

# The Privy Council clarifies the statutory jurisdiction to rectify a company's register of members

UPDATE

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This update discusses the recent Privy Council decision of *Nilon Limited and another v Royal Westminster*. This decision clarifies BVI law on the Court's powers (and limits) to rectify a company's Register of Shareholders and it re-confirms BVI law relating to the necessary and proper party requirement for service out of jurisdiction and what constitutes the appropriate forum.

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The recent Privy Council decision of *Nilon Limited and another v Royal Westminster Investments SA 2 UKPC* [2015], delivered by Lord Collins, clarifies two points of BVI law:

1. It sets out the BVI Court's powers (and limits) to rectify a company's Register of Shareholders pursuant to section 43 of the BVI Business Companies Act 2004 (the **Act**); and
2. It re-confirms BVI law as it relates to the 'necessary and proper party' for service out of jurisdiction and what constitutes the appropriate forum.

## Facts

The Claimants asserted that, by virtue of an oral agreement concluded between the parties in England in October 2002 (the **Joint Venture Agreement**), 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. Their businesses involved the importation and sale of rice to Nigeria. The executive decision making powers of Nilon would be in the hands of Mr Varma (the **Respondent**) and some of the companies associated with him, who would be paid a management fee for managing Nilon and/or operating companies owned by Nilon.

It was also agreed that the Claimants and the Respondent 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. Each joint venture partner would be entitled to an equal profit share.

The Respondent was to procure and/co-operate in procuring the issue of voting shares in Nilon in various proportions.

The Claimant alleged that they contributed funds to Nilon under the joint venture and received dividend payments pursuant to it. They claimed to be legal and/or beneficial owners in Nilon but that the Respondent had failed to procure the allotment of shares in Nilon to them, or enter their names on the Register of members, or the issue of share certificates to them. The Claimants sought declarations (in the BVI) that they were owners of the agreed proportions of the issued shares in Nilon and an order that the shareholder register be rectified pursuant to section 43(1)(a) of the Act to give effect to the Joint Venture Agreement.

The Claimants applied to serve the proceedings out of the jurisdiction on the Respondent on the basis that he was a 'necessary and proper party' to the dispute between the Claimants and the Company.

## Judgment

At first instance, Bannister J did not allow service out of the jurisdiction on the basis that there was no real issue between the Claimants and Nilon to which it could be said that the Respondent was a 'necessary and proper party'. He came to this view because the Claimants were not shareholders of Nilon and, as a consequence, they could not have the register of members rectified to show as much. Put simply, Bannister J held that rectification of the Register was merely an administrative procedure to rectify an inaccurate record of facts. The jurisdiction to order rectification would not arise unless and until Nilon actually allotted shares to the Claimants which it then neglected to register.

The Court of Appeal overturned that decision and held that section 43 of the Act was wide enough to resolve any underlying dispute as to whether or not a party should be a shareholder. In reaching that decision the Court of Appeal placed a great deal of reliance on the English Court of Appeal case *Re Hoicrest*.<sup>1</sup> In doing so the Court of Appeal held that section 43(2) of the Act requires the court to have regard to equitable as well as legal rights and that the court could permit enquiry into the substantive cause for the omission.

## The Privy Council's Decision

In relation to rectification of the Register pursuant to section 3 of the Act, Lord Collins, giving the lead judgment, held that:

'There is no doubt that the legislation is primarily concerned with legal title ...The legislation both in the BVI and in Great Britain is concerned with rectification of the register of members, and membership concerns legal title.

...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.

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 dependent on the conversion of an equitable right to a legal title by an order for a specific performance of a contract.'

As regards service out of jurisdiction, the Privy Council held that it followed that the issue of joining the Respondent as a necessary and proper party did not arise and a *fortiori* the issue of *forum conveniens* also did not arise. However, the Board of the Privy Council gave an indication of its views.

The issue had not arisen before Bannister J and the Court of Appeal had held that the BVI was the correct forum for trial of the issues at hand.

The Board indicated that, had the issue needed to be decided then it would have held that the BVI was not the appropriate forum and that there was still a need for the Claimants to demonstrate that the BVI was the correct forum. In the Board's view, 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.

Lord Collins stated:

'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 ... would be mainly in England. The documents are in England or

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<sup>1</sup> [2000] 1WLR 414.

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.'

## Conclusion

This is patently, on the facts, the correct view. In order for the terms of the Joint Venture Agreement to apply, specifically that it was governed by BVI law, there would first have had to be, as a preliminary matter, a trial on whether or not the Joint Venture Agreement, as alleged by the Claimants, was entered into and on what terms. That did not happen and so there was no reason for the dispute to be rooted in the BVI, in light of the factual background as set out by Lord Collins. That having been said the case is not, as some commentators have been quick to assert, proof that future disputes concerning BVI entities need not be litigated in the BVI. Had there been a binding written joint venture agreement the issues would not have arisen. Since Nilon was heard at first instance, the BVI CPR has been amended (CPR 7.3(7)) and a new gateway has been inserted which permits service out if the subject matter relates to:

- the constitution, administration, management or conduct of the affairs of a BVI company; or
- the ownership or control of such a company.

Obviously, this amendment did not apply on the facts of Nilon, however, the Board commented that even if it did apply, it would still not obviate the need for a claimant to demonstrate that the BVI is clearly the appropriate forum.

## Contacts

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