bringing the claim against the defendant company, or that there is no cause of action against the defendant company, and as the defendant company has made a fulsome response to the claim, it is my view that the defendant company is deemed to have been properly cited in the matter before the court.

**The Notice issue**

[36] The claimant, in his statement of claim, and in his witness statement states that he did not have proper notice of the purported shareholders meeting. In his own words*"I was completely unaware of the shareholders meeting. " 6* He gave evidence that the first notice dated 11th March 2014 for the meeting of 11th April 2014, sent to his address in Brazil, was defective as it did not contain the time of the meeting. He does not agree that the second notice dated the 7th April 2014 for the same meeting of 11th April 2014 cured the first notice. Mr. Vandenbroucke was shown Exhibit page 77 of Trial Bundle No. 2 which he says is a log book7 or recor of correspondence coming to the hotel named Vansa Hotelaria Ltda in Rio de Janeiro, Brazil. The log book/register of correspondence shows that on the 13th February 2014, one envelope arrived at the Vansa Hotelaria Ltda for Mr. Sabat Nuto from Mr. Pierre Vandenbroucke. This envelope was received by one named 'Erick'

The register further shows that on the 13th February 2014, one envelope was received at the Vansa Hotelaria Ltda for 'Mr. Pierre Vandenbroucke, Hotel lpanema Plaza' from Evalex S.L. The record shows that this envelope was received by one 'Erik' on the 13th February 2014. As regards the envelope that was recorded as being sent to Mr. Sabat Nuto from Mr. Vandenbroucke, and apparently received by 'Erik' on the 13th February 2014, Mr. Vandenbroucke states that there is an obvious error in that the clerk inserted the recipient in the sender's section, and that the document was received by "Erik' a representative of Mr. Sabat Nuto and someone who does not work with him (Mr. Vandenbroucke). Mr. Vandenbroucke states that none of the two envelopes were received by him personally. If Mr Vandenbroucke's observation is correct about the error made by the clerk, it would mean that on the 13th February 2014, two envelopes were received at the Vansa Hotelaria Ltda for Mr Vandenbroucke - one from Mr Sabat Nuto and the other from Evalex S.L. and both were received by one, "Erik"8

[37] Ms. Vania Lucia Santos Lopes gave evidence that correspondence for Mr. Vandenbroucke are usually delivered to her. She found it strange that she was not given any correspondence dated 13th February 2014 pertaining to the requisitioned meeting or the notice of shareholders' meeting; Yet, according to her, an unrelated document was handed to her on that same day.

[38] The defendant company called three witnesses who gave evidence on this aspect of the case, namely, Oscar Bacardit Mariscal, Mrs. Stacey Richards-Roach, (Mrs. Richards-Roach), and Ms. Eva Sabat Cuevas9.

[39] Mrs. Richards Roach gave evidence that on 5th February 2014, Mr Sabat Nuto and Evalex SL issued a requisition for a shareholders' meeting for the defendant company. She stated that to her knowledge, the requisition was also delivered by hand to the registered office of the company at 60 Nevis Street, St John's Antigua. She also gave evidence that on 11th March 2014, a notice of

6 See paragraph 5of witness statement of Mr Vandenbroucke.

7 The log book entries were in Portuguese, but the parties agreed that the translation thereof be done by Mr Vandenbroucke

8 Erik was not called to give evidence

9 Her evidence was given via video link Antigua/Spain

shareholders meeting was issued pursuant to the requisition. A further notice specifying the time of the meeting was issued on ?ti April 2014. She was aware that both notices to Mr Vandenbroucke were sent by mail in accordance with the bylaws of the defendant company.

[40] Mr. Bacardit gave evidence that he personally attended to sending the requisition by registered mail to Mr. Vandenbroucke at his official address in the company's records at Hotel lpanema Plaza. He stated that the requisition was also delivered by hand to the registered office of the defendant company. According to Mr. Mariscal, Mr. Vandenbroucke took no action in respect of the shareholders requisition. On the 11th March 2014, a notice of shareholders meeting was issued

pursuant to the requisition. A further notice specifying the time of the meeting was issued on 7th April 2015. Mr. Mariscal stated that he personally attended to the mailing of both notices to Mr. Vandenbroucke by registered mail. He stated that he posted the notices on 14th March 2014.

[41] Ms. Eva Sabat Cuevas gave evidence that Mr Sabat Nuto issued notice of shareholders' meeting to Mr. Vandenbroucke, and a further notice giving notice of the precise time of the meeting. She exhibited a copy of the notice and the registered mail certificate. She stated that the notice was also sent to CMT. She said that she was satisfied that Mr. Vandenbroucke received the notice of the meeting before it was held and deliberately did nothing. During cross examination, Ms. Sabat Cuevas told the court that she and her father Mr. Sabat Nuto usually communicate with Mr Vandenbroucke by way of email, but they were told by lawyer Ms. Stacey Richards Roach that they had to send out the notice in a formal way; hence the reason why they did not inform Mr. Vandenbroucke by way of email of the requisitioned meeting or the notice of the shareholders meeting.

[42] As previously stated, Mr. Vandenbroucke stated that the requisition letter was never delivered to him until 26th January 2015; even though he was in Rio de Janeiro around that time. He further stated that the second notice was only delivered to him on the 19th December 2014.

**Finding on the notice issue**

[43] Article 7.11 of the bylaws of the defendant company reads:

*"7.11. Notice of meeting. Written or printed notice stating the place, day and hour of the meeting and, in case of* a *special meeting, the purpose for which the meeting is called, shall be delivered not less than twenty-one days before the date of the meeting, either personally, or by mail to such shareholder of record, entitled to vote at such meeting. If mailed, such notice shall be deemed to be delivered when deposited in the mail, addressed to the shareholder at his address as it appears on the stock transfer books of the company, with postage thereon prepaid."*

[44] In **Alexander v Simpson** [1889] Ch at 143, the court explained the effect of sending a notice by registered mail in this way:

*"Under the Articles before me the notice has to be duly given and duly served and the statute only refers to notice. If it is sent by* a *prepaid letter -if the notice is sent and you prove the*

*posting then it is* a *misfortune in* a *case of this kind on the part of the member if he does not received it or if he is abroad and cannot receive it in due time to attend the meeting."*

[45] Based on Article 7.11 and **Alexander's case** which interprets an article similar to Article 7.11, it is not open to the claimant to complain that he did not receive the notice, because the notice is deemed to have been delivered or served when it was posted on 14th March 2014.

[46] Moreover, the fact that the first notice did not contain the hour of the meeting is not fatal as the claimant has argued. The defendant company does not dispute the first notice was defective in that it did not contain the 'hour' of the meeting' pursuant to Article 7.11 of the bylaws. They argue however, that the shareholders were given enough information as to the ·agenda, and place and timing of the meeting. They argue that the fact that the specific hour was only stated in the second notice does not diminish in any way the fact that the date and the substance of the agenda and the purpose of the meeting were disclosed. A further position taken by the defendant company was that because the claimant's shares were disabled, he was not entitled to notice.

[47] The question then, is whether the second notice cured the defect in the first notice. In other words, was the second notice valid? This point was raised, discussed and decided in the case of **Gold Rex Kirkland Mines et al v Morrow et al** [1944] O.R. 415 -419. The question before the court was whether, having called a meeting in the first instance for the 17th January by a notice which was invalid, any power remained in the shareholders to send out a second notice on the 7th January for the meeting of the same date, namely, the 17th January. In other words, the defendan·tsargue that a new requisition under s. 47, subs. 1 would be necessary before a second notice of meeting could be sent out. The court was not in agreement with that contention as put forward by the defendants. The court expressed its disagreement in the following terms:

*"Some doubt was present in the minds of the shareholders who were endeavoring to have* a *meeting of the shareholders of the company as to the validity of the notice which they had sent out calling* a *meeting for the 3()1h December, and in order to make certain that the meeting to elect directors should be properly called, they sent out* a *second notice for* a *meeting of the shareholders for 17th January 1944. It is admitted by counsel for the defendants that this notice was* a *proper one and I find this as* a*fact. The meeting was called on the 17th January and the plaintiffs ... were elected as the new directors of the plaintiff company. The defendants contend that the notice sent out on the 23 rd December for* a *meeting to be held on the 3()1h December, exhausted any powers which the shareholders had under the requisition which they had obtained as provided bys. 47 of the*

*Act, to call* a *further meeting, and that, having called* a*meeting tn the first instance for the 17th January by* a *notice which was invalid, no power remained in the shareholders to send out* a *notice on the 7th January for the meeting on the same date, namely the 17th January . In other word ·s the defendants argue that* a *new requisition required bys. 47 subs.1 would be necessary before* a *second notice of meeting could be sent out. I* am *not able to hold with that contention. The language of the statute must be construed in its ordinary and literal sense. There is no magic in the requisition required bys 41 of the Act which vanishes because those who have invoked the provisions of the section take steps to correct certain acts they have done purporting to be in pursuance of the section, which do not properly carry out its terms, in order that such terms may*

*be properly complied with. My opinion is that the shareholders are entitled to convene* a *valid meeting, and one at which the purposes for which it is called for can be accomplished."*

[48] It would appear that on the approach taken in **Gold-Rex,** the second notice issued on the 7th April 2014, was valid. I adopt that approach, and I find that the second notice issued by the defendant company was valid.

[49] On the totality of the evidence regarding notice, I find that Mr. Vandenbroucke was notified of the shareholders meeting in accordance with the provisions of Article 7.11 of the bylaws of the defendant company. In particular, I find that the notices contained the relevant information about the purpose of the meeting, and that the notices were duly served or given, under the bylaws. Posting of the requisition and notices was proved. If they were not received in time for the meeting (as Mr Vandenbroucke has complained), then it is a misfortune on his part.

[50] It follows that I am unable to agree with the claimant that the second notice did not cure the defect in the first notice. It would have been different if a new date was set, in which case, a fresh notice would have had to be given for a date to which the shareholder is entitled (21 days before the new meeting).

[51] This brings me to the question as to whether there was a legal quorum at the shareholders' meeting.

**The quorum issue**

[52] Section 113. (1) of the IBC Act, and clause 7.5 of the bylaws address the quorum requirement:*"113. (1) Unless the bylaws otherwise provide,* a*quorum of shareholders is present at* a*meeting of shareholders if the holders of* a*majority of the shares entitled to vote at the meeting is present in person or represented by proxy (Emphasis mine).*

And clause 7.5 of the bylaws reads:

*"7.5. Quorum. No business shall be transacted at any shareholders' meeting unless* a *quorum of shareholders is present at* a *time when the meeting proceeds to business*. Save as *is otherwise provided shareholders present in person or by proxy representing* a*majority of the Company's share shall constitute* a *quorum."10 (Emphasis again mine)*

[53] The claimant contends that the necessary quorum was not met for the lawful start of the meeting because he holds 50% of the shares and thus, his absence meant that the necessary quorum was not met. Counsel for the defendant company on the other hand submitted that as a shareholder whose shares have been disabled; the claimant was not entitled to attend the meeting, or to vote at the shareholders' meeting. Accordingly, submitted counsel for the defendant company, the claimant's absence did not affect in any way the required quorum.

**Finding on the quorum issue**

[54] Section 113 (1} of the IBC Act is clear. It is restrictive using as it does the word 'unless' The word "unless" imposes a restriction on the court. It is intended to place the court under

mandatory position not to consider section 113 (1) if the bylaws say otherwise. The bylaws do not contain the words 'entitled to vote'; neither counsel has expressly addressed me on this point. They have not suggested the number of shareholders to constitute a quorum. However, the claimant says there was no quorum; whilst the defendant company says there was a quorum. If I am to take into consideration the absence from 7.5 of the bylaws of the words "entitled to vote at a meeting" then it would seem that I should ignore the fact that the clamant was not entitled to vote at the meeting because at the material time (at the start of the meeting}, his shares were disabled. It would mean, based on the argument of Mr. Kentish, that there would have been a majority of shareholders with voting rights representing Mr. Sabat and Evalex SL.

[55) On the other hand, if I were to take into consideration Mr. Johnson's argument, then it mattered not that Mr Vandenbroucke's shares were disabled, which gave him no right to vote at the meeting, because based on 7.5, it mattered not that he had no voting rights, his absence from the meeting meant that there was no quorum representing a majority of shareholders. On Mr. Johnson's

10 Section 113.(1) 'otherwise' refers to 'shareholders entitled to vote'

argument, there was no majority shareholder since Mr. Vandenbroucke holds 50 % of the shares in the defendant company.

[56] Mr. Vandenbroucke has admitted that his shares were disabled. I do not agree with counsel that the shares of Mr Sabat and Evalex SL were similarly disabled at the material time, namely at the time of the meeting. As Mr Vandenbroucke's shares were disabled, he had lost the right to vote at the meeting. Even if he had attended the meeting, this would not have impeded the holding of the meeting because Mr Sabat and Evalex SL who were represented at the meeting, (albeit by proxy), constituted the majority of shareholders entitled to vote, and thus, I am satisfied that there was no unlawfulness as it relates to the quorum as the quorum was met by the presence of Mr Mitchell Hill, the Honorary Consul of Spain, and the proxy holder for Mr Sabat Nuto and Evalex SL.

**The conspiracy issue**

**[57]** The conspiracy issue was introduced for the first time in the reply to the defence of the defendant company. The defendant company has no opportunity to respond to this most serious allegation introduced for the first time in the reply. I decline to address it, as it has not been properly pleaded to mark out the parameters of the case that is being advanced for the claimant, to enable the defendant company to properly reply to it. That is the basic purpose of pleadings. . **(See East Caribbean Flour Mills Limited v Ormiston Ken Boyea, Saint Vincent and the Grenadines Civil Appeal No 12 of 2006.**

Whether the meeting of 11th April 2014 which, among other things expelled Mr Vandenbroucke from directorship of the defendant company, and appointed Mr Sabat, his daughter and Mr Bacardit Mariscal was a valid meeting

[58] Since I have discerned no unlawfulness in the issuance of the Requisition, nor of the delivery or service of the notice of the shareholders' meeting; and since I have discerned no

unlawfulness in the presence of a quorum, I find that all conditions for a valid meeting were met, and it was possible for a valid transaction of a shareholders' meeting, and thus, I must hold that the shareholders present convened a valid meeting - one at which the purposes for which it was called were accomplished. I must further hold that the three directors and the auditor appointed at the meeting were validly appointed; and that all business transacted subsequent to the said meeting were valid.

[59] That having been said, it is noted that learned counsel for the claimant has drawn the court's attention to clause 7.8 of the bylaws which provides that all elections for directors shall be by majority vote and that each shareholder shall have one vote for each share of which he is shareholder. Additionally, counsel has pointed to clause 8.11 of the bylaws which provides that any director may be removed by a majority vote of the shareholders. Counsel then went on to reiterate his position in respect of the 50% shareholding of Mr. Vandenbroucke and re-emphasized his position that the decision to remove Mr Vandenbroucke and elect or appoint three new directors could not have been valid, as a quorum representing a majority of the company's shares had not been met. As I have already considered these submissions, I see no reason why I should consider them further.

[60] I have considerable sympathy for the claimant in the predicament in which he finds himself, but the applicable statutory provisions are clear. He needs to rectify the status of his bearer shares, which he has acknowledged, have been disabled. Mr. Vandenbroucke, as well as the Sabat group, were required to deposit their bearer shares with a licensed custodian by the 28th or 29th July 2011. By section 139 (C) (2), a defaulting shareholder may apply to the FSRC for more time (not exceeding one year) within which to comply. As I have previously stated, the Sabat group deposited their shares with a licensed custodian, albeit out of time, on the 5th February 2014, and they were accepted after the transition date. Mr Johnson has taken issue with such acceptance. He says the shares were subject to mandatory redemption. That may very well have been the case at some point and time. However, I do not consider that I am called upon to look behind the depositing of the shares by the Sabat group, and the acceptance thereof by the custodian, after the transition date. And I decline to do so.

[61] Suffice it to say that there is no dispute that at the date of trial, Mr. Vandenbroucke had not deposited with, or delivered to a custodian his bearers shares, consequently, the shares are disabled. Disablement means that the rights attaching to those shares are disabled. A disabled bearer share does not carry any of the entitlements which it would otherwise carry, and any transfer or purported transfer of any interest in the bearer share is void and of no effect11." It has been submitted, without objection, that 'entitlement' would include the entitlement to attend a

11 See section 139 (1) of the Amending Act

shareholder's meeting, the entitlement to make a claim as a shareholder, the entitlement to enforce one's shareholding rights, the entitlement to dividends, and the entitlement to a share in the assets of the defendant company on its winding up or its dissolution. The evidence before me establishes that Mr. Vandenbroucke, not having deposited his shares has lost entitlements which he would otherwise have.

**Conclusion**

[62] For all the reasons stated above, I am satisfied that (i) the claimant is not entitled to the declarations and orders claimed; (ii) that the shareholders' meeting held on the 11th April 2014 was a valid meeting; (iii) that Amadeo Sabat Nuto; Eva Sabat Cuevas and Osca Bacardit Mariscal were validly appointed or elected directors; (iv) that Moore Stephens Addveris Auditores *y* Consultores, SL.P. were validly appointed as auditors of the defendant company; (v) that even though the first notice was defective, the second notice cured the minor defect and it was not necessary to issue new notice changing the date of the meeting; (vi) that the requirement for a quorum was met by the presence of Mr. Mitchell Hill, the proxy holder for Mr Sabat Nuto and Evalex SL.

[63] It is declared that:

1. The meeting held on the 11th April 2014 was a valid meeting

And it is ordered that

1. The claim brought by the claimant Mr. Pierre Vandenbroucke be, and it is dismissed in its entirety.

2. The defendant is entitled to costs in accordance with CPR 65.5 Appendices B and C as amended, such costs to be assessed if not agreed.

[64] Counsel for each party has presented me with helpful submissions and authorities.12 I am grateful for their assistance.

**Pearletta E. Lanns**

**High Court Judge [Ag]**

**By the Court**

**Registrar**

12 Submissions and authorities were received on the 14th and 15th November 2016