Hilary Term
[2015] UKPC 2
Privy Council Appeal No 0043 of 2012

JUDGMENT

Nilon Limited and another (Appellants) *v* Royal Westminster Investments S.A. and others (Respondents)

From the Court of Appeal of the British Virgin Islands

before

Lord Mance
Lord Sumption
Lord Carnwath
Lord Toulson
Lord Collins

JUDGMENT GIVEN ON

21 January 2015

Heard on 23rd and 24th July 2014

Appellants	*Respondents*
Richard Snowden QC Stuart Ritchie QC (Instructed by PCB Litigation LLP)	Phillip Marshall QC James Mather (Instructed by Peters & Peters Solicitors LLP)

LORD COLLINS:

I Introduction

1. These are appeals from a judgment of the Court of Appeal, Eastern Caribbean Supreme Court (Territory of the Virgin Islands). The primary questions which were the subject of argument were (1) whether a claimant (A) can bring proceedings for rectification of the share register of a company (D1) when the reason for rectification is an untried allegation that a defendant (D2) has agreed to allot shares in D1 to A; and (2) if so, whether D2 is a necessary and proper party to A's claim against D1 and whether the BVI is an appropriate forum for A's claim against D2.

2. The first claimant, Royal Westminster Investments SA, is a Panamanian company and is alleged to be the nominee of the second claimant, Mr Mahtani, who is a businessman resident in Nigeria. The third claimant, Mr Sunder Dalamal, is the father-in-law of Mr Mahtani, and was, when these proceedings were instituted, resident in London. The fourth claimant, Mr Nari Dalamal, is the brother of Mr Sunder Dalamal and was resident in London. It is now said by the claimants that the third and fourth claimants are resident in India. The first claimant plays no substantial role in these proceedings and can be ignored for present purposes, and the claimants will be referred to as "the Mahtani parties."

3. The first defendant, Nilon Ltd ("Nilon") is a BVI company which was incorporated on November 7, 2002 by the second defendant, Mr Manmohan Varma ("Mr Varma"), who is resident in London. Mr Varma is registered as the sole shareholder of the issued shares in Nilon in Nilon's register of members.

4. The Mahtani parties have brought proceedings in the BVI against Mr Varma for breach of a contract to procure the issue of shares in Nilon to the Mahtani parties, and against Nilon for rectification of its share register to show the Mahtani parties as shareholders. The principal issue on this appeal was whether permission should have been given by the BVI court to the claimants to serve Mr Varma out of the BVI, but there is also an issue whether the claim against Nilon should have been struck out on the basis that there was no sustainable cause of action for rectification. Whether there was a cause of action against Nilon is, as will appear, also central to the question whether permission to serve Mr Varma outside the BVI should have been given, and for that reason Nilon is a party to this appeal, although it has taken no active part in it.

II The nature of the claim and the course of the proceedings

5. The Mahtani parties allege that it was agreed orally between Mr Varma and them at a meeting in Rochester, Kent in England on October 25, 2002 ("the Joint Venture Agreement") that:

> (1) A new company would be incorporated in the BVI to be called Nilon, which would be operated from Jersey as the holding company of Nigerian operating companies, whose businesses involved the importation and sale of rice to Nigeria.
>
> (2) The executive decision making powers of Nilon would be in the hands of Mr Varma and/or companies associated with him, who would be paid a management fee for managing Nilon and/or the operating companies owned by Nilon.
>
> (3) The Mahtani parties and Mr Varma as joint venture partners would remit an initial down payment to a bank account to be opened in Jersey in the name of Nilon as capital for the joint venture.
>
> (4) Each joint venture partner would be entitled to an equal profit share for the rice cargo venture business run by Nilon, which was to involve the importation of rice from Nigeria and onwards sale.
>
> (5) Mr Varma would procure and/or co-operate in procuring the issue of voting shares in Nilon (in accordance with their entitlement to profits derived from the establishment of a rice cleaning plant which was to involve initially the importation of brown rice from India and the processing of it in Nigeria) in these proportions: Mr Varma would own 37.5% of the issued shares in Nilon; 5% would be allotted to a local Nigerian investor to be agreed between the joint venture partners; and the remaining 57.5% would be allotted to the Mahtani parties in the following proportions: 37.5%, 10%, 10%.

6. The Mahtani parties allege that they contributed funds to Nilon in pursuance of the Joint Venture Agreement and received dividend payments from Nilon pursuant to it. They claim to be legal and/or beneficial owners in Nilon, but that Mr Varma failed to procure the allotment of shares in Nilon to them, or the entry of their names in its register of members, or the issue of share certificates to them. Consequently they claim declarations that they are owners of the agreed proportions of the issued shares in Nilon, and an order that the share register be

rectified pursuant to section 43(1)(a) of the BVI Business Companies Act 2004 ("the BVI Act") to give effect to the Joint Venture Agreement. They also claim an order for specific performance of the Joint Venture Agreement, and damages in lieu of or in addition to specific performance.

7. In his defence Mr Varma accepts that there was an agreement reached on October 25, 2002 concerning certain terms of a joint venture between him and the Mahtani parties. Those agreed terms included: (1) the incorporation of Nilon in the BVI to operate in Jersey as the holding company for the operating companies of the joint venture; (2) the opening of a joint venture bank account in Jersey into which each joint venture partner would make an initial contribution by way of loan; (3) profit-sharing arrangements in respect of (i) the importation business (25% each) and (ii) the manufacturing business (in the proportions claimed by the Mahtani parties); (4) all control and decision-making powers would vest in him or his group of companies, who would receive a management fee. He accepts that sums were remitted by the Mahtani parties, but says that these were loans and were not remitted for shareholdings in Nilon, and that the sums paid by Nilon to them were not dividends.

8. Nilon filed a separate defence, in which (*inter alia*) it denies that the Mahtani parties are entitled to rectification of the register and denies that it has refused to give effect to any legitimate rights of the Mahtani parties in it.

9. The Mahtani parties applied to the BVI Commercial Court (without notice) for permission to serve Mr Varma out of the jurisdiction. The procedural background is complex, but for the purposes of this appeal, it is only necessary to say that Bannister J initially refused permission to serve out of the jurisdiction because there was no real issue between the Mahtani parties on their rectification claim, since the Mahtani parties were not shareholders in Nilon and there was no allegation that Nilon itself had agreed to allot shares to them, and for essentially the same reason he subsequently struck out the claim against Nilon. The Court of Appeal allowed appeals by the Mahtani parties and decided that there was an arguable claim against Nilon, to which Mr Varma was a necessary and proper party. The principal point of law, whether there is a sustainable claim for rectification of Nilon's share register, is the same in both appeals, and the Board, like the parties, will treat Mr Varma's appeal as the principal appeal.

III Service out of the jurisdiction: principles

10. The application to serve Mr Varma out of the jurisdiction was made under BVI CPR 7.3(2)(a) which provided at that time as follows:

> "(2) A claim form may be served out of the jurisdiction if a claim is made -
>
> (a) against someone on whom the claim form has been or will be served, and -
>
> (i) there is between the claimant and that person a real issue which it is reasonable for the court to try; and
>
> (ii) the claimant now wishes to serve the claim form on another person who is outside the jurisdiction and who is a necessary and proper party to that claim."

11. This Rule was substantially similar to the present rule in England (CPR Practice Direction 6B, para 3.1(3)), except that where the BVI rule refers to "necessary *and* proper party" the English rule (like its Order 11 predecessor since the 19th century) uses the expression "necessary *or* proper party." Nothing turns on the difference in this appeal.

12. The BVI Rule has subsequently been amended to use the expression "necessary or proper party" and a new head of jurisdiction has been added to allow service out of the jurisdiction if the subject matter of the claim relates to (*inter alia*) "the ownership or control of a company incorporated within the jurisdiction" (Rule 7.3(7), introduced by the Eastern Caribbean Supreme Court Civil Procedure (Amendment) Rules (SRO 47 of 2011, in force from October 1, 2011).

13. The applicable principles relating to service out of the jurisdiction were set out, with references to the prior authorities, in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804, at para 71, per Lord Collins. On an application for service out of the jurisdiction, three requirements have to be satisfied. First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context "good arguable case" connotes that one side has a much better argument than the other. Third, the claimant must satisfy the court that in all the circumstances the forum which is being seised (here the BVI) is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

14. In the search for the appropriate forum the question of the location of witnesses will be an important factor, and has been described as a core factor: see *VTB Capital Plc v Nutritek International Corporation* [2013] UKSC 5, [2013] AC 337, at para 62, per Lord Mance.

15. In *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* (above) the Judicial Committee also set out the principles applicable to the "necessary or proper party" head of jurisdiction (at 73 para et seq), and emphasised these points:

    (1) The necessary or proper party head of jurisdiction was anomalous, in that, by contrast with the other heads, it was not founded upon any territorial connection between the claim, the subject matter of the relevant action and the jurisdiction of the English courts.

    (2) Caution must always be exercised in bringing foreign defendants within the jurisdiction under that head, and in particular it should never become the practice to bring in foreign defendants as a matter of course, on the ground that the only alternative requires more than one suit in more than one different jurisdiction.

    (3) The fact that the defendant within the jurisdiction (D1 or the "anchor defendant") is sued only for the purpose of bringing in the party outside the jurisdiction (D2) is not fatal to the application for permission to serve D2 out of the jurisdiction, but it is a factor in the exercise of the discretion.

    (4) The action is not properly brought against D1 if it is bound to fail.

    (5) If a question of law arises on the application which goes to the existence of jurisdiction, the court will normally decide it, rather than treating it as a question of whether there is a good arguable case.

    (6) The question of the merits of the claim is relevant to the question of whether the claim against D1 is "bound to fail" and to the question whether there is a "serious issue to be tried" in relation to the claim against D2; and there is no practical difference between the two tests, and they in turn are the same as the test for summary judgment.

(7) In considering the merits of the claim, whether the claim against D1 is bound to fail on a question of law should be decided on the application for permission to serve D2 (or to discharge the order), but it would not normally be appropriate to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts.

(8) The question whether D2 is a proper party is answered by asking: "supposing both parties had been within the jurisdiction would they both have been proper parties to the action?"

16. It is also trite law that in appeals from the exercise of a discretion an appellate court should not interfere with a decision of a lower court which has applied the correct principles and which has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the appellate court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion which has been entrusted to the court.

IV The rectification claim

17. The main questions which have been canvassed on this appeal are: (1) whether there is a real issue between the Mahtani parties and Nilon under section 43(1) of the BVI Act which it is reasonable for the court to try as between those parties; (2) even if there is such a real issue, whether the BVI is the appropriate forum for trial of the claim against Mr Varma.

18. The claim in the claim form for an order for rectification of Nilon's register of members is made under section 43(1)(a) of the BVI Act. The relevant sections provide:

> "41. (1) A company shall keep a register of members containing, as appropriate for the company,
>
> (a) the names and addresses of the persons who hold registered shares in the company...
>
> …

42. (1) The entry of the name of a person in the register of members as a holder of a share in a company is prima facie evidence that legal title in the share vests in that person.

(2) A company may treat the holder of a registered share as the only person entitled to

(a) exercise any voting rights attaching to the share;

(b) receive notices;

(c) receive a distribution in respect of the share; and

(d) exercise other rights and powers attaching to the share.

43. (1) If

(a) information that is required to be entered in the register of members under section 41 is omitted from the register or inaccurately entered in the register, or

(b) there is unreasonable delay in entering the information in that register,

a member of the company, or any person who is aggrieved by the omission, inaccuracy or delay, may apply to the Court for an order that the register be rectified, and the Court may either refuse the application, with or without costs to be paid by the applicant, or order the rectification of the register, and may direct the company to pay all costs of the application and any damages the applicant may have sustained.

(2) The Court may, in any proceedings under subsection (1) determine any question relating to the right of a person who is a party to the proceedings to have his name entered in or omitted from the register of members, whether the question arises between

(a) two or more members or alleged members, or

(b) between members or alleged members and the company

and generally the Court may, in the proceedings, determine any question that may be necessary or expedient to be determined for the rectification of the register of members."

19. The equivalent in Great Britain is now section 125 of the Companies Act 2006, which has a long history, going back to the Joint Stock Companies Act 1856 (19 & 20 Vict c 47), section 25 and the Joint Stock Companies Act 1857 (20 & 21 Vict c 14), sections 8 and 9, the Companies Act 1862 (25 & 26 Vict c 89), section 35, the Companies (Consolidation) Act 1908, section 32, the Companies Act 1929, section 100, the Companies Act 1948, section 116, and the Companies Act 1985, section 359.

20. The equivalents in the Companies Act 2006 are sections 113 (register of members), 125 (rectification) and 127 (register to be evidence). Section 125 provides:

"(1) If -

(a) the name of any person is, without sufficient cause, entered in or omitted from a company's register of members, or

(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member,

the person aggrieved, or any member of the company, or the company, may apply to the court for rectification of the register.

(2) The court may either refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved.

(3) On such an application the court may decide any question relating to the title of a person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on

the other hand, and generally may decide any question necessary or expedient to be decided for rectification of the register.

…"

IV The judgments in the BVI

21. The principal point on this aspect of the appeal is whether the effect of section 43(2) of the BVI Act is that the court has power in the circumstances of this case "in proceedings under subsection (1)" to determine the right of the Mahtani parties "to have [their] name entered in … the register of members" on the basis that "the question arises between … members or alleged members and the company."

22. The relevant proceedings under section 43(1) are proceedings for the register to be rectified on the ground that information which is required to be registered under section 41 is "omitted from the register" and the relevant information in section 41 is "the names and addresses of the persons who hold registered shares in the company."

23. Bannister J at first instance (in the striking out proceedings) and the Court of Appeal (speaking through Bennett JA) came to opposite conclusions on the question whether the Mahtani parties had a claim against Nilon under section 43(2). What divided them was whether proceedings for rectification are maintainable only if the register is presently inaccurate (as Bannister J found and Mr Varma and Nilon contend), or whether it can be used to determine whether a defendant is in breach of a contract to procure that a company would issue shares (as the Court of Appeal found and the Mahtani parties contend).

Bannister J

24. Bannister J held that

    (1) There was no evidence that the name or address of any holder of a registered share had been omitted from Nilon's register of members or was inaccurately entered in that register (as required by section 43(1) of the BVI Act).

    (2) Even if the Mahtani parties' contractual claims against Mr Varma under the Joint Venture Agreement were successful, these claims

would only result in an *in personam* order against Mr Varma requiring him to procure Nilon to issue new shares, and such an order would give the Mahtani parties no interest in any shares in Nilon.

(3) The jurisdiction to order rectification would not arise unless and until Nilon actually allotted shares to the Mahtani parties which it then neglected to register; the Mahtani parties could not obtain any order against Nilon under section 43 requiring it to allot shares to them.

(4) Section 43(2) only applies if section 43(1) is engaged, and it cannot be used to determine whether a defendant is in breach of a contract to procure that a company would issue shares.

Court of Appeal

25. The reasoning of the Court of Appeal was as follows:

(1) It accepted that under section 43 the applicant had to show that his name had been omitted from the register as being a person who holds registered shares in the company, and the information required by section 41 to be recorded on the register was the names and addresses of persons holding or immediately entitled to hold legal title to the shares.

(2) Where a person has legal title to the shares the registration of which is in issue, the question which arises will generally be between that person and the company.

(3) But it was plain from section 43(2) that the court would have jurisdiction to rectify the register where questions concerning the applicant's right to have his name entered on the register arose between the members or alleged members inter se without involving the company.

(4) It was therefore not necessary for the company to be in breach of any of its obligations to the applicant for the court to exercise its jurisdiction under section 43.

(5) The discretion conferred by section 43(2) requires the court to have regard to equitable as well as legal rights, since questions of title in most instances involve equitable rather than legal entitlements, and such questions typically arise when the holder of the shares refuses to clothe the person claiming rectification with legal title.

(6) Consequently, even though the information required by section 41 comprised the names and addresses of persons who held or were immediately entitled to hold legal title, the court was not obliged to strike out an application for rectification where the party claiming the relief was unable to assert a present entitlement to registration.

(7) The court would not order rectification where the Mahtani parties were not in a position to assert legal title to the shares, but section 43(2) permitted the court to decide disputes as to entitlement to registration and the court had ample powers of case management under the CPR which enabled it to determine any such dispute prior to deciding whether or not to permit rectification.

VI *Re Hoicrest Ltd*

26. To a large extent this difference of view turned on the application of the decision of the Court of Appeal in England (Kennedy and Mummery LJJ) in *Re Hoicrest Ltd* [2000] 1 WLR 414. That was a decision on what is now section 125 of the Companies Act 2006. 98 shares in the company were issued to Mrs Martin (M). Mr Keene (K), who had been living with M, claimed that M had agreed to hold 49 of these shares on trust for him pending repayment of a loan by her to fund the acquisition of a lease by the company. K issued an application under section 359 seeking rectification of Hoicrest's register of members.

27. Judge Rich at first instance struck out K's rectification claim on the grounds that he had no jurisdiction to rectify Hoicrest's register of members, because unless and until the dispute between K and M had been resolved and M had executed an instrument of transfer in K's favour, K had no right to be entered in Hoicrest's register of members in respect of the 49 shares which he claimed M held on trust for him. It would only be then that it could be said that K's name had been omitted from the register "without sufficient cause" under what is now section 125(1).

28. On appeal the Court of Appeal, in a judgment given by Mummery LJ, held that what is now section 125(3) enabled the court to direct a trial of K's claim to a

beneficial interest in shares held by M. The Court of Appeal set aside the order striking out K's claim and gave directions for a trial of K's trust claim as a preliminary issue. Mummery LJ said (at 419):

> "… Jurisdiction to rectify is conferred by subsection (1). A general discretionary power is conferred on the court by subsection (3) so that a court to which an application to rectify is made may, on such application:
>
> > "decide any question relating to the title of a person who is a party to the application to have his name entered in or omitted from the register … and generally may decide any question necessary or expedient to be decided for rectification of the register."
>
> There is such a question here: the title of Mr Keene to the 49 shares which he claims should be registered in his name. It is true that … Mr Keene must establish that he has title to be entered in the register as a member in respect of the 49 shares. But, if there is a dispute about that title, subsection (3) empowers the court "on such an application" to decide that question. It is true that the court would not make an order which required the company or its board to act in contravention of section 183 or the articles. But that inhibition on making an order does not prevent the court from resolving, prior to deciding whether or not to make an order for rectification, relevant disputes about entitlement to the shares."

29. In these proceedings Bannister J, at para 43, thought the decision was wrong to the extent that it decided that the legislation conferred "a self-standing jurisdiction to decide under the section who owns what - regardless whether the company's register of members included the names of all those persons whose names should have been included in it and did not include the names of any persons whose names should not have been included." But he also considered that *Re Hoicrest Ltd* could be distinguished on the basis that (a) the legislation in Great Britain was different; and (b) the decision was in essence procedural (ie a case management decision).

30. The Court of Appeal, on the other hand, considered that Bannister J's criticism was not well made and that section 43(2) of the BVI Act gave the court a wide discretion which was broad enough to permit enquiry into the substantive cause for the omission. *Re Hoicrest Ltd* had rejected the proposition that it was necessary to find the existence of a legal title which the company had failed

properly to register before the section operated, and the approach in that decision should be adopted under section 43 of the BVI Act.

VII The arguments on the appeal

31. It is not necessary to elaborate on the arguments of the parties on this appeal, because they are largely covered in the judgments of the courts below.

32. Mr Varma emphasises that a company is not obliged to have any regard to trusts or beneficial interests in its shares and is entitled to deal only with the legal owner of the shares: *Re A Company (No 007828 of 1985)* (1985) 2 BCC 256*; National Westminster Bank Plc v Inland Revenue Commissioners* [1995] AC 119, 124; *Enviroco Ltd v Farstad Supply A/S* [2011] 1 WLR 921, at paras 37-38. At most Nilon might at some point in the future be called upon to give effect to an executed stock transfer requiring it to register the Mahtani parties as the holders of legal title to some of the shares in place of Mr Varma, but that will only happen after resolution of the contract claims. The reference in section 43(2) to the court being able to determine questions as to the right of a member or alleged member to have his name entered in or omitted from the register, allows the court, for example, to decide an issue as between two competing parties as to which is entitled to have the legal title and be on the register in circumstances in which the company is entirely neutral. The result in *Re Hoicrest Ltd* was largely driven by issues of domestic case management on a differently worded statute or, alternatively, *Re Hoicrest Ltd* was wrongly decided and should not have been followed by the Court of Appeal in this case.

33. The Mahtani parties say that *Re Hoicrest Ltd* shows that performance of the agreement can be compelled in a single set of proceedings, involving all proper parties. Once it has been held that shares are held on bare trust for an applicant, the applicant will be entitled to require that the bare trustee transfer the legal title to him, and the entitlement to such an order is suitable for resolution under section 43(2) of the BVI Act. The principle that, for purposes of its internal management, a company is not obliged to have regard to trusts of or beneficial interests in its shares, does not affect the position of a company faced with the situation where a party asserts an entitlement to be registered as the legal owner of shares.

34. On the hearing of the present appeal, the Mahtani parties sought to revive the argument which they put before the Court of Appeal that they were legal owners of shares because Nilon was estopped from denying their shareholding. But the allegation that Nilon (as distinct from Mr Varma) was estopped was introduced late and was never the basis of the application for permission to serve out of the

jurisdiction. It was not dealt with by the Court of Appeal, and played no part in the Mahtani parties' Statement of Case before the Board, nor in the Statement of Facts and Issues. There is no viable allegation of facts which could give rise to an estoppel against Nilon, and it is in any event now too late to rely on it.

VIII Conclusions

The claim for rectification

35. The claim by the Mahtani parties for rectification is confused. So far as relevant to this issue, the claim against Mr Varma is that he agreed to procure and/or co-operate in procuring the issue of voting shares in Nilon to them in agreed proportions, but that he failed to cause their names to be entered in the register of members of Nilon, or to cause Nilon to issue them with voting shares and share certificates, and that notwithstanding that failure they acquired an equitable interest in Nilon's shares. The evidence before the Board indicates that the authorised share capital of Nilon is US$50,000 divided into 50,000 shares, but that (at least as of 2005) only 100 shares had been issued. Consequently the substance of the Mahtani parties' claim on this aspect is for an order for specific performance requiring him to procure the allotment and issue of their respective shareholdings.

36. The parties very helpfully produced a schedule of the many reported cases on rectification of the share register going back to the cases on the Joint Stock Companies Act 1856 (19 & 20 Vict c 47) and the Joint Stock Companies Act 1857 (20 & 21 Vict c 14).

37. There are two points which emerge from the cases. The first is that from the earliest days of the legislation, the courts have made it clear that the summary nature of the jurisdiction makes it an unsuitable vehicle if there is a substantial factual question in dispute: eg *Re Russian (Vyksounsky) Iron Works Company, Stewart's Case* (1866) LR 1 Ch App 574, 585-586; *Re Heaton Steel and Iron Company, Simpson's Case* (1869) LR 9 Eq 91. In such a case an issue may be directed to be tried (*Re Diamond Rock Boring Co Ltd, Ex p Shaw* (1877) 2 QBD 463, at 484) or the application may be adjourned or stayed (*Re South Kensington Hotel Company Limited, Braginton's Case* (1865) 12 LT (NS) 259), but it may also be dismissed or struck out: *Re Hoicrest Ltd* [2000] 1 WLR 414, at 420, citing *Re Greater Britain Products Development Corporation Ltd* (1924) 40 TLR 488, where it was said (at 489):

> "Where it was clear that there was something to be answered and something to be investigated, the ordinary course, as far back as

> the court had been able to trace, had been for the judge to dismiss the summons or motion, but to leave it open to the party to bring his action."

38. The second point is that *Re Hoicrest Ltd* appears to be alone in deciding that it is sufficient for the applicant to have a prospective right against the company, and not an immediate right, to be entered on, or removed from, the register.

39. There is no doubt that the legislation is primarily concerned with legal title. In *Re London, Hamburgh and Continental Exchange Bank, Ward and Henry's Case* (1867) LR 2 Ch App 431 Lord Cairns LJ stated what might be thought to be the obvious when he said (at 440) that the object of the section was to secure a list or register which would show who were the shareholders entitled to the profits, and liable to contribute to the debts, of the company. The legislation both in the BVI and in Great Britain is concerned with rectification of the register of members, and membership concerns legal title: *Enviroco Ltd v Farstad Supply A/S* [2011] UKSC 16, [2011] 1 WLR 921, at paras 37-38, where Lord Collins said:

> "37. The starting point is that the definition of 'member' in what is now section 112 of the 2006 Act … reflects a fundamental principle of United Kingdom company law, namely that, except where express provision is made to the contrary, the person on the register of the members is the member to the exclusion of any other person, unless and until the register is rectified: *In re Sussex Brick Co* [1904] 1 Ch 598 (retrospective rectification of register did not invalidate notices).
>
> 38. Ever since the Companies Clauses Consolidation Act 1845 (8 & 9 Vict c 16) and the Companies Act 1862 (25 & 26 Vict c 89) membership has been determined by entry on the register of members. The companies legislation proceeds on that basis and would be unworkable if that were not so ..."

40. The great majority of the cases on the power of the court to order rectification involve a situation where a transfer has been executed but not registered, and the applicant seeks to be put on the register: eg *Re Contract Corporation, Head's Case, White's Case,* (1866) LR 3 Eq 84; *Re Overend, Gurney & Co., Ward and Garfit's Case* (1867) LR 4 Eq 189; *Re London, Hamburgh and Continental Exchange Bank, Ward and Henry's Case* (1867) LR 2 Ch App 431 (conflicting transfers); *Smith v Charles Building Services Ltd* [2006] BCC 334; *Blindley Heath Investments Ltd v Bass* [2014] EWHC 1366 (Ch).

41. The next largest category is cases (many of which are old cases concerning holders of partly paid shares seeking to avoid being contributories) where the applicant is already on the register but wishes to be removed, eg because the registration was effected as a result of misrepresentation (*Re Scottish and Universal Bank Ltd, Ship's Case* (1865) 2 DJ&S 544) or was effected without authority (*Martin's Case* (1865) 2 H&M 669) or was illegal because exchange control permission was not obtained (*Re Transatlantic Life Assurance Co. Ltd* [1980] 1 WLR 79) or bonus shares were improperly issued (*Re Cleveland Trust plc* [1991] BCC 33).

42. The overwhelming majority of the cases turn on legal title. The only cases which have any bearing on the issue in the present appeal are these. First, there is a dictum of Turner LJ in *Re Russian (Vyksounsky) Iron Works Company, Stewart's Case,* (1866) LR 1 Ch App 574 which assists the argument of the Mahtani parties that the rectification jurisdiction may be used where the applicant claims to be on the register because of a contract. It is obiter because this was a case of a shareholder seeking removal from the register. Turner LJ said (at pp 585-586):

> "Now suppose a question to arise between the vendor of shares and the purchaser of shares, the purchaser desiring to have his name entered on the list, and the vendor disputing the contract and refusing to concur. Suppose, then, an application made by the purchaser, under this section, to have his name entered on the list. Would not the Court have authority to entertain the application? … I cannot but think that there would be power to apply to the Court under this section to have the name of the purchaser entered on the register, though it would depend on the circumstances of the case, and the extent to which the purchaser established his right to specific performance of that agreement, whether the Court would interfere brevi manu to order the name to be entered on the register, or would direct the case to stand over till it had been decided between the parties, in a suit for specific performance, whether the purchaser was entitled to have his name entered on the register."

43. On the other hand, in a decision ultimately resting on the principle that the company is not concerned with beneficial interests, the applicant sought rectification of the company's register to remove individuals on the ground that transfers executed in favour of such individuals had been carried out in breach of trust. Rectification was refused on the basis that even if the shares had been transferred in breach of trust, that was not a matter which concerned the company, or which invalidated the registration of the transferees' names: *Elliot v Mackie & Sons Ltd, Elliot v Whyte*, 1935 SC 81, in which Lord President Clyde said (at 90):

> "According to the averments in the petition, these transfers were granted and registered in breach of the trust set up by the testator's trust-disposition and settlement; and, constituting, as they do, the transferees members of the company (ex facie in their own right), expose the shares to the deeds of the transferees, to the diligence of their creditors, and to any lien competent to the company. Assuming all this to be true, it discloses no ground on which it can be said, in the words of section 100(1) of the Act of 1929, that the names of the transferees have been entered in the register 'without sufficient cause'. The company is not the judge of whether a transfer has been executed contrary to some trust reposed in the transferor, and, indeed, is not concerned with considerations of that kind, assuming them to exist. The fact – if it be a fact – that a transfer may be subject to challenge in respect that the transferor, albeit himself a registered holder of the shares, is in breach of some trust in executing it is a matter between the transferor and the persons interested in the trust, and not a matter for the company."

44. That conclusion is also supported by the leading cases on the relationship between what are now sections 125(1) (application for rectification) and 125(3) (decision on title in course of application for rectification) of the Companies Act 2006.

45. In *Re North British Australasian Company (Limited), Ex p Robert Swan* (1859) 7 CB (NS) 400 it was decided by the Court of Common Pleas that the sections applied, not only where there was a dispute between the applicant and the company, but also where the dispute existed between two persons, each of whom alleged himself to be a member of a company in respect of the same shares. In that case Mr Swan had entrusted custody of his shares to his broker. The broker fraudulently transferred them to two innocent third parties, who were made parties to the application. The sole question was whether Mr Swan was estopped from denying his title by his negligence. On the application the court was equally divided and he failed. But he was ultimately successful in the Exchequer Chamber in an action for a declaration of title and for an order of mandamus requiring rectification of the register: *Swan v North British Australasian Company (Limited)* (1863) 2 H&C 175.

46. In *Re Diamond Rock Boring Co Ltd*, *Ex p Shaw* (1877) 2 QBD 463 a strong Court of Appeal (Lord Coleridge CJ and Bramwell and Brett LJJ) confirmed that a claim for rectification was maintainable where the company took no active part in the proceedings and the real dispute was between rival members. In that case an agent (A) acted for both purchaser (Shaw) and seller (Piers) on the sale and purchase of shares in the company. Piers executed a transfer in favour of Shaw and sent it to the secretary of the company, but A did not pay over the price to

Piers and falsely told Piers that Shaw would not complete, whereupon Piers demanded back the transfer. A cut off Piers' signature and absconded. Shaw sought and obtained rectification because, although the company was not at fault in failing to register the shares, the transfer had been duly executed and Shaw had legal title.

47. Lord Coleridge CJ emphasised (at pp 475, 476) that "Shaw had an undoubted legal right to the shares, and was entitled to be registered as the owner of them" and that Shaw was "a person whose name, without sufficient cause, has been omitted from the register." Bramwell LJ said (at p 480) that Shaw had "made out that he has good title, except registration, for he paid Piers' agent the price of the shares, and the transfer was duly executed." Brett LJ said (at p 484) that "it would be perfectly monstrous, if, after the purchase has been duly completed, and the money paid, and the transfer executed, the right of Mr Shaw to be registered as the shareholder could be affected by the fact of Sir E Piers or his agent having destroyed the transfer".

48. *Re Hoicrest Ltd* stands alone in being an actual decision which turned on the question whether proceedings for rectification are a permissible vehicle for determining a dispute about beneficial ownership, and whether they can be used not only by a person seeking registration of a share transfer, but also by a person claiming an order for transfer of shares.

49. In reality *Re Hoicrest Ltd* was a case management decision. First, nothing other than costs turned on whether the rectification proceedings should be allowed to go ahead. Mummery LJ said at the outset of his judgment (at p 416): "In substance the appeal is about who should pay the considerable costs already incurred in proceedings which have taken two years to get nowhere". Second, he referred (at p 420) to the fact that since the hearing before the judge, the new Civil Procedure Rules had come into force, and the overriding objective introduced by the CPR was more likely to be furthered by actively managing the case with appropriate directions rather than by simply striking it out and requiring K to start fresh proceedings against M claiming that she held the shares in trust for him.

50. In the present case much more than costs might have turned on whether *Re Hoicrest Ltd* was correctly decided. If it was not correctly decided, then it would be clear that there was no viable cause of action against Nilon to which Mr Varma could be a necessary and proper party, and therefore no possible basis for a claim against Mr Varma in the BVI.

51. In the view of the Board, proceedings for rectification can only be brought where the applicant has a right to registration by virtue of a valid transfer of legal title, and not merely a prospective claim against the company dependant on the conversion of an equitable right to a legal title by an order for specific performance of a contract. It follows that *Re Hoicrest Ltd* was wrong as a matter of principle, however sensible it might have been as a matter of case management.

52. The claim form seeks an order that the register be rectified forthwith to give effect to what is described as the true and proper state of affairs pertaining to it, in accordance with the terms of the Joint Venture Agreement, by entering the names of the Mahtani parties as the legal owners of the relevant numbers of shares in Nilon. The Mahtani parties have no such present right, which could only arise after they had been successful in their principal claim against Mr Varma, and only after he had been ordered to procure the issue and allotment of the shares to them. In these proceedings the Mahtani parties have no arguable case to a present right to rectification, and there is therefore no claim against Nilon to which Mr Varma can be a necessary and proper party.

53. Even if, contrary to the view of the Board, proceedings for rectification could be a vehicle for deciding questions of beneficial interest or the right to specific performance of an obligation to transfer, or procure the allotment of, shares, this case is not a suitable one for the application of what has always been meant to be the summary procedure which, in the BVI, is contained in section 43 of the BVI Act. Although in general it is not objectionable to bring a viable claim against D1, who is within the jurisdiction, with the principal object of joining D2, who is outside the jurisdiction, as a necessary/proper party, the combination of the motive and the artificiality of the rectification proceedings, and the fact that they are dependant on a trial of the underlying facts, means that the appropriate order in these circumstances is not to stay or adjourn the rectification application, but to strike it out.

Service out of the jurisdiction: discretion and forum conveniens

54. It follows that the question of joining Mr Varma as a necessary and proper party to the claim against Nilon does not arise, and a fortiori the issue of forum conveniens also does not arise. But because the Court of Appeal dealt with the forum conveniens issue, and the issue raises a point of general principle, the Board will indicate its views.

55. The question of forum conveniens did not arise before Bannister J in relation to the claim by the Mahtani parties against Mr Varma because he held that there

was no claim against Nilon for rectification (or for breach of an agreement to allot shares to the Mahtani parties). He indicated, obiter, that if there had been a viable claim against Nilon for breach of a contract by it to allot shares, then the BVI would have been the appropriate forum for resolution of that dispute: October 21, 2010, at para 34.

56. The Court of Appeal rejected the contention that the BVI was not the appropriate forum for trial of the issues relating to the Joint Venture Agreement, and decided that the BVI was clearly the appropriate forum for trial as a preliminary issue of the questions arising between the members and alleged members of Nilon which concerned the Mahtani parties' rights to registration as holders of shares in Nilon.

57. The Board is satisfied that this is a case where the error of the Court of Appeal would have been sufficient to justify interference with the exercise of the discretion, because the Court of Appeal asked itself the wrong question, and because it took into account matters which were not relevant, and failed to take into account relevant matters.

58. First, even if there was a viable claim to rectification against Nilon, the issues between the Mahtani parties and Mr Varma had little or nothing to do with the Mahtani parties' right to registration as members. The issue was whether Mr Varma had contracted to give them a beneficial interest in Nilon. The Court of Appeal itself accepted that the determination of the dispute between the Mahtani parties and Mr Varma would largely involve questions of fact concerning the terms, if any, upon which they agreed to participate in the ownership and management of Nilon, a BVI company.

59. Second, the Court of Appeal thought it relevant that matters concerning the organisation and administration of a company are generally treated as matters ideally suited to be determined in the location in which the company has been formed, citing what is now Dicey, Morris and Collins, *Conflict of Laws*, 15th ed (2012), para 30-028. The Mahtani parties continue to rely on this passage and in particular the statement:

> "English courts have been reluctant to intervene in domestic issues between members of a foreign corporation. In particular they will not normally seek to control the exercise of discretionary powers which are given to officers of a foreign corporation by its constitution. In such cases and in other matters involving the internal management of a foreign corporation the English court will give considerable weight to the court of the country of incorporation as the appropriate forum, though in the light of the

> development of the doctrine of forum non conveniens the jurisdiction of the latter court should not necessarily be regarded as exclusive."

60. But this is not a case involving any of the domestic issues referred to. The relevant principles have been developed in the context of such issues as those arising between members, or issues relating to the powers of organs of a company, the appointment of directors, the extent of members' liabilities for debts of the company, or the right of shareholders to bring derivative actions. The Court of Appeal relied on Bannister J's statement that if foreigners incorporate companies in the BVI they must expect to have to come to the BVI to litigate disputes going to the membership and administration of such companies, but the Court of Appeal ignored the context of those remarks, which was consideration of the forum conveniens if (contrary to his view) there was a viable cause of action against Nilon for breach of contract. The issues in this case are not about the organisation or administration, or the internal management, of a company. They are about the terms of an alleged contract to which it is not suggested Nilon was a party.

61. Third, the Court of Appeal accepted that in order to resolve the claim for rectification, the BVI court would have to determine, as a preliminary matter, the dispute between the Mahtani parties and Mr Varma, but it held that the factors relied upon by Mr Varma were not persuasive. It considered that although the issues would be largely factual concerning the terms, if any, on which they agreed to participate in the ownership and management of Nilon, and evidence as to what was said at the meeting in Rochester, Kent would be important, but also important would be documentary evidence of subsequent dealings: the locations at which such dealings took place were incidental, since the venture had little operational connection with either England or the BVI.

62. Here also, the Board considers that the Court of Appeal erred. The burden was on the Mahtani parties to show that the BVI was the appropriate forum, and the Court of Appeal's reasoning showed that the issues relating to the underlying claim had nothing to do with the BVI, and there was nothing about the issues in the claims for rectification of the register and breach of contract, taken together, which pointed towards the BVI as the appropriate forum.

63. Fourth, although the Court of Appeal rightly gave little weight to the fact that the substantive law of the Joint Venture Agreement would have been English law, it gave too much weight to the points that (a) the BVI legislation would govern the modalities of performance of any obligations imposed by the Joint Venture Agreement in relation to the issue or transfer of shares in Nilon; and (b) regardless of the forum in which the factual dispute between the Mahtani parties

and Mr Varma were resolved, the remedy of rectification would ultimately require the intervention of the BVI court.

64. But each of these points assumes that the Mahtani parties would prevail; and even if they did satisfy the court, whether in England or in the BVI, that not only did Mr Varma promise to procure that they had a beneficial interest, but also that he was bound to procure their registration as members, that would be purely a matter of the machinery of enforcement since their entitlement would, in those circumstances, be res judicata. There is no suggestion that there would be any real issue relating to the modalities of performance or the intervention of the BVI court, even if (which cannot be assumed, since he would be subject to the contempt jurisdiction of the English court) Mr Varma did not comply with an order to procure the registration of the Mahtani parties as shareholders.

65. Fifth, the Court of Appeal considered that if the court were to strike out or stay the claim for rectification so as to permit the relevant question to be decided in England, that would involve a waste of the considerable time, effort and resources already committed to the pursuit of the proceedings. But this ground not only confuses the question of the viability of the claim against Nilon for rectification of the register with the claim against Mr Varma, but also ignores the fact that it cannot normally be right to take into account the costs expended as a result of the Mahtani parties' attempts to establish BVI jurisdiction.

66. The reality of the matter is that, apart from the fact that the claim is that Mr Varma made a promise to allot shares in a BVI company, and that if they are successful the Mahtani parties may obtain an order that Mr Varma procure the allotment or transfer to them of shares in Nilon, the issues have nothing to do with the BVI at all. The alleged contract was made in England, the company was to be managed from Jersey, the underlying business was concerned with Nigeria and India, the operating companies would be in Nigeria, the witnesses (including Mr Mata and Mr Surana, the managing director and secretary of Nilon, and who were said to be involved in the formation and performance of the Joint Venture Agreement) would be mainly in England. The documents are in England or Jersey. There is no suggestion that there are any witnesses or documents in the BVI, or that there is any connection with the BVI other than as the place of Nilon's incorporation.

67. Nor is it relevant, as the Mahtani parties contend, that the BVI CPR now contain a specific provision permitting service of a claim form out of the jurisdiction if the subject matter of the claim relates to (a) the constitution, administration, management or conduct of the affairs of a BVI company; or (b) the ownership or control of such a company (Rule 7.3(7) of the BVI CPR, as introduced by the Eastern Caribbean Supreme Court Civil Procedure (Amendment) Rules (SRO

47 2011, in force from October 1, 2011). This appeal must be dealt with under the CPR as they stood. In any event, the fact that there is a specific gateway dealing with the ownership or control of a particular type of property within the jurisdiction does not obviate the need for a claimant to show that the BVI is clearly the appropriate forum.

68. In those circumstances the Mahtani parties could not have shown that the BVI is clearly or distinctly the appropriate forum.

69. Their Lordships will therefore humbly advise Her Majesty that the appeals should be allowed and that the action against Nilon be struck out and the permission to serve Mr Varma out of the jurisdiction be set aside.

70. It appears to the Board that costs should follow the event and that the Mahtani parties and the first respondent should pay the costs of Nilon and Mr Varma before the Board, in the Court of Appeal, and in the court below. The Board will make an order in these terms unless submissions to the contrary are made within 21 days of this advice being handed down, in which case the Board will consider those submissions and any submissions made in reply within 14 days of the receipt of those submissions.