

JERSEY / JUDGMENT

Thayer Group 6-Sep-2006 [2006] JRC 125B (06 September 2006)

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judgment

the deputy bailiff: 1. This is an application by Thayer Group Limited (the company) pursuant to Article 47 of the Companies (Jersey) Law 1991 to rectify its share register. 2. The background is extremely complicated. The transactions in question formed part of a complex series of transactions concerning a group known as the Burford Group and involving a number of companies. We have been provided with a number of affidavits which set out the overall position in considerable and very helpful detail. 3. For the purposes of this judgment we think it necessary only to refer to the key transactions which have given rise to this application. On the basis of the evidence produced to us we find that the relevant facts are as follows. The company was incorporated in Jersey on 11 th July 2001. The subscribers to the memorandum of association were Premier Circle Limited (Premier) and Second Circle Limited (Second); they are both in-house companies of Bedell Trust Company Limited. The authorised share capital of the company was £300,000 divided into 240,000 ordinary shares of £1 each and 60,000 redeemable preference shares of £1 each. At the first board meeting, held on 12 th July 2001, it was resolved to issue two fully paid ordinary shares to each of the subscribers. The relevant shares certificates were duly issued. It was at all times intended that Premier and Second should hold their respective shares as nominees for Mr Julian Gleek and Mr John Anderson. In other words Mr Gleek and Mr Anderson would each beneficially own one ordinary share in the company. Those two gentlemen were employees of the Burford Group as well as being directors of the company. 4. As part of the proposed sequence of events, it was envisaged that the company would acquire all the issued share capital of another company called Thayer Properties (Jersey) Limited. The share capital in that company consisted of 171,000 ordinary shares which were held by a company called Thayer Properties Limited, and 60,000 redeemable preference shares which were held by Mr Gleek. 5. It was intended that there should be a share for share exchange; thus the company would acquire the share capital in Thayer Properties (Jersey) Limited in exchange for issuing 171,000 ordinary shares to Thayer Properties Limited and 60,000 redeemable preference shares to Mr Gleek. 6. The company held a second board meeting on 12 th July 2001 to deal with these matters. Three directors were present, namely Mr Gleek as chairman, Mr Anderson and a Mr Andrew Pettit. The company agreed to enter into a written share purchase agreement which recorded the terms on which it would acquire the shares in Thayer Properties (Jersey) Ltd from Thayer Properties

Limited and Mr Gleek. It was also formally resolved, pursuant to the share purchase agreement, to issue 171,000 ordinary shares of £1 each to Thayer Properties Limited and 60,000 redeemable preference shares of £1 each to Mr Gleek. The minutes had been drafted in advance and they reflected what was proposed. They were signed by Mr Gleek as chairman. 7. It follows that, at the end of the meeting, the share capital of the company was held as follows: one ordinary share was held by Premier; one ordinary share was held by Second; 171,000 ordinary shares were held by Thayer Properties Limited; and 60,000 redeemable preference shares were held by Mr Gleek. All concerned believed that that was the position and that, although there were subsequent changes in the share capital of the company, Premier and Second continued to hold one share each as nominee for Mr Gleek and Mr Anderson respectively. 8. In late 2004 it was discovered that the share register did not reflect this position. What had happened, it seemed, was that following the board meetings in July 2001, Mr Roland Deller, an administrator at Bedell Trust Company Limited, was tasked to write up the company records in accordance with the decisions taken at the two meetings. In the course of doing this he came across a manuscript note and a letter, written by Advocate Hollywood of Bedell Cristin, which suggested, erroneously as we find, that the two shares in the company held by the subscribers were to be cancelled upon the issue of the 170,000 shares to Thayer Properties Limited and the 60,000 redeemable preference shares to Mr Gleek. The shares could not just be cancelled. Accordingly Mr Deller suggested that, rather than 171,000 shares being issued to Thayer Properties Limited, the two subscribers' shares should be transferred by Premier and Second to Thayer Properties Limited with only 170,998 new ordinary shares then being issued to Thayer Properties Limited. Pursuant to this suggestion he drafted amended minutes to reflect this and sent them to the then London lawyers who were involved. That firm does not appear to have considered the matter and simply sent the amended minutes on to Mr Gleek and asked him as chairman to sign the amended minutes to correct what they described as an oversight in the original minutes. They did not draw Mr Gleek's attention to what this oversight was nor to the changes which were being made. Mr Gleek acted on their advice and signed the minutes. 9. It follows that there are two signed versions of the minutes of the meeting of 12 th July in existence. The share register has been drawn up in accordance with the second of these versions. Thus the register shows Premier and Second as having transferred their shares to Thayer Properties Limited on 12 th July and as no longer being share holders after that date. No completed share transfers by Premier or Second have been located and we find on the evidence that no share transfers were ever executed by those two companies. 10. It is submitted that there are two damaging consequences if the position remains as currently shown in the share register. First, Mr Gleek and Mr Anderson are no longer the beneficial owners of shares in the company despite never having agreed to transfer them. They assert that, contrary to what is shown in the register, each of them in fact remains the beneficial owner of one share and that that share is of some value. Secondly, and perhaps more significantly, there are substantial possible adverse UK tax consequences if Mr Gleek and Mr Anderson did not retain their shares after 12 th July. We do not need to go into detail as to how this occurs, but it is fully explained in the affidavit evidence before us. 11. Given the existence of this second factor we have scrutinised the evidence before us closely in order to satisfy ourselves that there has indeed been a genuine mistake. It is of course not open to parties to use the remedy of rectification to cure defects in any scheme which

they have knowingly entered into. We are quite satisfied that that is not the position here. We find that there was never any intention on the part of Mr Gleek or Mr Anderson to transfer their ordinary shares and the directors never approved any transfer by Premier or Second, nor were any share transfers completed. 12. We find therefore that the share register is incorrect in stating that Premier and Second did transfer their shares to Thayer Properties Limited on 12 th July. The first minutes of the meeting were correct, the second set of minutes was incorrect. 13. Turning to the law, Article 47 of the 1991 Law provides as follows: "(1) If -

- (a) the name of a person, the number of shares held, the class of shares held, or the amount paid up on the shares, or the class of members to which the person belongs is, without sufficient reason, entered in or omitted from a company's register of members; or
- (b) there is a failure or unnecessary delay in entering on the register the fact of a person having ceased to be a member, the person aggrieved, or a member of the company, or the company, may apply to the court for rectification of the register.
- (2) The court may refuse the application or may order rectification of the register and payment by the company of any damages sustained by a party aggrieved.
- (3) On an application under paragraph (1) the court may decide any question necessary or expedient to be decided with respect to the rectification of the register.
- (4) Where an order is made under this Article, the company in relation to which the order is made shall cause the relevant Act of the court to be delivered to the registrar for registration within 14 days after the making of the order; and in the event of failure to comply with this paragraph the company is guilty of an offence." 14. Article 42(1) of the 1991 law provides as follows: "(1) Notwithstanding anything in its articles, a company shall not register a transfer of shares in the company unless -
- (a) an instrument of transfer in writing has been delivered to it;" We do not need to refer to paragraphs (b) and (c) which are not applicable in this case. 15. Apparently Article 47 has not fallen for consideration in any previous Jersey case, but the Article is clearly based upon similar provisions in the various English Companies Acts and accordingly English judicial decisions are of assistance. We have been referred to a number of cases and we would extract the following principles for the purposes of this case; (1) The jurisdiction to rectify the register of a company is to be widely construed (see *Re Imperial Chemical Industries* [1936] 2 All ER 463). (2) The Court has a discretion as to whether or not to grant rectification even where satisfied that there are grounds for making such an order (see *Re Diamond Rock Boring Co. Limited ex parte Shaw* [1877] 1 QBD 463). (3) Rectification may be retrospective i.e. to take effect as from the date upon which the correct entry should have been made, but the Court may refuse to do this where it would prejudice the rights of third parties (see *Re Sussex Brick Company*

[1904] 1 Ch 598 , and *Smith v Charles Building Services Limited*

[2006] EWCA Civ 14 at para 22). 16. We are quite satisfied, in respect of the two founder shares, that the names of Premier and Second have been omitted and the name of Thayer Properties Limited has been entered in the register without sufficient reason. It is both because the entries were made by reason of a mistake and also because no share transfer, in respect of these two shares, was ever delivered to the company as required by Article 42(1)(a). 17. It was, however, the intention of Thayer Properties Limited that it should hold 171,000 shares. In fact, only 170,998 ordinary £1 shares are recorded in the register as being allotted to Thayer Properties Limited. This is because the second version of the board minutes recorded that the balance had been made up by the transfer of the two subscribers' shares. Thus, if the register is rectified to show the two subscriber shares as remaining in the hands of Premier and Second without further correction, Thayer Properties Limited will be shown as holding two shares less than was intended and agreed. Accordingly it is necessary to rectify the share register to record that 171,000, rather than 170,998, ordinary £1 shares were allotted to Thayer Properties Limited. The authorised share capital of the company as at 12 th July 2001 was sufficient to enable this to occur. 18. The next question is whether the rectification should be ordered to take effect as from 12 th July 2001. We are in no doubt that it should. It was clearly the intention of all concerned that Mr Gleek and Mr Anderson should continue to hold the two shares and that these should continue to be held to date. The other shareholders do not object to this and there is no prejudice that we can see to any third party as a result of our making such an order. Accordingly we order that the rectification take effect as from 12th July 2001. 19. As a final point the ordinary shares have since been redesignated and it has been agreed by all parties that the shares retained by Premier and Second should be treated as having been redesignated as A ordinary shares as at 31 st August 2001. 20. We therefore make an order in the form of the draft supplied to us by Mr Kelleher. Thayer Group Limited to do forthwith rectify its register of members:

- (1) to remove the reference to the transfer on 12 th July 2001 by Premier Circle Limited of one ordinary £1 share bearing certificate number 1 to Thayer Properties Limited;
- (2) to remove the reference to the transfer on 12 th July 2001 by Second Circle Limited of one ordinary £1 share bearing certificate number 2 to Thayer Properties Limited;
- (3) to record that as at 12 th July 2001 Premier Circle Limited was the holder of one ordinary £1 share bearing share certificate number 1 in Thayer Group Limited;
- (4) to record that as at 12 th July 2001 Second Circle Limited was the holder of one ordinary £1 share bearing share certificate number 2 in Thayer Group Limited;
- (5) to record that as at 12 th July 2001 Thayer Properties Limited was the holder of 171,000 ordinary £1 shares bearing share certificate number 3 in Thayer Group Limited;
- (6) to record that the one ordinary £1 share bearing certificate number 1 held by Premier Circle Limited was on 31 st August 2001 reclassified as one A ordinary £1 share;

- (7) to record that the one ordinary £1 share bearing certificate number 2 held by Second Circle Limited was on 31 st August 2001 reclassified as one A ordinary £1 share;
- (8) to record that insofar as concerns A ordinary £1 shares, Thayer Properties Limited was at 31 st August 2001 the holder of 118,435 A ordinary £1 shares in Thayer Group Limited;
- (9) to record that Premier Circle Limited is the current holder of one A ordinary £1 share in Thayer Group Limited;
- (10) to record that Second Circle Limited is the current holder of one A ordinary £1 share in Thayer Group Limited;
- (11) to record that Thayer Properties Limited is the current holder of 118,435 A ordinary £1 shares in Thayer Group Limited. We also make the two ancillary orders requested by Mr Kelleher. Authorities Companies (Jersey) Law 1991. Re Imperial Chemical Industries (1936) 2 All ER 463. Re Diamond Rock Boring Co. Limited ex parte Shaw (1877) 1 QBD 463. Re Sussex Brick Company
- (1904) 1 Ch 598 . Smith v Charles Building Services Limited
- (2006) EWCA Civ 14 at para 22. Page Last Updated: 15 Oct 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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