

CAYMAN ISLANDS GRAND COURT

In the Matter of S. 46 of the Companies Law (2011 Revision) and in the Matter of Fulcrum Utility Investments Limited Cause No. FSD 82 of 2012, Quin J 30 July 2012

COMPANIES - INVALID ISSUE OF SHARES -
MISTAKE - RECTIFICATION OF REGISTER

Fulcrum established a share incentive scheme to motivate its management team to achieve certain targets. However, an administrative error occurred when the incentive shares were issued. Fulcrum inadvertently purported to issue certain shares at less than par value, and did not follow the procedure set out in Section 35 of the *Companies Law* to lawfully issue the shares at a discount. Some time passed before the error was discovered. In order to ensure that its staff could not be considered liable for any perceived unpaid balance on the incentive scheme shares, Fulcrum sought a declaration that the issue of the shares was void for illegality as well as under the doctrine of mistake. Fulcrum was solvent at the time of the application and its creditors consented to the application.

Section 46 of the *Companies Law* permits a company to apply to the Court for an order that the register of members be rectified and the Court may make such an order if satisfied of the justice of the case. In this instance, the Court found that the subscription letters were void contracts, as they amounted to the unlawful issue of shares at a discount. Further, Quin J confirmed that, under Cayman Islands law, there is no distinction to be made between “mistake of law” and “mistake of fact”. The shares were issued under a mistake that rendered the contract impossible to perform. In this case, the mutual mistake of Fulcrum and its management team resulted in something substantially different from what the parties intended and thought they had achieved. Accordingly, the application was successful on both grounds and an order was made to rectify the register.

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