

**IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
COMMERCIAL DIVISION**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVI HC (COM) 189 OF 2016

BETWEEN:

**(1) Muhammed Nazir Muhammed Ismail
(2) Mohammed Nazim**

Claimants

And

**(1) Inderjit Kaur Chhina
(2) Firmingham Ltd
(3) AMS Trustees Limited**

Defendants

Appearances:

Ms. Sarah-Jane Knock of Withers BVI for the Claimant

2017: January 12, 17

JUDGMENT

Decision:

[1] Before me is an application for permission to serve the claim and ancillary documents out of the jurisdiction on the first Defendant in England. The facts alleged are that the First Defendant, Ms Chinna, formerly held the shares of the Second Defendant, a BVI incorporated company ("**Company**"), in trust for the First Claimant, who is the father of the Second Claimant. After a breakdown in the relationship between the First Claimant and the First Defendant, he instructed her to transfer the shares in the Company to the Second Defendant and to appoint him as director. Ms. Chinna executed the share transfer instrument for this purpose and passed the relevant resolutions for updating the register and for her resignation and appointment of the Second Claimant as director but has refused to give these instructions to the Company's Registered Agent, the Third Defendant in the proceedings. The Claimants plead that they hold the original documents for this purpose.

- [2] As pleaded the claim appears to be one for the enforcement of the provisions of the Second Defendant's Articles of Association but the Claimants have obviously been advised that the Registered Agent and Ms. Chinna should be joined to this action.
- [3] The requirements on which I must be satisfied in order to grant permission to serve out have been set out in **AK Investments CJSC v Kyrgyz Mobile Tel Limited et al [2011] UKPC 7 and confirmed in Nilon Limited et anor v Royal Westminster Investments S.A. et al [2015] UKPC 2.**
- [4] The Application is grounded on CPR Part 7.3(7) that the claim involves the ownership of a company and the administration of the affairs of the Company. The Claimants have no difficulty in showing that there is a good arguable case that this gateway has been satisfied. A late attempt was made by counsel for the Claimants to raise a further gateway under rule 7.3(2)(a). As this ground was not in the Application itself, I do not propose to address it in this ruling.
- [5] The Claimants also need to satisfy me that there is in relation to Ms. Chinna, the foreign Defendant, a claim with a real prospect of success. I am satisfied that on the pleadings that this has also been made out in that it would be arguable that as an incident of the Claimants' establishment of their rights against the Company, the court must make a finding that Ms. Chinna is no longer entitled to be registered as shareholder of the Company.
- [6] The troubling point was the third requirement that the BVI should be the appropriate forum. The test in *AK Investments* is that "the Claimant must satisfy the court that in all the circumstances the [BVI] is clearly or distinctly the appropriate forum for the dispute...". The test is therefore a stringent one and not the lower test that Ms. Knock submitted was applied by the Court of Appeal in Singapore in **Siemens AG v Holdrich Investment Ltd [2010] SGCA 23**. The Privy Council decisions in *AK Investments* and *Royal Westminster* are binding on me and accordingly I am unable to follow a decision of the Singapore Court of Appeal that is not consistent with the decisions of our highest court.
- [7] In her second round of submissions, Ms. Knock addressed me more fully on the forum issue and sought to distinguish the recent decision in **Nilon Limited and Varma v Royal Westminster Investments S A and others [2015] UKPC 2**. After considering these arguments, I agree with her submissions that the thrust of the claim as pleaded lies not in any direct dispute between Ms. Chinna and the Claimants as to the ownership of the shares but in the Company's refusal to comply with its own Articles of Association and the provisions of the BVI Business Companies Act 2004 in its refusal to register the transfer of the shares when presented by the Claimants. This allegation anchors the claim to the BVI on the basis that it involves a domestic issue in relation to the BVI company. The Claimant has therefore satisfied me that BVI appears, at this stage at least, when no arguments have been put forward by Ms, Chinna, to be clearly the appropriate forum for the dispute and in all the circumstances I ought to exercise the discretion to permit service of the claim out on Ms. Chinna.

- [8] Another issue arises, however, almost by postscript. The claim was made by Fixed Fate Claim Form whereas CPR Part 8.1(5) does not permit this kind of claim to be made by use of this procedure. Ms. Knock submitted that this incorrect procedure was used in other proceedings and has become a “common and accepted practice”. I regret that I do not accept that practice and I am of the view that it should cease forthwith.
- [9] I therefore order that permission be given for the Claimants to serve the claim form out of the jurisdiction on Ms. Chinna, the First Defendant, at the address given for her in the United Kingdom, such service to be by any method that does not infringe the laws of England and Wales. I further direct that prior to such service, the Claimants shall amend the Fixed Date Claim Form as an Ordinary Claim Form and comply otherwise with CPR Part 8. I further direct that the other provisions of CPR Part 7 and the Practice Direction be adhered to and will ask Counsel to lay over a draft Order for my approval.
- [10] By way of further postscript, Ms Knock presented the court after the hearing some communication allegedly from Ms Chinna in which she purports to refute the claim on the basis that the documents relied on by the Claimants are forgeries. I do not propose to consider this document at this time as Ms Chinna, if served, will have adequate opportunity to take advice on the courses of action open to her in the proceedings.

John Carrington QC
Commercial Court Judge [Ag]
17th January 2017