

BRITISH VIRGIN ISLANDS HIGH COURT

Maria Helen Moraes Scripilliti -v- Clomar Corporation Claim No. BVIHCV 222 of 2013

BEARER SHARES - EFFECT OF FAILURE TO DEPOSIT WITH CUSTODIAN - ABILITY TO TRANSFER DISABLED BEARER SHARES TO COMPANY FOR CONVERSION, EXCHANGE, REDEMPTION, PURCHASE

The Applicant applied for relief in her personal capacity and as administratrix of the estate of Clovis Scripilliti (the "Estate"). She sought declarations that the shares in Clomar Corporation, a BVI company, (the "Company") were legally and/or beneficially owned 50:50 by the Estate and herself respectively and an Order rectifying the Company's register of members to reflect that fact under Section 43(1) of the *BVI Business Companies Act, 2004* ("BCA"). The shares in the Company had been issued as bearer shares.

Two issues arose: the first, whether personal service on a former Registered Agent was proper service on the Company. The Court held that it was not but that the Company might have been properly served on the registered office under BCA Section 101.

The second issue is of greater significance. In 2005, the BVI introduced legislation which required existing BVI companies which had issued bearer shares prior to 1 January 2005 to either convert their bearer shares to registered shares or immobilise them. A period of grace was allowed, but unless they had previously been cancelled, redeemed or acquired by the company, all bearer shares were required to be deposited with a custodian by 31 December 2010. Bearer shares not deposited were disabled and would not carry any of the entitlements that it would otherwise carry, namely the entitlement to, vote, a distribution and a share in the assets of the company on liquidation, or could it be transferred and/or the subject of a valid mortgage or charge.

The bearer shares the subject of the application had not been deposited with a Custodian. The Claimant submitted that BCA Section 68(3)(b) and Section 78(3)(b) allowed bearer shares which had not been deposited with a Custodian nevertheless to be transferred to the Company for conversion or exchange into registered shares, for redemption, purchase or other acquisition by the company or to be forfeited and cancelled.

The Court rejected this submission and held that those provisions could not be read in isolation, but that they were subject to the mandatory provisions of the BCA which disabled bearer shares unless deposited with a Custodian and they only applied if the mandatory provisions had been complied with. The fact that the mandatory provisions had not been complied with was due to inadvertence.

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