THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2017/0021

JOSE GILLIS
(lawful attorney of PIERRE VANDENBROUCKE)

Appellant

and

STAR PROPERTIES CORP.

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mr. Lenworth Johnson for the Appellant
Mr. Kendrickson H. Kentish and with him Ms. Kathleen Bennett and
Ms. Cherice Archibald for the Respondent

2018: February 16;
May 23.

Civil Appeal – Section 139 of the International Business Corporations Act as amended – Effect of failure to deposit bearer shares within prescribed time – Disabled bearer shares – Consequences of voting disabled bearer shares at shareholders' meeting - Procedural fairness - Audi alteram partem rule - Whether the rule of procedural fairness is absolute and does not allow any exceptions once the court is satisfied that the rights of non-parties could be affected by the decision – Whether the court has a discretion and should treat each case on its own facts

This appeal arises out of the decision of the learned judge dated 25th August 2017 in which she upheld the validity of a meeting of the shareholders of the respondent, Star Properties Corp. ("the Company"), held on 11th April 2014, and the resolutions passed at the meeting.

The Company was incorporated under the provisions of the International Business Corporations Act ("the IBC Act") in January 2000. Following incorporation, the Company issued 65 bearer shares to the appellant, Mr. Pierre Vandenbroucke ("Mr.

Vandenbroucke"), representing 50% of its issued capital, 40 bearer shares to Mr. Sabat Nuto and 25 bearer shares to Viajes Riveriera SA (later Evalex SL ("Evalex")). The shares held by Mr. Sabat Nuto and Evalex are beneficially owned by the Sabat family and are referred together as "the Sabat shares".

Prior to the amendment of the IBC Act in 2010, companies incorporated in Antigua and Barbuda under the Act were allowed to issue bearer shares. The amendments to the IBC Act that came into force on 29th April 2011 ("the Amendment Act") introduced a regime for placing all bearer shares into the custody of licensed and recognised custodians. Section 139A allowed a transition period of three months ending on 29th July 2011 ("the transition date") to put all the shares into custody, failing which they became disabled and subject to mandatory redemption. The Financial Services Regulatory Commission ("the Commission") was given the power under section 139C to extend the time for depositing the shares by such periods as it saw fit, but not exceeding one year in total.

Mr. Vandenbroucke failed to deposit his bearer shares with a custodian and consequently his shares became disabled as of 29th July 2011. The holders of the Sabat shares deposited their shares with a licensed custodian, CMT Corporate Services Limited ("CMT Ltd."), on 5th February 2014, that is, 30 months after the transition date. On 19th February 2014, the Commission issued a certificate of reinstatement restoring the Company to the register of companies. The Company treated the certificate of reinstatement as proof that the Sabat shares had been properly deposited and were not disabled.

The Sabat shareholders purported to hold a meeting of the shareholders of the Company on 11th April 2014 and passed resolutions at the meeting which, inter alia, removed Mr. Vandenbroucke as the sole director of the Company and appointed three new directors.

Mr. Vandenbroucke filed a claim in the High Court against the Company seeking several reliefs including declaratory orders that the purported deposit on 5th February 2014 of the Sabat shares with CMT Ltd. is invalid, null and void; that the meeting held on 11th April 2014 and all decisions taken thereat are null and void; and that the proceeds of redemption of any bearer shares be held in trust by the Company for the benefit of the owners of the bearer shares.

The learned trial judge found that Mr. Vandenbroucke never deposited his shares with a custodian with the result that his shares were disabled by virtue of the Amendment Act. However, the Sabat shares were deposited with a custodian, albeit out of time, and the meeting held on 11th April 2014 and the resolutions passed thereat were valid. She also decided that it was unnecessary to "look behind" the deposit of the Sabat shares. The irresistible inference from these findings is that the judge was satisfied that the Sabat shares were properly deposited and were not disabled.

Being dissatisfied with the decision of the learned trial judge, Mr. Vandenbroucke appealed to this Court. His position on the appeal is that the Sabat shares were permanently disabled and that their deposit on 5th February 2014 could not cure the disability. Therefore, the learned trial judge erred in holding that the 11th April 2014 shareholders' meeting and the resolutions passed at the meeting were valid.

The main issues on this appeal are whether the Sabat shares were disabled and the effect of the non-joinder of the Sabat shareholders as defendants in the proceedings in the court below.

Held: allowing the appeal, setting aside the judgment of the learned trial judge, declaring that the meeting of shareholders of the company held on 11th April 2014 and resolutions passed at that meeting are null and void, and ordering the respondent to pay the costs of the appeal at two-thirds of the amount awarded in the court below, that:

1. The intention of the Amendment Act is clear – bearer shares were being taken out of circulation as of 29th July 2012 and any bearer shares not deposited by that date were permanently disabled and liable to mandatory redemption under section 139D(1). There is no evidence that the Sabat shareholders applied under section 139C or otherwise to extend the time to deposit their shares during the transition period or the 12-month period thereafter ending on 29th July 2012. In the absence of evidence of an application to extend time, the purported deposit of the shares with a custodian followed by the restoration of the Company to the register of companies by the Commission did not have the effect of validating the Sabat shares. The Commission had no jurisdiction to extend the period for depositing the Sabat shares or any other bearer shares into custody after 29th July 2012. Therefore, the Sabat shares were disabled as of 29th July 2011 and the beneficial owners of the shares were not entitled to vote the shares at the April 2014 meeting.

   Section 139 of the **International Business Corporations Act** as amended Cap. 222, Revised Laws of Antigua and Barbuda 1992 applied.

2. Procedural fairness dictates that a decision should not be made that affects a person's property or his rights without giving him a chance to be heard and to respond to the case that has been made against him (*audi alteram partem*). The rule recognises that for a person to be deprived of his property or his rights he must be given a fair opportunity to present his side of the case and to reply to the evidence and the other side's case. The rule is not absolute and any departure from it can be justified only in exceptional circumstances. There are exceptional circumstances in this case. The Sabat shareholders, though not joined as defendants, were aware of the challenge by Mr. Vandenbroucke to the validity of their shares and the April 2014 meeting, and were given ample opportunity to and did participate in the proceedings through their representatives. They were instrumental in presenting the Company's defence to the claim. The disabling of the Sabat shares was a shareholder issue and the defence to that part of the claim, though presented by the Company, was in substance the defence of the Sabat shareholders. The joining of the Sabat shareholders as parties would not have made a difference to the factual and legal issues regarding the late deposit of the Sabat shares.
   Independent Asset Management Company Limited v Swiss Forfaiting Limited BVIHCMAP2016/0034 (delivered 24th November 2017, unreported)

applied; **Lloyd v McMahon** [1987] AC 625, pp. 702-703 applied; **Re Greater Britain Insurance Company; ex parte Brockdorff** (1920) 124 LT 194 considered.

JUDGMENT

[1] **WEBSTER JA [AG.]:** This is an appeal against the judgment of the learned judge dated 25th August 2017 by which she upheld the validity of a meeting of the shareholders of the respondent, Star Properties Corp., ("the Company"), held on 11th April 2014 and the resolutions passed at the meeting.

Background

[2] The Company was incorporated under the provisions of the **International Business Corporations Act**[1] ("the IBC Act") in January 2000. Following incorporation, the Company issued 65 bearer shares to the appellant, Mr. Pierre Vandenbroucke, representing 50% of the issued capital of the Company, 40 bearer shares to Mr. Amadeo Sabat Nuto ("Mr. Sabat Nuto") and 25 bearer shares to Viajes Riveriera SA (later Evalex SL ("Evalex")). The shares held by Mr. Sabat Nuto and Evalex are beneficially owned by the Sabat family and are referred to in this judgment together as "the Sabat shares".

[3] The appellant was appointed as the sole director of the Company and remained in that position until his purported removal at the disputed shareholders' meeting held on 11th April 2014.

[4] Prior to 2010, companies incorporated in Antigua and Barbuda under the IBC Act were allowed to issue bearer shares. In 2010, the IBC Act was amended by the **International Business Corporations (Amendment) Act, 2010** ("the Amendment Act") to introduce a regime for placing all bearer shares into the custody of licensed and recognised custodians. This resulted in bearer shares

[1] Cap. 222, Revised Laws of Antigua and Barbuda 1992.

losing their essential qualities of being owned by the person in possession of the shares and transferable by delivery. All bearer shares had to be deposited with a custodian by the transition date of 29th July 2011, failing which they became disabled. The sections of the Amendment Act that are material to this appeal are set out and analysed below.

[5] The provisions of the Amendment Act came into force on 29th April 2011. Section 139A allowed a transition period of three months ending on 29th July 2011 to put the shares into custody ("the transition date"). The Financial Services Regulatory Commission ("the Commission") was given the power under section 139C to extend the time for depositing the shares by such periods as it saw fit, but not exceeding one year in total.

[6] The appellant did not deposit his bearer shares with a custodian and it is common ground that as a result his shares became disabled as of 29th July 2011.

[7] The holders of the Sabat shares deposited their shares with a licensed custodian, CMT Corporate Services Limited ("CMT Ltd."), on 5th February 2014, that is, 30 months after the transition date. On 19th February 2014, the Commission issued a certificate of reinstatement restoring the Company to the register of companies. The Company treated the certificate of reinstatement as proof that the Sabat shares had been properly deposited and were not disabled.

[8] The Sabat shareholders purported to hold a meeting of the shareholders of the Company on 11th April 2014 and passed resolutions at the meeting which, inter alia, removed the appellant as the sole director of the Company and appointed three new directors, namely: Mr. Sabat Nuto, his daughter Ms. Eva Sabat Cuevas, and Mr. Oscar Bacardit Mariscal. Resolutions were also passed dealing with amendments to the Company's bylaws and the appointment of new auditors.

[9] The appellant filed a claim in the High Court against the Company seeking several reliefs including declaratory orders that:

i. the purported deposit on 5th February 2014 of the Sabat shares with CMT Ltd. is invalid, null and void;

ii. the meeting held on 11th April 2014 and all decisions taken thereat are null and void;

iii. he was wrongfully removed as the sole director of the Company and should be reinstated;

iv. the new directors were wrongfully elected; and

v. the proceeds of redemption of any bearer shares be held in trust by the Company for the benefit of the owners of the bearer shares and, at the beneficiaries' election, be reinvested in the Company as registered shares in the same percentage as the disabled bearer shares.

[10] The learned trial judge found in paragraph 6 of her judgment that the Sabat shares were deposited with a custodian, albeit out of time, and that the appellant never deposited his shares with the result that his shares were disabled by virtue of the Amendment Act. Further, that the meeting held on 11th April 2014 and the resolutions passed thereat were valid. She also decided that it was not necessary for her to "look behind" the deposit of the Sabat shares. The irresistible inference from these findings is that the judge was satisfied that the Sabat shares were properly deposited and were not disabled.

[11] The learned judge did not make any orders regarding the redemption of the appellant's disabled bearer shares.

Submissions on Appeal

[12] Counsel for the appellant, Mr. Lenworth Johnson, submitted that the Sabat shares were disabled as of 29th July 2011 (actually 30th July) and were not validated during the transition period or any extension of that period which ended on 29th

July 2012. Further, that the deposit of the Sabat shares on 5th February 2014 could not cure the disability attaching to the shares. The 11th April 2014 shareholders' meeting and the resolutions passed at the meeting were therefore invalid and should be set aside, and the appellant should be reinstated as the Company's sole director.

[13] Leading counsel for the Company, Mr. Kendrickson H. Kentish, submitted that the April 2014 meeting and the resolutions passed at the meeting were valid for at least the following reasons:

a. The Sabat shares were deposited with a recognised custodian and the Commission issued its certificate of reinstatement two weeks later. It is to be inferred from the acceptance of the shares by the custodian and the issuing of the certificate of reinstatement by the Commission that the shares were no longer disabled.

b. Alternatively, the learned judge's order confirming the validity of the disputed shareholders' meeting and the resolutions should not be set aside because the dispute in this case is between the shareholders of the Company and the appellant, and the crucial issue that has the effect of determining all other issues is whether the Sabat shares were disabled for failure to deposit them with a custodian within the prescribed time. This is an issue that must be determined among the shareholders *inter se* and it would be unfair to determine that issue without the Sabat shareholders being joined as parties to the proceedings in the court below. They were not joined and therefore the court should not make declarations that their shares were disabled.

c. The appellant does not have a cause of action against the Company.

[14] The issues that arise from the parties' written and oral submissions are:

i. The Company's fresh evidence application.

ii. Whether the Sabat shares were disabled.

iii. The effect of the non-joinder of the Sabat shareholders.

Issue 1: The Fresh Evidence Application

[15] On 23rd January 2018, the Company filed an application to adduce fresh evidence in the appeal concerning the disabled bearer shares held by the appellant. The new evidence is to the effect that in November 2017 the appellant purported to deposit his bearer shares with a custodian and to transfer the shares to a company by the name of Searchlight Ltd. The appellant filed evidence in response to the application saying that he had reversed the transfer and deposit of his shares and that they were still owned by him. We refused the application and advised counsel that we would include the reason for doing so in the judgment on the appeal. We now do so.

[16] We are satisfied that the application met two of the three conditions of the test in **Ladd v Marshall**,[2] in that the new evidence was not available at the trial and it is credible. However, the new evidence would not have an impact on the appeal, in that there is no dispute that the appellant's shares were disabled since April 2011, and the new evidence would not have any effect on the status of the shares in 2011 nor at any later time. In any event, the appellant had reversed the transfer and deposit of the shares. In the circumstances, we dismissed the application.

Issue 2: Whether the Sabat shares were disabled

[17] In my outline of the facts above, I mentioned the requirement for depositing bearer shares into the custody of a recognised custodian under the provisions of the Amendment Act. I will now analyse the new regime for bearer shares that was introduced by the Amendment Act.

[2] [1954] EWCA Civ 1.

[18] Section 139F provides that a bearer share is deposited by delivering it to a custodian who has agreed to hold it. Section 139C sets out provisions regarding the deposit of bearer shares. Section 139C reads:

> "(1) An existing (bearer) share shall on or before the transition date, be –
> (a) deposited with a custodian;
> (b) converted to, or exchanged for, registered shares;
> (c) cancelled and forfeited.
>
> (2) A company or an interested person may apply to the Commission to extend the period of time in subsection (1).
>
> (3) An application to the Commission shall be in writing and shall state in detail the reasons for the request for an extension of time.
>
> (4) The Commission may extend the period of time by such period or periods of time as it sees fit, but not exceeding one year in total.
>
> (5) (intentionally omitted)".

[19] The transition date referred to in section 139C(1) is defined in section 2 of the Act as "…three months after the commencement of this [Amendment] Act or such other date as the Commission may determine in accordance with section 139C(4)." The commencement date of the Amendment Act was 29th April 2011 and the transition date was therefore 29th July 2011.

[20] Section 139A(3) provides that after the transition date, bearer shares held by any person other than a custodian are disabled and section 139B deals with the effect of disabled bearer shares. Section 139B reads:

> "(1) A disabled bearer share does not carry any of the entitlements which it would otherwise carry and any transfer or purported transfer of an interest in the bearer share is void and of no effect.
>
> (2) Without limiting the scope of subsection (1), an "entitlement" includes an entitlement to vote, an entitlement to a distribution and an entitlement to share in the assets of the company on its winding up or its dissolution."

[21] Section 139D states that a bearer share that has been disabled pursuant to section 139A(3) is subject to mandatory redemption.

[22] The wording of section 139C is clear. The holders of bearer shares were required to deposit the shares with a recognised and licensed custodian on or before the transition date on 29th July 2011. Shareholders who could not meet this deadline could have applied under section 139C(2) during the three-month transition period ending on 29th July 2011 for an extension of time to deposit the shares. The Commission had jurisdiction under section 139C(4) to extend the period of time for depositing the shares by such period or periods as it saw fit "…but not exceeding one year in total." This means that the Commission could extend the transition date mentioned in sub-section (1) for depositing bearer shares for any period or periods of time up to the one year, ending no later than 29th July 2012.

[23] There is nothing in section 139C that says that the application for extension cannot be made after the transition date, but it is equally clear that the Commission cannot extend "… the period of time in subsection (1)", which is the transition date of 29th July 2011, for more than one year. Therefore, if an application was made after the transition date but before 29th July 2012, the Commission could grant one or more extensions, but the time granted could not go beyond 29th July 2012. If an application was made after 28th July 2012, the Commission could not grant an extension because an extension of even one day after that date would have had the effect of extending the transition date for more than the one year period allowed by section 139C(4). In short, the Commission does not have jurisdiction to grant extensions after 28th July 2012.

[24] There is no evidence that the Sabat shareholders applied under section 139C or otherwise to extend the time to deposit their shares during the transition period or the 12-month period thereafter ending on 29th July 2012. In the absence of evidence of an application to extend time, the Company's submission that the restoration of the Company to the register of companies by the Commission on 19th February 2014 had the effect of validating the Sabat shares must be rejected. Even if an application was made before 29th July 2012, it could not have extended the time for deposit beyond that date. The evidence is that the shares were

deposited with a custodian on 5th February 2014, which was more than two years after the transition date and more than a year after the final deadline for depositing bearer shares. The Commission had no jurisdiction to extend the period for depositing the Sabat shares or any other bearer shares into custody after 29th July 2012. The Sabat shares were therefore disabled as of 29th July 2011 and an application was not made within the prescribed period or during the one year period following to extend the time for making a proper deposit.

[25] Mr. Kentish referred the Court to the provisions of the Amendment Act and submitted that when the definition of the transition date in section 2 is read with section 139C, the effect of the new provisions and the intention of the drafter was that the Commission could approve an extension of time to deposit the shares at any time after the transition date for periods of up to one year. I do not accept this submission. The Commission's power in section 139C(2) is "…to extend the period of time in subsection (1)." The period of time in subsection (1) is the three-month period ending on the transition date. As stated above, the Commission could extend time on any application, whether made before or after the transition date, up to 29th July 2012. After that date, the Commission could not grant any further extensions and all bearer shares that were not deposited as of that date were permanently disabled.

[26] I find support for this conclusion in the Company's final submissions in the lower court where it stated on page:[3]

> "Pursuant to the provisions of the Amending Act, it seems clear that the bearer shares issued by Star Properties Corp. should have been deposited with a licensed custodian by July 28, 2011, failing which the shares would be automatically disabled, and from the following day would carry no entitlements.'

The Company has not withdrawn this submission. Its position in this Court is that even if the Sabat shares were disabled, the disability was cured by the February

[3] Tab 17 of Core Bundle.

2014 deposit of the shares with CMT Ltd. and the Commission's certificate of reinstatement restoring the Company to the register of companies. I have several problems with this conclusion and they are set out in the following paragraphs.

[27] The time limit for depositing bearer shares into custody can be extended on a written application to the Commission setting out full reasons for the request for the extension. The application to extend time to deposit the Sabat shares into custody was not produced in the proceedings in the court below and the Court is left to speculate as to what application, if any, was made to the Commission, and what were the reasons for the delay in depositing the shares. There is no evidence of the date when the application (if any) was made to the Commission. Even if an application was made, the Commission could not have extended the time beyond 29th July 2012 and the deposit was not made until February 2014.

[28] The certificate of reinstatement issued by the Commission *ex facie* states that it was issued pursuant to section 335(6) of the IBC Act. Section 335(6) has nothing to do with the deposit of bearer shares into custody or extending the time for making the deposit. Further, the certificate states that the Company was struck off the register of companies on 10th May 2011 and that it "…has been restored." The certificate does not state the reason why the Company was struck off the register in May 2011 and there was no written or oral evidence linking the Company's restoration to the register by the Commission under section 335, to an application by the Company or the Sabat shareholders under section 139C (3) to extend the time to deposit bearer shares. In fact, the only witness who addressed this issue was the Company's legal advisor, Mrs. Stacey Richards-Roach ("Mrs. Richards-Roach"), who said in cross-examination that she did not know why the Company was struck off the register and she did not give any evidence about an application to deposit the Sabat shares under section 139C. This is so even though the undisputed evidence on behalf of the Company is that Mrs. Richards-Roach was the Company's legal advisor at the material time.

[29] One thing that is clear as a matter of law is that there is no provision in the IBC Act or the Amendment Act for striking a company off the register for failure to deposit bearer shares with a custodian. The deposit of bearer shares is a shareholder issue and the consequence of not depositing the shares is set out in section 139D(1) – the shares are disabled and subject to mandatory redemption. This has nothing to do with a company's status.

[30] The deposit of the Sabat shares with CMT Ltd. was done outside the transition date or any extension of that date that the Commission could have granted. Therefore, the Commission did not have jurisdiction after 29th July 2012 to extend the time for depositing the Sabat shares into custody, and there is no evidence that they purported to do so. The intention of the Amendment Act is clear – bearer shares were being taken out of circulation as of 29th July 2012 and any bearer shares not deposited by that date was permanently disabled and liable to mandatory redemption under section 139D(1).

[31] Based on my findings that the Sabat shares were disabled as of 29th July 2011 and that an application to extend the time for depositing the shares could not have been made after 29th July 2012, I would reject the Company's contention that the Sabat shares were properly deposited into custody in February 2014, thereby removing any disability that may have attached to the shares prior to deposit. The Sabat shares were automatically disabled as of 29th July 2011 and the purported deposit of the shares in 2014 with a custodian had no effect on their disability. The Commission's certificate of reinstatement is not proof that the Commission extended the time for depositing the shares and there is no other evidence that the time was extended. It follows that the Sabat shares were disabled and the beneficial owners of the shares were not entitled to vote the shares at the April 2014 meeting.

Non-joinder of the Sabat shareholders

[32] The Company's alternative position is set out in a rolled-up plea in paragraph 15 of its statement of defence which reads:

> "The Defendant contends that all the matters pleaded in the Statement of Claim are properly to be litigated between the shareholders of Star Properties Corporation and that they do not disclose a cause of action against the Defendant."

The main issue pleaded in the statement of claim that is relevant to this appeal is whether the April 2014 shareholders' meeting and the resolutions passed at the meeting are null and void on account of the failure of the Sabat shareholders to deposit the Sabat shares with a licensed custodian on or before the deadline on 29th July 2012. The Company is saying in paragraph 15 that this issue should be litigated between the shareholders of the Company *inter se* and that as a result the appellant does not have a cause of action against the Company.

Cause of action

[33] In response to the submission that there is no cause of action against the Company, Mr. Johnson relied on a passage from **Shackleton on the Law and Practice of Company Meetings**[4] to submit that a meeting of the shareholders is really a meeting of the company through one of its organs: the shareholders. Decisions taken at such a meeting are decisions of the company. In this case, the Company held a meeting of shareholders based on disabled shares and the court can set aside that meeting of the Company. This is an attractive argument that could find fertile ground in cases where the defect in the meeting such as improper notice does not affect the rights or interests of the shareholders attached to the shares. But in this case, in order to determine the validity of the meeting, the Court must make a prior finding as to the validity of the Sabat shares and this finding will affect the rights attached to the shares. This means that the appellant's cause of action in respect of the validity of the Sabat shares and the meeting is against the Sabat shareholders.

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[4] M Cordes and J Pugh-Smith (eds.) (18th ed., Sweet and Maxwell, 1991) paras. 12-01 to 12-02.

[34] However, the appellant does have a separate cause of action against the Company. There is no dispute that the appellant's shares were disabled within the meaning of the Amendment Act. Section 139D provides that the disabled shares are subject to mandatory redemption and "the company shall hold the proceeds of redemption on trust for the owner of the bearer share." The appellant pleaded in paragraphs 6 and 7 of the statement of claim that his shares as well as the Sabat shares were disabled and are subject to mandatory redemption and that the Company holds the proceeds of redemption on trust for the owners of the disabled shares. The relief sought by the appellant includes an order that "…the proceeds of redemption held in trust by the Defendant Corporation for the owners of the bearer shares be, at the beneficiaries' election, reinvested in the company as registered shares in the same percentage of shares as heretofore."[5] This is undoubtedly a claim that the appellant is asserting against the Company that upon mandatory redemption of his bearer shares they should be reissued to him as registered shares in an amount that is proportionate to his disabled bearer shares. This is an issue to be resolved between the Company and the appellant and it is sufficient to dispose of the allegation that the appellant does not have a cause of action against the Company.

Procedural fairness

[35] The other point raised by the Company in paragraph 15 of its defence amounts to saying that a finding that the disputed meeting is invalid necessarily involves an earlier finding that the Sabat shares were disabled and the court should not make any finding regarding the Sabat shares because the Sabat shareholders were not joined as defendants in the lower court.

[36] The resolution of this issue involves a consideration of the rule of procedural fairness that a decision should not be made that affects a person's property or his rights without giving that person a chance to be heard and to respond to the case

[5] Relief 7 in the claim form and statement of claim the size and significance.

that has been made against him (*audi alteram partem*). The basis of the rule is fairness. The rule recognises that for a person to be deprived of his property or his rights he must be given a fair opportunity to present his side of the case and to reply to the evidence and the other side's case. This principle was applied by this Court as recently as November 2017 in **Independent Asset Management Company Limited v Swiss Forfaiting Limited**[6] where the Court declared that shares issued to a third party were improperly issued but did not make an order setting aside the issuance of the shares and rectifying the share register by deleting the third party's name from the register because the third party was not a party to the proceedings in the court below nor in the appeal.

[37] Applied to this case the rule means that an order should not be made that affects the rights attached to the Sabat shares without giving the Sabat shareholders an opportunity to respond to the case and the evidence against them. An order by this Court declaring the deposit of the Sabat shares with CMT Ltd. ineffective resulting in the disabling of those shares as of the transition date, and the setting aside of the April 2014 meeting and the resolutions passed at the meeting, would mean that the Sabat shareholders would have lost their entitlements attached to the shares. These entitlements include the right to vote at shareholders' meetings which is directly in issue in this case. Mr. Sabat Nuto would also lose any benefits derived from the disputed meeting such as his appointment as a director of the Company. The ownership rights attached to the shares would remain unaffected. The Sabat shareholders would still own their shares but the rights attached to the shares would be transformed by operation of section 139D of the Act to a right to receive from the Company the proceeds of redemption of their disabled shares.

[38] I am satisfied that the Sabat shareholders' rights in the Sabat shares will be affected by an order of this Court declaring the Sabat shares disabled. The issue to be resolved in this appeal is whether the rule of procedural fairness is absolute

[6] BVIHCMAP2016/0034 (delivered 24th November 2017, unreported) – see para. 48.

and does not allow any exceptions once the court is satisfied that the rights of non-parties could be affected by the decision, or if the court has a discretion and should treat each case on its own facts. The essence of Mr. Kentish's submission is that the rule is absolute and does not allow for any exceptions.

[39] There is no gainsaying that the rule promotes fairness and that any departure from the rule can be justified only in exceptional circumstances.

[40] Approaching the matter on principle, I do not think that a rule of procedural fairness should be absolute and not allow for exceptions. The Court retrains a supervisory jurisdiction to deal with each case on its facts. In **Lloyd v McMahon** Lord Bridge observed:

> "My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness".[7]

Lord Lloyd is confirming in this passage that the rules of natural justice should be applied flexibly and the guiding principle is fairness.

[41] Counsel in the appeal did not assist the Court with authorities showing how the court should exercise discretion in dealing with the situation where there has not been full compliance with the rule that a party whose rights can be affected by the court's order is entitled to a fair hearing. This is not surprising because it is only in the exceptional circumstances that the courts will forgive a breach of the rule

[7] [1987] AC 625, pp. 702-703.

requiring a fair hearing. But the court does retain a limited discretion in appropriate cases to make orders affecting non-parties.

[42] In **Re Greater Britain Insurance Company; ex parte Brockdorff**,[8] a decision of the English Court of Appeal, the appellant company entered into a contract with a non-party, Cork and Son, whereby Cork and Son underwrote an entire issue of new shares by the appellant. Cork and Son entered into a sub-underwriting contract with a Mr. Brockdorff by which Mr. Brockdorff agreed to purchase 30,000 of the new shares. A dispute arose between Cork and Son and Mr. Brockdorff regarding the price of the shares that he had purchased. Mr. Brockdorff sued the company under section 32 of the **Companies (Consolidation) Act 1908** for rectification of the share register by removing his name as the owner of the 30,000 shares and for the return of the money he had paid for the shares. Cork and Son was not joined as a defendant, although they could have been affected by the court's decision: if the court granted Mr. Brockdorff's claim, Cork and Son would be responsible for the 30,000 shares. The trial judge (Russell J) refused the application primarily on the ground that he would not order rectification of the share register in favour of Mr. Brockdorff by determining the matter as between him and the company (without joining Cork & Son). Mr. Brockdorff appealed to the Court of Appeal. The Court of Appeal dealt substantively with the absence of Cork and Son from the proceedings but found on the facts that the claim for rectification failed and therefore dismissed the appeal. Their Lordships noted that the dispute involved a pure question of construction of the relevant documents and that the application for rectification could have proceeded without joining Cork and Son. The leading judgment was delivered by Lord Sterndale, MR who said:

> "Russell, J. decided that he ought not to dispose of the matter upon an application under sect. 32 of the Companies (Consolidation) Act 1908, because if you dispose of it in favour of the applicant it might raise questions as between the company and Messrs Cork and Son, and, perhaps, as between the applicant and Messrs. Cork and Son. I think that when you look at the thing theoretically it is possible that difficulties might

[8] (1920) 124 LT 194.

> have arisen in the circumstances. But I confess I do not myself think that there is any substance in it. I think that all the necessary matter is before us, and that the possible question arising with respect to Messrs. Cork and Son afterwards would not in fact and in substance cause any complication."[9]

In a concurring judgment Warrington LJ said:

> "Speaking for myself, if I was sitting here as a judge of first instance, and had to consider this question, I should say that the suggested inconvenience of trying this by motion was purely fanciful. I do not think that there was any substance in it at all. It turned upon the construction of one or two documents and the absence of the underwriters [Cork and Son] seems to be to have been irrelevant to the question between the company and the sub-underwriter [Mr. Brockdorff] …"[10]

[43] The **Brockdorff case** is distinguishable from the instant appeal in that the Court of Appeal in England found that the case for refusing rectification was a straightforward matter of construction of documents and the result would not have had an adverse effect on the non-party, Cork and Son, whereas in the instant appeal a decision setting aside the April 2014 meeting, though straightforward as a matter of fact and law, would have an adverse effect on the Sabat shareholders as outlined above. However, the **Brockdorff case** is helpful in that it shows that the court will proceed in the absence of a non-party who could be affected by the court's decision. It is a matter of discretion and one where the court will only proceed in exceptional circumstances.

[44] I will now review the facts of this and the relevant law to see if it would be unfair to the Sabat shareholders to make an order in respect of the Sabat shares.

[45] One of the striking features of this case is that the line between the Company and the Sabat shareholders has been blurred almost to the point of being non-existent. They are the only shareholders of the Company and they appointed their nominees to the board of directors at the disputed April 2014 meeting. The

[9] ibid, p. 197.
[10] ibid, p. 200.

directors are Mr. Sabat Nuto who owns 35% of the issued shares. Ms. Eva Sabat Cuervas is a director of the 15% shareholder, Evalex SL, which she describes as a company that belongs to the Sabat family. She is also the daughter of Mr. Sabat Nuto. The third director, Mr. Osca Bacardit, is a long-time employee of Mr. Sabat Nuto and his companies.[11]

[46] It is patently obvious that the Sabat shareholders control the Company and were the driving force behind the Company's defence of the appellant's claim. Ms. Sabat Cuervas gave a 12-page witness statement in response to the claim and stated, among other things, that "I have to say that, before sending the requisition to convene the meeting, we (my father and Evalex SL) deposited our bearer shares as we were advised to do" and ended the statement by saying that "We are asking the court to dismiss this claim…".[12] She also gave oral evidence at the trial. Mr. Bacardit and the Company's attorney, Mrs. Richards-Roach, gave witness statements about the deposit of the Sabat shares with CMT Ltd., and Mrs. Richards-Roach also testified about the certificate of reinstatement issued by the Commission.

[47] The disabling of the Sabat shares was a shareholder issue and the defence to that part of the claim, though presented by the Company, was in substance the defence of the Sabat shareholders. They are the only persons who have a direct interest in preserving the shares. The Company has no such interest. In fact, the Company asserted in its pleadings, evidence and submissions that the appellant did not have a cause of action against it.

[48] In the circumstances, I am satisfied that the Sabat shareholders were aware of the challenge by the appellant to the validity of the shares and the April 2014 meeting, and they were given ample opportunity to and did defend the claim and participate in the proceedings through the Company which they control. In fact, they used the

[11] Paragraph 2 of his witness statement.
[12] Paragraphs 11 and 17, respectively of her witness statement.

Company to put forward a shareholders' defence to the status of the Sabat shares which had nothing to do with the Company.

[49] There is no dispute about the facts in this case and the findings of law under Issue 2 above are relatively simple and straightforward. To recap, the Amendment Act mandated that all bearer shares were to be deposited with a custodian by no later than 29th July 2012. If they were not so deposited they were disabled and the Commission did not have jurisdiction to extend the time for depositing the shares beyond that date. There is no evidence that the Sabat shareholders applied for an extension of time or that the Commission purported to extend the time. The reliance on the Commission's certificate of reinstatement to satisfy the requirements of section 139C of the Amendment Act is misconceived. All the evidence that was before the Court dealing with the automatic disability attached to the Sabat shares came from the Sabat shareholders and their associates. In my opinion the joining of the Sabat shareholders as parties would have made a difference to factual and legal issues regarding the late deposit of the Sabat shares. This was one of the bases for their Lordships' decision in the **Brockdorff case** – see paragraphs 41 and 42 above.

[50] The learned trial judge did not deal with the issue of the deposit of the Sabat shares. She disposed of it tersely in paragraph 60 of her judgment by saying "…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." I take this to mean that the learned judge was saying either that she did not have jurisdiction to deal with the issue or that it was completely irrelevant. In either case I do not agree. Based on the finding of law above that the deposit of bearer shares out of time was ineffective, the status of the Sabat shares following the deposit with CMT Ltd. was a live issue before the trial judge. However, she took the position that she did not need to deal with the issue. A decision on the issue would have had a decisive effect on the outcome of the trial. Having not done so this Court will resolve the issue.

[51] I am satisfied that there are exceptional circumstances in this case. The Sabat shareholders, though not joined as defendants, were aware of the challenge to their shares and the April 2014 meeting. They participated in the trial through their representatives and presented the Company's defence to the claim. The factual and legal issues are so clear-cut in this case that it would be a waste of time and expense to remit this case to the High Court to determine the issue of the status of the Sabat shares with all the relevant parties joined.

[52] In all the circumstances of this exceptional case, I find that this Court has the power to make a finding on the status of the Sabat shares and it would not be unfair to the Sabat shareholders to do so. The Sabat shares were disabled as of 29th July 2011 and are subject to compulsory redemption by the Company. It follows that the Sabat shareholders could not have voted their shares at the April 2014 meeting and the meeting and the resolutions passed thereat are void and of no effect.

[53] I would allow the appeal and make the following orders and declarations:

1. The appeal is allowed, and the judgment of the learned judge is set aside.

2. The meeting of the shareholders of the Company held on 11th April 2014 and the resolutions passed at the said meeting are declared to be null and void and of no effect.

3. The appellant is awarded prescribed costs of the proceedings in the court below calculated on a deemed value of $50,000.00, and two-thirds of the resulting amount as his costs of the appeal.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Mario Michel
Justice of Appeal

By the Court

Chief Registrar