



May 2015

## Spring 2015 Legal Update

### **Nilon Limited v Royal Westminster Investments SA [2015] UKPC 2**

Lennox Paton acted for Nilon Limited who succeeded in their defence of a claim to rectify their share register brought by Royal Westminster Investments SA. The background facts are somewhat complex but essentially they concerned a purported oral agreement between a Mr Varma on the one hand and members of the Mahtani family on the other.

The Mahtani family alleged that Mr Varma had agreed to incorporate Nilon Limited in the BVI and to issue shares to the Mahtanis in return for consideration. Nilon Limited denied that such an agreement existed and argued that the money received from the Mahtanis was a loan. Nilon further argued that sums paid to the Mahtanis from Nilon were interest payments and not dividends. The Privy Council had to decide whether the Mahtani family had "a good arguable case" against Nilon for rectification of the share register. This was important because if the claim against Nilon was struck out any claim against Mr Varma would also fail because Nilon was the "anchor defendant" in the BVI and the BVI Court would not otherwise have jurisdiction over Mr Varma who was not resident in the jurisdiction.

The Mahtani family relied upon the English Court of Appeal decision in *Re Hoicrest Ltd* [2000] 1 WLR 414. At first instance, Bannister, J., held that this case had been incorrectly decided. The Eastern Caribbean Court of Appeal reversed his Judgment and held that the English authority was good law. In the Privy Council, Lord Collins held that Bannister, J., had been correct in his analysis of *Re Hoicrest Ltd* which appeared to be in opposition to all prior common law authority. The Privy Council found that the only claim which the Mahtani family had was for alleged breach of an oral contract which fell to be decided before the English courts and not the Commercial Court in the BVI.

The case is also important because Lord Collins went on to make obiter comments in relation to the doctrine of forum non conveniens. He criticised the Eastern Caribbean Court of Appeal's comments that because the underlying subject matter of the dispute was shares in a BVI company this led to the conclusion that "the BVI was clearly the appropriate forum for trial of a preliminary issue of the questions arising between the members and the alleged members of Nilon." Lord Collins disagreed with this analysis and

held that in this case the most appropriate forum should be viewed from the perspective of contract rather than company law. It should be noted Lord Collins is the editor of *Dicey Morris & Collins* on the Conflict of Laws and as such his dicta is of significant relevance.

### **Comodo Holdings Limited v (1) Renaissance Ventures Limited and (2) Joseph Katz BVIHCV(COM)45/2013**

Bannister, J., in the Commercial Division of the High Court held that an application under s.43 of the BVI Business Companies Act, 2004 for rectification of the Register of Members of a company does not amount to an application for specific performance of a contract of allotment and therefore no statute bar applies.

### **Sonera Holding BV v Cukurova Holding A.S. BVIHCV(COM)119/2011**

Bannister, J., sitting in the Commercial Division of the High Court held that section 3(1) of the new Arbitration Act, 2013 prevents the Court from interfering in the arbitration of a dispute (whether domestic or foreign) unless the Act otherwise expressly permits it. In that case the Court refused to grant an injunction to restrain Cukurova from continuing to prosecute an arbitration which sought to re-open an earlier tribunal's award notwithstanding that judgment had been obtained upon the first award in the BVI. However, the Court intimated that while the "Court was in no position to grant a restraining injunction" (...) Cukurova may face difficulties if it attempts to deploy in [the BVI] any award which it may obtain against Sonera from the Second Tribunal."

### **Hornbeam Corporation v Halliwell Assets Inc, Panikos Symeou, Marigold Trust Company Limited**

A costs order had been obtained against a company. The Commercial Division of the High Court was asked to consider whether it had the power to permit service out of the jurisdiction of an application for costs on an individual who, although not a party to the suit, was the ultimate beneficial owner of the company in question and the real interested party in the outcome of the proceedings. The Court observed that in England and Wales the High Court has jurisdiction

to award costs against non parties. However, in the BVI the Court does not have an inherent jurisdiction to permit service out. Instead for permission to be granted, it is necessary that claim fall within the gateway set out in CPR rule 7.3(10) which permits service out of a claim which is made under an enactment conferring jurisdiction on the Court. The Court held that it did not have power to make a third party costs order because there was no enactment conferring this power and there was no gateway available under CPR rule 7. The Court suggested that in certain circumstances where it is appropriate for third party costs orders to be made it may not be necessary to serve out on an individual where he may be regarded as having assented to the Court's jurisdiction by his conduct.

## New Commercial Division Judge - Mr Justice Barry Leon

Mr Justice Barry Leon has succeeded Mr Justice Edward Bannister QC as Judge of the Commercial Division of the High Court on 16 March 2015. Mr Justice Leon was formally a leading international arbitration practitioner and it is expected that his appointment will help support the new BVI International Arbitration Centre which is to be established following the introduction of the Arbitration Act, 2013. The Commercial Division which sits in the BVI has gone from strength to strength under the leadership of Mr Justice Bannister QC in the six years since it was established.

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