IN THE SUPREME COURT OF BERMUDA

Civil Jurisdiction

2005: No. 288

IN THE MATTER OF THE COMPANIES ACT 1981 SECTION 67 AND IN THE MATTER OF BALI ENERGY LIMITED

BETWEEN:

PT TENAGA BUMI BALI	**Applicant**
and	
BALI ENERGY LIMITED	**First Respondent**
and	
KOJI MATSUMOTO	**Second Respondent**

JUDGMENT

Date of Hearing: Tuesday, 16 December 2008

Date of Judgment: Monday, 22 December 2008

Mr. John Riihiluoma, Appleby, for the Applicant

Mr. Christian Luthi, Conyers, Dill & Pearman, for the First Respondent

Introduction

1. In these proceedings, taken by way of notice of originating motion, the applicant (which was referred to variously by counsel and the deponents as PTT, TBB and PTB; I will refer to it as "TBB") seeks the rectification of the share register of the first respondent ("BEL") pursuant to section 67 of the Companies Act 1981 ("the Act"). The second respondent ("Mr. Matsumoto") took no part in the proceedings, and apparently was not served with them.

Factual Background

2. TBB is a company incorporated under the laws of Indonesia. It acquired 100% of the shares of BEL, a Bermuda exempted company, either in May or September 2001 (the difference is not material, but the affidavit evidence is not consistent). BEL had been appointed by the government of Bali in about November 1996 to engage in a joint venture to construct the Bedugul electric power plant in Tabanan Regency, north of Denpasar in Bali. This venture was described by I.B. Ngurah Wijaya, the deponent on behalf of TBB, as the "Power Project" and is the sole business in which BEL is engaged.

3. In his first affidavit sworn on 16 September 2005, Mr. Wijaya averred that in or about July 2004 TBB began the process of searching for a partner to develop the Power Project through BEL. He said that TBB required a partner able to attract (or provide) much needed financing so that the Power Project might proceed.

4. Mr. Wijaya indicated that TBB had made contact with Mr. Matsumoto, who expressed an interest in investing in BEL through his company, MMG Holding Co. Ltd. ("MMG"), which Mr. Wijaya understood to be a Japanese company. He described Mr. Matsumoto as the president, chairman, a director and the principal of MMG.

5. Mr. Wijaya carried on to describe the contractual arrangements between TBB and MMG by reference to a share purchase agreement dated 7 September 2004 ("the

Share Purchase Agreement"), but this is in fact not the appropriate starting point. Edwin Joenoes, the principal deponent for BEL, indicated in his affidavit sworn on 10 October 2008 that the parties had entered into a preliminary agreement referred to as a "Memorandum of Understanding", on 2 August 2004, which set out an in principle agreement that MMG would purchase from TBB 70% of its shares in BEL, or 840,000 shares, on the payment terms set out therein. It was intended that the Memorandum of Understanding would be superseded by execution of the Share Purchase Agreement, as it was. The payment terms from the Memorandum of Understanding were duplicated in the Share Purchase Agreement. The total consideration for the transfer of the 70% interest in BEL was US$7,500,000, but the payments were to be made in four tranches (the first three representing 30% of the purchase price, and the last being the balance of 10%). The payments were subject to certain criteria being achieved in terms of the underlying power plant generating specified levels of power. As it turned out, the projected levels were not achieved, in consequence of which there were amendments to the payment schedule, but those changes are not material to the issues before me. It is to be noted that the Memorandum of Understanding was signed on behalf of TBB by Mr. Wijaya, who was described as president director, Mr. Joenoes, who was described as director, and Sunarto Hadiprayitno, who was described as commissioner. For MMG, the document was signed by Mr. Matsumoto as chairman, and Toshihide Nakajima.

6. Shortly after the Memorandum of Understanding was signed, MMG paid US$500,000 to BEL by way of a loan convertible to equity, and constituting a part of MMG's initial payment obligation under the Memorandum of Understanding. The payment was evidenced by a promissory note between MMG and BEL dated 6 August 2004.

7. The Share Purchase Agreement is governed by the laws of Bermuda, and its effective date is 7 September 2004. Pursuant to its terms, TBB undertook to deliver to MMG the original certificate representing the 840,000 shares to be sold

by the one to the other on the effective date, as well as the requisite share transfer forms duly executed for transfer. There was provision for the documentation then to be delivered to the corporate secretary of BEL. This document was executed by the same parties as had executed the Memorandum of Understanding, namely, Messrs. Wijaya, Joenoes and Hadiprayitno for TBB and Messrs. Matsumoto and Nakajima for MMG.

8. Next, on 22 September 2004, Mr. Matsumoto wrote on behalf of MMG to TBB in the following terms:

> "MMG Holdings Co., Ltd. hereinafter referred to as "MMG" is processing all agreements with PT Tenaga Bumi Bali regarding purchase of Bali Energy's shares. MMG has nominated that shares held for MMG will be held in the name of our Chairman, Koji Matsumoto.
>
> MMG Holdings co. Ltd. will continue to retain all obligation under original Share Transfer Agreement and Koji Matsumoto will act on behalf of MMG regarding all matters of MMG share holdings.
>
> Koji Matsumoto will act in all matters as MMG representative and all responsibilities for Koji Matsumoto's actions will be borne by MMG Holdings Co. Ltd."

9. This was followed by the execution of a share transfer form dated 28 September 2004, which was in the following terms:

> "FOR VALUE RECEIVED
> We PT. Tenaga Bumi Bali (the "Transferor") hereby sell, assign and transfer unto Koji Matsumoto (the "Transferee") 840,000 common shares of the Company".

Unlike the previous documents, the share transfer form was only signed by Mr. Hadiprayitno on behalf of TBB as transferor, and there is an issue raised in regard to this document by virtue of Mr. Hadiprayitno's status as commissioner of TBB, and questions of authorisation arise generally.

10. The form of share transfer was followed by a unanimous written resolution by Messrs. Hadiprayitno and Joenoes, representing all the directors of BEL, approving the share transfer from TBB to Mr. Matsumoto.

11. There are some further documents to which I should refer. First is a letter of 5 October 2004 written by Mr. Wijaya to Mr. Matsumoto, which referred to the transfer of shares held by TBB to MMG, pursuant to which TBB indemnified MMG from any existing claims. Then there were the minutes of a meeting of the shareholders of TBB held on 5 and 6 October 2004, pursuant to which TBB appointed Mr. Wijaya as its representative to attend the annual general meeting of BEL, and next are the minutes of that meeting, held on 6 October 2004. Mr. Luthi placed reliance on those minutes, particularly because in terms of referring to the attendees at the meeting, the minutes drew a distinction in the traditional way between those "present" and those "in attendance", the former being shareholders and the latter not. Mr. Matsumoto was identified as the first shareholder, with "(chairman)" after his name, and TBB was identified as the second shareholder, followed by "(represented by Mr. Ida Bagus Ngurah Wijaya)". Those minutes were signed by Mr. Matsumoto and Mr. Wijaya.

Procedure at Hearing

12. Before turning to the argument, I should just indicate that these proceedings have proceeded on the basis of the affidavit evidence filed, without cross-examination of deponents, with the consent of counsel. For TBB, Mr. Riihiluoma had put in a late affidavit which exhibited proceedings which had taken place in Indonesia between Mr. Joenoes and Mr. Wijaya, relating to the ownership of shares in TBB. Mr. Luthi submitted a document dated 16 June 2007, which post-dated both the first instance and court of appeal judgments in Indonesia, and which indicated settlement of the dispute between the parties. While Mr. Luthi indicated that he was happy to have Mr. Joenoes give evidence in relation to the new document, in the event this was not necessary because Mr. Riihiluoma placed no reliance on the

documents and agreed that on its face the document produced by Mr. Luthi should have been produced in addition to the decisions of the Indonesian courts.

The Argument

12. For TBB, Mr. Riihiluoma argued that any assignment of the benefit of the share purchase agreement from MMG to Mr. Matsumoto required the consent of TBB. That consent, he contended, had not been given, and in this regard, he argued that the share transfer form, the terms of which are set out at paragraph 9 above, was defective insofar it had only been signed for TBB by Mr. Hadiprayitno. He referred to the terms of Mr. Wijaya's affidavit, and particularly paragraph 13 thereof, which is in the following terms:

> "The Transfer of Shares was purportedly executed on behalf of TBB by Sunarto Hadiprayitno ("Hadiprayitno"). Hadiprayitno was neither an officer nor a director of TBB. He held the position of Commissioner pursuant to Indonesian corporate law and practice. It is my understanding and I do verily believe that a Commissioner, without any separate authority bestowed upon him by a company, has no authority to conduct business on behalf of a company".

13. Mr. Riihiluoma submitted that Mr. Wijaya's evidence as to the position and role of a commissioner pursuant to Indonesian corporate law had not been challenged, and referred to the deed of establishment which had been exhibited by Mr. Wijaya, dealing both with the general management of the company, and the duties and authority of the commissioner. Mr. Riihiluoma contended that the exhibited materials supported Mr. Wijaya's contention that a commissioner has no authority to conduct business on behalf of a company.

14. Mr. Riihiluoma then contended that the acceptance of the share transfer by Messers. Hadiprayitno and Joenoes as directors of BEL was flawed on the basis of the invalid share transfer, since he said that both directors must have known the true position in relation to TBB's articles and hence that the share transfer form

was ineffective. Accordingly, he said that BEL was fixed with the knowledge of the defect.

15. Mr. Riihiluoma made it clear that he did not pursue the suggestion of wrongdoing which had been raised in paragraph 16 of Mr. Wijaya's affidavit, but did say that paragraphs 18 to 20, which maintained that Mr. Wijaya had not been aware of the purported transfer to Mr. Matsumoto until July 2005, should be accepted. Mr. Riihiluoma submitted that Mr. Joenoes had skated over the problems created by the ineffective share transfer, and maintained that Mr. Wijaya's appointment as TBB's proxy and attendance at the meeting of BEL did not constitute a waiver of his position that Mr. Matsumoto had been wrongly registered as a shareholder of BEL, and that there was nothing inconsistent between that latter contention and TBB seeking to enforce the terms of payment.

16. When pressed by the Court on the non-assignability of the share purchase agreement without the consent of TBB, Mr. Riihiluoma maintained that TBB's consent was necessary by virtue of the nature of the joint venture relationship, and contended that the fact that Mr. Matsumoto was "related" to MMG did not affect that principle.

17. Mr. Luthi for BEL did not accept that the share transfer form had not been properly approved by BEL. Neither did he accept that Mr. Matsumoto's letter of 22 September 2004 effected an assignment; he described Mr. Matsumoto as effectively being a nominee for MMG, by reason of the fact that it was clear from the letter that in all matters, Mr. Matsumoto would be acting on behalf of MMG. He said that TBB had not objected to the nomination, and submitted that the transfer of the shares on 28 September 2004 had been entirely in line with the spirit of the Share Purchase Agreement and the intention of the parties. Moreover, he submitted, it must have been clear to Mr. Wijaya when he signed the minutes of BEL's annual general meeting of 6 October 2004, that it was Mr. Matsumoto who was the shareholder in BEL, rather than MMG. He did not

accept that the position was clear on the evidence as to who was authorised to bind the company as a matter of Indonesian law.

18. In this regard, Mr. Luthi submitted that TBB made a very technical case. He maintained that TBB was aware of MMG's wish to have the shares transferred into the name of Mr. Matsumoto, that this fell in line with the intention of the parties, and that if the share transfer had, technically, not been authorised, TBB must be taken to have affirmed the transfer by its subsequent actions. Particularly, in this regard, Mr. Luthi relied upon the terms of the proxy which TBB had given to Mr. Wijaya in relation to his attendance at the annual general meeting of BEL on 6 October 2004. This referred in terms to the fact that TBB was the holder of 360,000 shares in BEL, and although no stress was laid by counsel on this next point, the signatory on behalf of TBB does appear to be Mr. Wijaya himself. In any event, he would certainly have seen the terms of the proxy.

19. Mr. Luthi therefore said that it was clear that TBB knew that it had parted with the shares by this time, and queried how in these circumstances, TBB could properly claim for rectification of BEL's share register so as to reflect the position prior to the Share Purchase Agreement, by ordering that the register should be rectified to show TBB as the owner of 1,200,000 shares in BEL.

Findings

20. The first document to be considered is the Share Purchase Agreement. In relation to the share transfer, the recitals reflect that it is MMG that wishes to purchase TBB's shares in BEL, and in relation to the mechanics of transfer, the relevant clause provides for TBB to deliver to MMG on the effective date (7 September 2004) the original share certificates, together with share transfer forms duly executed for transfer to MMG. There is then a further provision for delivery of a copy of the original corporate records of BEL, and a provision for MMG to deliver to the corporate secretary of BEL the "information" necessary to complete

the transfer of shares from TBB to MMG. So it is clear that this document envisaged that the shares would be transferred to MMG. The document says nothing in relation to any assignment of the benefit of the agreement.

21. Since it was part of Mr. Riihiluoma's case that no assignment of the benefit of the Share Purchase Agreement could be effected without TBB's consent, this is no doubt the appropriate time to address that contention. It is also the appropriate time to address Mr. Luthi's contention that Mr. Matsumoto's letter of 22 September 2004, did not effect any assignment, but simply represented a nomination of Mr. Matsumoto as the representative of MMG. It seems to me that this latter contention ignores the fact that the Share Purchase Agreement very clearly envisages a share transfer to MMG, and whether one calls it a nomination or an assignment, the letter's purpose was to have the shares transferred to a different person than provided for in the Share Purchase Agreement, and a subsequent share transfer form and resolution achieved this. So in practical terms, it seems to me that Mr. Matsumoto's letter did indeed seek to effect an assignment of the right of MMG to be registered as the holder of the 840,000 shares of BEL which it was purchasing from TBB.

22. That brings me back to the question whether TBB's consent is required to an assignment, as contended for by Mr. Riihiluoma. In this regard, it is important to note that the Share Purchase Agreement contains no prohibition on assignment, either with or without TBB's consent.

23. Mr. Riihluoma's contention that the joint venture nature of the agreement required an effective prohibition against assignment is one which might have carried some weight had the purported assignment been to some completely unrelated commercial entity. One can see that in those circumstances it might well be argued that the very nature of the joint venture precluded such an assignment. But Mr. Matsumoto was well known to TBB. He was the person whom TBB had first approached when they were searching for a partner to develop the Power Project.

It was not the case that TBB wished to deal with somebody else within MMG; they specifically sought out and dealt with Mr. Matsumoto.

24. Bermuda does of course have the statutory equivalent of the relevant United Kingdom provisions relating to statutory assignments, in section 19 (d) of the Supreme Court Act 1905. Notice was given to TBB in the form of Mr. Matsumoto's letter of 22 September 2004. It seems to me that that letter was effective to substitute Mr. Matsumoto for MMG in relation to the right to be the transferee of the shares in BEL, which were the subject of the Share Purchase Agreement, and I so find.

25. The next question to be considered is the validity of the share transfer form, and the fact that this was signed by Mr. Hadiprayitno as commissioner, without any execution by a director representing the management of TBB.

26. It seems to me that too much is made of this point. The reality is that TBB had an obligation pursuant to the Share Purchase Agreement, and taking into account the terms of Mr. Matsumoto's letter, to transfer its 840,000 shares in BEL to Mr. Matsumoto. TBB also clearly intended to effect a transfer of those shares; as Mr. Wijaya said in his affidavit, when referring to Mr. Hadiprayitno's execution of the share transfer form:-

> "At that time, TBB believed that the transaction with MMG was proceeding in accordance with the terms of the agreement". (Paragraph 14 of his first affidavit).

27. Further, by 6 October 2004, Mr. Wijaya clearly believed that the 840,000 shares had been transferred from TBB – see the proxy of 6 October 2004, which, as I have said, seems to have been signed by Mr. Wijaya, and which shows TBB to then be the holder of only 360,000 shares in BEL.

28. Last is the minute of the annual general meeting of BEL, signed by Mr. Wijaya. Mr. Riihiluoma referred to this as being a rather subtle point, but Mr. Wijaya is obviously a sophisticated business man, and would no doubt have expected to see MMG shown as shareholder with Mr. Matsumoto as its representative, as was shown for the TBB shareholding, had the shares in fact been transferred to MMG. In any event, this document makes it clear that by 6 October 2004, TBB believed it had effected the transfer of 840,000 of its shares. That does beg the question as to how Mr. Wijaya believed that transfer to have been effected, bearing in mind he appears to have signed many other documents on behalf of TBB.

29. Looking at matters in broad terms, it may well be that as a technical matter under Indonesian law, Mr. Hadiprayitno was not authorised to execute the share transfer on behalf of TBB. But I am satisfied that TBB did intend to transfer those shares, that it knew by 6 October 2004 that the shares in question had been transferred, and either knew or should have known that Mr. Matsumoto was the transferee. In those circumstances, I find that any objection to the validity of the share transfer form has been waived by TBB.

30. If I were to be wrong in relation to that aspect of matters, I would still decline to afford relief to TBB under the provisions of section 67 of the Act. As I understand the equivalent position in the United Kingdom, the court's discretion would not be exercised if injustice would be caused to other members not represented in the proceedings. It seems to me that MMG would fit within that category, and notwithstanding that there may have been a dispute between TBB and MMG as to the funds paid, there is no question but that very great injustice would be caused to MMG if the share register of BEL were to be rectified so as to restore TBB as the registered holder of the 840,000 shares which it contracted to transfer to MMG under the provisions of the Share Purchase Agreement, and which it clearly believed had indeed been transferred.

Conclusion

31. Taking all of the above matters into account, I refuse the relief sought in TBB's notice of originating motion.

Costs

32. It seems to me that costs should follow the event in the usual way, but I will hear counsel for TBB on the issue of costs should he wish to be heard.

Dated this day of December 2008.

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Hon. Geoffrey R. Bell
Puisne Judge