In The Supreme Court of Bermuda

COMMERCIAL COURT
CIVIL JURISDICTION

2015: No. 138

BETWEEN:-

PT SATRIA TIRTATAMA ENERGINDO

Plaintiff

-and-

(1) EAST ASIA COMPANY LIMITED
(2) BALI ENERGY LIMITED

Defendants

JUDGMENT

(In Court)

Application for rectification of share register in favour of purchaser under s 67 of Companies Act 1981 – whether contract for sale of shares – whether notices convening Board meetings to approve sale and transfer of shares were defective – whether purchaser can rely on indoor management rule – whether directors in breach of fiduciary duty to seller – whether company has already exercised its discretion to refuse registration

Date of hearing: 4th – 8th July and 22nd – 26th August 2016
Date of judgment: 21st October 2016

Mr Steven White, Cox Hallett Wilkinson Limited, for the Plaintiff

Mr Saul Froomkin QC and Mr Allan Doughty, BeesMont Law Limited, for the Defendants

The issue

1. By a specially endorsed writ of summons dated 7th April 2015 the Plaintiff company, PT Satria Tirtatama Energindo ("PT Satria"), seeks an order for rectification of the share register of the Second Defendant, Bali Energy Limited ("BEL"), to record that the shares in the company are no longer held by the First Defendant, East Asia Company Limited ("EACL"), but by PT Satria. PT Satria also seeks such declaratory relief as may be appropriate and, further or alternatively, damages.

Dramatis personae

2. PT Satria is part of an Indonesian conglomerate called PT Satria Gemareska ("SGR"). SGR's business includes power generation and PT Satria's business includes the development of geothermal energy sites in Indonesia. PT Satria's sole director and 85% shareholder, who is also President and director of SGR, is a man named Wisnu Suhardono ("Mr Suhardono").

3. BEL is a Bermuda exempted company. The Register of Directors and Officers shows that as of 20th October 2014 it had five directors.

4. The two longest serving directors were Edwin Joenoes ("Mr Joenoes") (appointed 2004) and Ira Hata ("Mr Hata") (appointed CEO on 4th December 2009 and a director on 24th December 2010 but involved with the company since 2007). They worked closely together and ran BEL.

5. The other directors were Kiyoshi Yamaura ("Mr Yamaura") (appointed 1st July 2013); Yoshinori Matsumoto ("Mr Y Matsumoto") (appointed 1st July 2013); and Masayo Matsumoto ("Ms M Matsumoto") (whose date of

appointment is not in evidence). They played no active role in the business of BEL.

6. Mr Yamaura and Ms M Matsumoto resigned as directors of BEL with effect from 1st April 2015 and Mr Y Matsumoto resigned as a director with effect from 15th April 2015.

7. The most recent Register of Directors and Officers of BEL, which is maintained by OSIRIS Limited as its purported Secretary, shows that as of 15th April 2015 its directors were Hiroichi Kitamoto ("Mr Kitamoto") and Motonari Takeyama ("Mr Takeyama"). I say "purported" because the validity of OSIRIS' appointment is in dispute, as is the appointment of Mr Kitamoto and Mr Takeyama.

8. EACL, another Bermuda exempted company, is the sole shareholder of BEL. The Register of Directors and Officers shows that as of 20th October 2014 it had three directors: Mr Joenoes; Mr Hata; and Mr Yamaura. Mr Yamaura resigned as a director of EACL with effect from 20th March 2016. The Defendants contend that today it has just two directors: Mr Kitamoto and Naotake Manaka ("Mr Manaka").

9. Its shareholding consists of 51,135,500 common shares. The shares were previously held by a Japanese company called AIM. The Chairman and principal of AIM was formerly a man named Koji Matsumoto ("Mr K Matsumoto"). He used also to be Chairman and a director of BEL, but resigned on 1st June 2013, together with another former director of BEL called Shu Hirano, ("Mr Hirano") when they were both declared bankrupt by the Tokyo District Court in Japan. AIM was also the subject of bankruptcy proceedings in that Court at the time.

10. The share register of BEL shows that Mr K Matsumoto holds in his own name an additional 4,500 shares in the company. However it is common ground that the register is out of date as BEL acquired these shares from Mr K Matsumoto's trustee in bankruptcy in the early part of 2015 and cancelled them.

11. Mr Yamaura is an old friend of Mr K Matsumoto, and Mr Y Matsumoto and Ms M Matsumoto are Mr K Matsumoto's children.

12. The sole shareholder of EACL is a company incorporated in the Seychelles called Affluent Ocean Limited ("AOL"), which is owned and controlled by a man named Matsuo Watabe ("Mr Watabe").

13. There is a dispute as to the control of EACL and BEL. Mr Joenoes and Mr Hata form one camp of purported directors. Mr Kitamoto, Mr Manaka and Mr Takeyama, who have the support of Mr Watabe, form the other. Their predecessors in what might be called "the Watabe camp" were Mr Yamaura, Mr Y Matsumoto and Mr K Matsumoto.

14. The Watabe camp is opposed to the sale of EACL's shares in BEL to PT Satria. They oppose PT Satria's application for rectification of BEL's share register. Negotiations for the sale and purchase of those shares took place against the backdrop of a series of manoueuvres whereby the directors in each camp tried to dismiss the directors in the other.

15. At a purported special general meeting ("SGM") of BEL on 31st December 2014 which took place in Japan, EACL as shareholder resolved to remove Mr Yamaura, Mr Y Matsumoto and Ms M Matsumoto as directors with immediate effect. EACL was represented by Mr Hata (30 million shares) and one Paul Unger (21,135,500 shares) as a proxy for Mr Joenoes.

16. On 4th March 2015 a purported SGM of EACL was held in Bermuda at which AOL in its capacity as sole shareholder of EACL purportedly removed Mr Joenoes and Mr Hata as directors of EACL and appointed Mr Kitamoto and Mr Manaka in their stead. AOL was represented by a proxy, Takahiro Katsumi. A purported requisition notice for the meeting was emailed to Mr Joenoes and Mr Hata on 18th February 2015.

17. Also on 4th March 2015 a purported SGM of BEL was held in Bermuda at which it was resolved that Mr Joenoes and Mr Hata be removed as directors of BEL and that Mr Kitamoto and Mr Takeyama be appointed in their stead.

It is probable that a purported requisition notice for the meeting was emailed to Mr Joenoes and Mr Hata on 18th February 2015.

18. Mr Watabe and the directors in his camp maintain that the purported SGM held in 31st December 2014 was not validly convened and that the purported removal of Mr Yamaura, Mr Y Matsumoto and Ms M Matsumoto as directors was ineffective.

19. Mr Joenoes and Mr Hata maintain that the purported SGMs of BEL and EACL held on 4th March 2015 were not validly convened and that their purported removal as directors was ineffective. It is not disputed that they were directors of both companies at least up until that date.

20. For the purposes of defending this action, BEL and EACL have acted through the directors or purported directors in the Watabe camp. References in this judgment to the position in the action taken by those companies are references to the companies as controlled by them.

The share transfers

21. BEL owns rights to develop a geothermal energy site at Bedegul in Bali, Indonesia. BEL intends to develop the site to generate electricity. This project ("the Project") is the company's only business. The rights are secured by two agreements, both dated 17th November 1995 and updated in 2004.

22. The first agreement is a joint operations contract ("JOC") with PT Pertamina Persero ("Pertamina"), an Indonesian state owned company. Under the agreement, BEL is obligated to design, finance, construct and operate an electric power plant at Bedegul at its own cost and risk.

23. The second agreement is an energy sales contract ("ESC") between BEL, Pertamina and PT PLN Persero ("PLN"), the Indonesian state power company, under which, once the power plant is built, PLN will buy electricity from BEL.

24. The most recent financial statements for BEL were prepared by PriceWaterhouseCoopers for the financial years ended 31st December 2008 and 2007. The notes to the financial statements recorded:

> "*As at 31 December 2008, the Company has a negative working capital of US$ 8.3 million, accumulated deficit of US 11.9 million, recurring losses and negative operating cash flows. Furthermore, the project is suspended as a result of delay in obtaining permit from the Government … These conditions raise substantial doubt about the Company's ability to continue as a going concern since ultimate realization of the Company's assets depends on the successful development of its commercial production and continuing financial support of its affiliated companies or its shareholders.*"

25. Mr Joenoes and Mr Hata tried to find a suitable investment partner and/or buyer of BEL. They entered into discussions with several of the leading companies in the engineering and power generation sector. These included PT Satria in 2011 – 2012 and subsequently another Indonesian energy company called PT Praja Bumi Selaras ("PBS").

26. PBS entered into a memorandum of understanding ("MOU") with EACL and EACL's then beneficial owner, Mr K Matsumoto, in 2012. When the MOU expired, they entered into a second MOU with EACL and EACL's new owner, AOL, in 2013.

27. The premise of the MOUs was that PBS would acquire BEL by purchasing 80 per cent of the shares in EACL upon completion of satisfactory due diligence, and that in the interim PBS would provide BEL with a level of financial support. The purchase price stated in the second MOU was US$ 8,000. AOL would be entitled to a share of revenue generated by future development of the project, but would have to contribute proportionately to the cost of such development.

28. PBS cancelled the second MOU in October 2014. This left BEL with a pressing need to find alternative funding. The minutes of a Board meeting of BEL, which took place on 14th December 2016 via Skype and at which the directors present were Mr Joenoes and Mr Hata, noted that whereas the key assets of the company, namely the JOC and the ESC, were intact, there

was a possibility that due to financial constraints the company would fall out of compliance with them.

29. In addition, BEL and EACL had to pay their Bermuda Government annual fees by 31st January 2015. Non-payment would incur the risk that the companies would be struck off the Register of Companies. Further, both companies needed to secure the services of a new corporate secretary, to replace the old one, which had resigned, and to pay the new secretary's annual fee, which would be required in advance as an annual retainer.

30. In December 2014 BEL issued cash calls to its shareholder EACL, which in turn issued cash calls to its shareholder AOL. The cash calls were authorised by Board resolutions of BEL dated 22nd October 2014 and EACL dated 6th January 2015. Both meetings took place via Skype and the directors present were Mr Joenoes and Mr Hata. The resolutions noted that if the members failed to provide financial support the respective companies would consider other sources.

31. The cash calls sought funds to: (i) facilitate a request by the Government of Indonesia for a site visit to Bedegul in January 2015 (US$ 14,000); (ii) pay outstanding tax liabilities to the Indonesian Tax Authorities; a judgment from the Department of Manpower in Indonesia ordering BEL to pay ex-employees back-pay and severance; and postponed payments to vendors (US$ 1.4 million); and (iii) pay outstanding salaries due to Mr Joenoes and Mr Hata plus compensation for (presumably the next) six months (US$ 518,500). The cash calls went unanswered.

32. When PT Satria heard that PBS had terminated the MOU, it contacted BEL to discuss re-opening talks. This was in December 2014. Mr Suhardono gave evidence that this was because the Indonesian Government had asked him to intervene and take what was potentially a failing project in hand. He said that the Government had confidence in him because he had previously done just that with two geothermal energy projects which were substantially larger than this one. He referred to it disparagingly as a "*trash project*".

33. Negotiations commenced in earnest on 16th January 2015, after the deadlines for the cash calls had expired. PT Satria undertook due diligence in relation to BEL, including reviewing the company's financial documents, and assessed the value of the company. PT Satria had conducted substantive due diligence in 2012, so it had only to update those findings. The work was undertaken by PT Satria's staff, who reported their findings to Mr Suhardono.

34. Having satisfactorily completed its due diligence, PT Satria began closing negotiations on 16th February 2015. When valuing BEL it took into account that the company was in debt by almost US$ 2 million; had no assets other than the JOC and ESC; did not own the Bedegul site; was insolvent in that it was unable to pay its debts as they fell due and was therefore vulnerable to enforcement action from creditors; and that on Mr Suhardono's estimate an investment of $60 million would be required to produce sufficient capacity at the site to realise a profit, or, as he put it, "*change trash into fertiliser*".

35. On 27th February 2015 PT Satria and EACL executed a document headed "*Heads of Agreement ('HOA') on the Sale and Purchase of Bali Energy Ltd.*". It was signed by Mr Suhardono in his capacity as director on behalf of PT Satria and Mr Joenoes in his capacity as director on behalf of EACL, and witnessed by Mr Hata in his capacity as CEO on behalf of BEL.

36. The HOA noted at paragraph 2 that EACL sought to sell 100 per cent of its shares in BEL (referred to in the HOA as "the Purchase Shares") to a competent investor that would develop exploitable geothermal energy within the Bedegul geothermal field at Bedegul (referred to in the HOA, as in this judgment, as "the Project"), and that PT Satria sought to purchase the shares held by EACL with a commitment to developing BEL's geothermal project in Bali expeditiously.

37. Paragraph 3 of the HOA stated:

"[EACL] and [PT Satria], (collectively referred to as the 'Parties'), now wish to record their intent to proceed to negotiate a Sale and Purchase Agreement ('the Final Agreement') for the Purchase Shares as follows.

A. [EACL] agrees to sell, and [PT Satria] agrees to purchase, the Purchase Shares for a consideration of two million United States Dollars and zero Cents (2,000,000 USD), hereafter referred to as the 'Cash Payment'.

B. The aforementioned Cash Payment shall be paid in full by [PT Satria] to [EACL] within thirty (30) days of the commissioning of the final unit of the Project.

C. The Parties acknowledge that in purchasing the Purchase Shares, [PT Satria] assumes all the current financial liabilities of BEL in the Republic of Indonesia, totalling up to one million nine hundred thousand United States Dollars (1,900,000 USD).

D. *[EACL] agrees and is ready to transfer the Purchase Shares immediately upon the signing of the agreement.*"

38. Paragraph 4 of the HOA stated that the Parties wished to conclude the Final Agreement as soon as possible, recognizing that there were pressing outstanding financial obligations in BEL, and that there was an urgency to formalize agreement and commence implementation of the Project as soon as possible.

39. Paragraph 8 of the HOA stated:

"*It is the intent that the Parties shall negotiate in good faith to finalize the Final Agreement, and that this Heads of Agreement shall be legally binding.*"

40. Exhibit A to the HOA set out the financial liabilities of BEL which would be paid from the $1.9 million, although they were stated to be subject to audit and confirmation, and the dates by which they would be paid. Certain liabilities would be paid immediately upon signing. Eg company fees due in Bermuda. Outstanding officers' compensation due from BEL to Mr Joenoes and Mr Hata in the sum of $532,450 was payable in stages, with the final stage payable within three months of the transfer of shares. Back pay and

severance to BEL's other employees, amounting to the equivalent of more than $570,000, was payable by no later than 31st December 2015.

41. PT Satria and EACL did not negotiate any further agreement. Instead, they treated the HOA as the Final Agreement.

42. On 28th February 2015 Mr Joenoes emailed to Mr Yamaura notice of a Board meeting of EACL to be held via Skype conference call on 1st March 2015 at 10 am Japan time together with an agenda. On the same day Mr Joenoes emailed to Mr Yamaura, Mr Y Matsumoto and Ms M Matsumoto notice of a Board meeting of BEL to be held via Skype conference call on 1st March 2015 at 10.15 am Japan time together with an agenda. The agendas for both meetings were identical. The items for discussion included "*Share transfer approval*".

43. On 1st March 2015 PT Satria and EACL executed a share transfer agreement ("the STA"). It was signed by Mr Joenoes on behalf of EACL as transferor and Mr Suhardono on behalf of PT Satria as transferee. Their signatures were witnessed by John Columbo, an employee of PT Satria. The STA stated:

> "*FOR VALUE RECEIVED, namely the assumption by [PT Satria] of the outstanding liabilities of [BEL] in the amount of One Million Nine Hundred Thousand Dollars and Zero Cents (1,900,000.00 USD).*
>
> *We, [EACL] ('the Transferor'), hereby sell, assign, and transfer unto [PT Satria] ('the Transferee') … 51,135,500 Common Shares of the Company.*"

44. By a purported Board resolution dated 1st March 2015 EACL approved the sale and transfer of its shares in BEL to PT Satria. The purported Board meeting took place at 10 am Japan time via Skype and the directors present were Mr Hata and Mr Joenoes.

45. By a purported Board resolution dated 1st March 2015 BEL resolved that, the Board having received a duly executed share transfer form, the transfer be approved and the register of members updated accordingly. The

purported Board meeting took place at 10.15 am Japan time via Skype, presumably following on directly from the purported EACL Board meeting, and the directors present were Mr Hata and Mr Joenoes.

46. I use the word "*purported*" because the Defendants dispute the validity of these Board meetings and Board resolutions.

47. BEL sought approval for the transfer from the Bermuda Monetary Authority ("BMA"). By a notice dated 27th April 2015 the BMA indicated that it had no objection to the transfer. However BEL has not recorded the transfer of its shares from EACL to PT Satria in its share register. That is why PT Satria has brought this action.

Bye-laws

48. The actions taken, or purportedly taken, by BEL and EACL fall to be considered within the context of the companies' respective bye-laws, which are in many material respects similar or identical. They include the following provisions:

(1) The Board is the Board of directors appointed or elected pursuant to the bye-laws acting by resolution in accordance with the Companies Act 1981 ("the 1981 Act") and the bye-laws, or the directors present at a meeting of directors at which there is a quorum. *BEL bye-law 1*, *EACL bye-law 1*.

(2) The business of the company shall be managed and conducted by the Board. In managing the business of the company, the Board may exercise all such powers of the company as are not, by the 1981 Act or the bye-laws, required to be exercised by the company in general meeting. *BEL bye-laws 2 and 3*, *EACL bye-law 45*. This provision mirrors section 91(5) of the 1981 Act. The bye-laws of EACL include an express provision that the Board may authorise any person to act on behalf of the company for any specific purpose and in connection therewith to execute any deed, agreement, document or instrument on behalf of the company. *EACL bye-law 46*.

(3) The Board may meet for the transaction of business, adjourn and otherwise regulate its meetings as it sees fit. A resolution put to a vote at a Board meeting shall be carried by the affirmative votes of a majority of the votes cast. *BEL bye-laws 19(1) and 19(3), EACL bye-law 54*.

(4) A meeting of the Board may at any time be summoned by the Chairman and/or CEO (BEL) or a director (EACL). Notice of the meeting may be given by electronic means, provided (BEL) that the words are represented in a legible and non-transitory form. *BEL bye-law 17(1), EACL bye-law 55*.

(5) Directors may participate in any Board meeting by such telephone, electronic or other communication facilities or means as permit all persons participating in the meeting to communicate with each other simultaneously and instantaneously. Participation in such a meeting shall constitute presence in person at such meeting. *BEL bye-law 19(2), EACL bye-law 56*.

49. The quorum necessary for the transaction of business at a meeting of the Board shall be two directors. *BEL bye-law 18, EACL bye-law 57*.

Rectification

50. The power of the Court to rectify BEL's share register is contained in section 67 of the 1981 Act, headed "*Power of Court to rectify register*", which provides:

"(1) If—

> *(a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or*
>
> *(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member,*

the person aggrieved, or any member of the company, may apply to the Court for rectification of the register.

(2) Where an application is made under this section, the Court may either refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved.

(3) On an application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for rectification of the register."

51. PT Satria, through its counsel Steven White, submits that by reason of the facts and matters set out above in the section headed "*Share transfers*" the company is entitled to an order for rectification. BEL and EACL, through their counsel, Saul Froomkin QC, submit that the application for rectification should be dismissed. I shall consider each of their objections to registration in turn. However I shall deal only with objections which were pursued at the hearing: I regard those objections which were pleaded and then not pursued as having (wisely) been abandoned.

52. First, Mr Froomkin submits that the HOA are no more than an "agreement to agree" and do not constitute an enforceable agreement between the parties. The leading case is RTS Ltd v Molkerei Alois Müller GmbH &Co KG [2010] 1 WLR 753 UKSC. Lord Clarke, giving the judgment of the Court, stated at para 45:

"*The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.*"

53. Thus, there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. See Lord Clarke *supra* at para 45, approving the judgment of the Court given by Lloyd LJ (as he then was) in Pagnan SpA Feed Products Ltd [1987] 2 Lloyd's Rep 601 EWCA at 619. As Aikens LJ, giving the judgment of the Court, stated in Barbudev v Eurocom Cable Management Bulgaria EOOD [2012] EWCA Civ 548, [2012] 2 All ER (Comm) 963 at para 32, summarising passages from, amongst others, the two aforementioned cases:

> "*On the question of an enforceable contract or not, it is for the parties to decide at what stage they wish to be contractually bound. To use the vivid phrase of Lord Bingham (as Bingham J) the parties are 'masters of their contractual fate'. [Pagnan at 611.] They can agree to be bound contractually, even if there are further terms to be agreed between them. [RTS Flexible Systems at para 48] The question is whether the agreement is unworkable or fails for uncertainty. However, where commercial men intend to enter into a binding commitment the courts are reluctant to conclude that such an agreement fails for uncertainty. [Hillas v Arcos Ltd (1932) 147 LT at 514 per Lord Wright.]*"

54. It is plain from the language of the HOA that the parties had intended to negotiate a Final Agreement but that they had intended to be bound by the HOA nonetheless. I am satisfied that the HOA includes all the terms necessary for the agreement to be workable and that indeed there was little if anything left to be agreed. I am therefore satisfied that the HOA constitutes an enforceable agreement between the parties.

55. Next, Mr Froomkin submits that the notices convening the Board meetings of EACL and BEL on 1st March 2015 were defective. By a letter emailed to Mr Hata and Mr Joenoes on 28th February 2015, Mr Yamaura objected to the Board meeting of EACL and by a letter emailed to them on the same date Mr Yamaura, Mr Y Matsumoto and Ms M Matsumoto (whom I shall refer to in this context as "the Objectors") objected to the Board meeting of BEL. As the objections in both letters were *mutatis mutandis* the same I need only quote from the BEL letter:

"*We wish to note that we object to convening this Board Meeting for the following reasons.*

Firstly we are not able to participate by Skype which is not a valid means of communication and there is no physical location or dial number stated on the Notice to enable us to attend the meeting.

Secondly, the majority of the shares of the Company are wholly owned by [EACL] and its sole shareholder, [AOL], has convened a Special General Meeting to be held on 4 March 2015 at 10.00 am (Bermuda time) to remove both of you as directors of EACL. Further we have convened a Special General Meeting of the Company to be held on 4 March 2015 at 11.00 a.m. (Bermuda time) to remove both of you as directors of the Company. Therefore you should not be approving any actions which relate to the assets or shares of the Company."

56. There is no merit to any of these objections. Skype was a valid means of communication as the use of electronic means of communication was sanctioned by the bye-laws of both companies. I take judicial notice of the fact that it is a reliable means of communication, and one indeed which is sometimes used by this Court to allow parties or witnesses to participate in court hearings remotely. The Objectors did not state why they were not able to participate by Skype, which is free to use and free to download. I am satisfied that they could have attended the meeting via Skype had they so chosen. If they required a dial number they had only to email Mr Joenoes or Mr Hata to request it.

57. As stated above, the bye-laws of EACL provide that the business of the Company shall be managed and conducted by the Board, and that in managing the business of the company, the Board may exercise all such powers of the company as are not, by the 1981 Act or the bye-laws, required to be exercised by the company in general meeting. The sale of the company's shares in BEL was not required by the bye-laws or the 1981 Act to be exercised by the company in general meeting.

58. I accept that in a quasi-partnership situation it may, depending on the circumstances, be appropriate to imply a term into the bye-laws that the

directors shall not dispose of the company's principal asset without the consent of the shareholders. See Strong v Brough & Son 5 ACSR 296 SC(NSW) *per* Young J at 301 – 302. But EACL was not a quasi-partnership company and with respect to its bye-laws there is no basis for implying such a term.

59. Moreover, BEL was insolvent in that it was unable to pay its debts as they fell due. In those circumstances its directors' duty to act in the best interests of the company required them to act in the best interests of the creditors, and the wishes of the shareholders became all but irrelevant. See Re First Virginia Reinsurance Ltd [2003] Bda LR 47 SC *per* Kawaley J (as he then was) at 7 ll 43 – 46. There was no other proposal which offered a viable future for BEL on the table and I regard the Defendants' position that there was a better deal to be had as fanciful.

60. As directors of BEL and EACL, Mr Joenoes and Mr Hata were under a duty to act in what they considered the best interests of those companies unless and until they were removed from office. The fact that meetings had been convened or purportedly convened for this purpose was irrelevant as it would not affect the lawfulness of the acts which they took prior to any such removal.

61. I accept that under the bye-laws of EACL Mr Joenoes and Mr Hata did not have authority to conclude the HOA without a resolution of the Board. But the requirements of the bye-laws in this respect were satisfied by the Board resolution of 1st March 2015 retrospectively approving the sale. See Municipal Mutual Insurance v Harrop [1988] 2 BCLC Ch D, *per* Rimer J at 553 e – f, applying Re Portuguese Consolidated Copper Mines (1890) 45 Ch D 16 EWCA.

62. In any case, applying the "*indoor management rule*" otherwise known as "*the rule in Turquand's case*", PT Satria was entitled to assume that, as directors of EACL, Mr Joenoes and Mr Hata were authorised to enter into

the HOA on EACL's behalf, even if, contrary to my findings, they were not. *Per* Lord Simmonds in Morris v Kanssen [1946] AC 459 HL at 474:

"*The so-called rule in Turquand's case [(1856) 6 E & B 327] is, I think, correctly stated in Halsbury's Laws of England, 2nd ed., vol. V., at p. 423: 'But persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular'.*"

63. Thus, as between the company and outsiders, outsiders are entitled to assume that its directors act with the authority of the company, which will be bound by their acts. That is unless the outsiders know or have notice that the directors are not so authorised. See Criterion Properties v Stratford (UK) Properties [2004] 1 WLR 1846 HL *per* Lord Scott, who gave the leading judgment, at para 31.

64. In the present case, PT Satria had positive reason to believe that Mr Joenoes and Mr Hata were authorised to conclude the HOA. Its staff spoke with Mr Joenoes and Mr Hata and reviewed the corporate documents of BEL and EACL. It established to its satisfaction that Mr Joenoes and Mr Hata remained directors of these companies; that the Board of EACL had authority to enter into an agreement with PT Satria for the sale and purchase of EACL's shares in BEL; and that the Board of BEL had authority to register the share transfer. PT Satria also established with the various Indonesian state authorities with which BEL dealt that Mr Joenoes was their key contact in all matters relating to the company.

65. I am satisfied that in the circumstances Mr Joenoes and Mr Hata had ostensible authority (as well as actual authority) to conclude the HOA and that this was something upon which PT Satria was entitled to rely.

66. Mr Froomkin raises two further objections to the notices convening the Board meetings. Due notice of a Board meeting must be given to all the directors entitled to receive it. See Mayfair Limited v Edmund Gibbons Limited, unreported 3rd July 1986 CA *per* Sir Alastair Blair-Kerr P at 29.

Mr Froomkin submits that the Objectors were not given due notice in the sense of an adequate notice period. But the bye-laws do not stipulate a minimum notice period. Clearly the Objectors had notice of the meetings because on 28th February 2015 they wrote to Mr Joenoes and Mr Hata objecting to them. They were not concerned about short notice as they did not give this as a ground of objection; still less did they seek an injunction restraining Mr Joenoes and Mr Hata from holding the meetings. There is no material from which I can properly infer that the notice period was intended to prevent the Objectors from attending the meeting, which, as noted above, was to be held via Skype. I am satisfied in the circumstances that the notice which they were given was adequate. Even if it was not, it was not such an irregularity as to vitiate the action of the Board.

67. Mr Froomkin further objects that the notices did not give adequate notice of the business to be transacted at the Board meetings, namely approval of the proposed share transfer. Now there is no obligation when giving notice of a directors' meeting to give notice of the business to be transacted, even if the business is of a non-routine, extraordinary or unusual character. See La Compagnie de Mayville v Whitley [1896] 1 Ch 788 EWCA *per* Lindley LJ at 797 and 799, and Kay LJ at 804, and 805 – 806. By contrast, shareholders should have clear and precise advance notice of the substance of any special resolution which it is intended to propose at a meeting of the members. That, it has been said, is so that shareholders can make an informed decision as to whether they wish to attend the meeting. See In re Moorgate Holdings Ltd [1980] WLR 227 Ch D *per* Slade J at 243 C – D.

68. However Mr Froomkin submits that if notice of the business to be transacted at a Board meeting is given then it must be frank and clear, and give sufficient warning of the subjects to be considered at the meetings. Ie that it is governed by the same principles that apply to notices of special resolutions at shareholders' meetings.

69. He relies on an Australian case, Dhami v Martin [2010] NSWSC 770 (13 July 2010), in which the Court held that a notice convening a directors'

meeting was inadequate because the meeting transacted business – the appointment of a representative to deal with a third party in relation to debt owed by that third party to the company – which was not stated in the notice of meeting. The appointment was therefore held to be void.

70. Explaining his decision on this point, Barrett J stated at paras 51 and 52:

> "*Where there is a requirement that the notice convening the meeting state the purpose or the business proposed to be transacted, the position is as stated in McLure v Mitchell (1974) 24 FLR 115 at 140:*
>
> > *'The purpose of a notice of meeting is to enable persons to know what is proposed to be done at the meeting so that they can make up their minds whether or not to attend. The notice should be so drafted that ordinary minds can fairly understand its meaning. It should not be a tricky notice artfully framed (Henderson v Bank of Australia (1890) 45 Ch D 330 [EWCA] at 337).'*
>
> *The position must be the same where the person summoning the meeting chooses to state what is proposed to be done at the meeting, even though there is no requirement that he or she do so and the meeting would have been properly convened by a notice that did not state a purpose. A statement of purpose actually included by the summoning person, whether or not required, is put forward in order that those entitled to attend can decide whether or not to do so. Indeed, in the context of a board of directors, where there is no requirement that the proposed business be stated, there is no other conceivable reason for a statement of purpose.*"

71. I do not entirely agree with this reasoning. As the judge acknowledged at para 57, directors, unlike shareholders, are generally expected to attend meetings. See also La Compagnie de Mayville v Whitley *per* Lindley LJ at 797; Kay LJ at 806 and AL Smith LJ at 810. Advance notice of the business to be transacted at a board meeting is in my judgment at least as much for the benefit of those who attend as those who do not. However I agree that a notice of a board meeting should not be a "*tricky notice artfully framed*" and that if it is the proceedings at the meeting insofar as they relate to the trickiness will be void.

72. Mr Froomkin submits that the notices for both Board meetings were "*tricky*". The agendas attached to the notices of both meetings were identical. Item 3 on the agendas, which was unrelated to PT Satria, was "*Share transfer cancellations*" and item 4, which concerned the approval of the transfer of the shares held by EACL in BEL to PT Satria, was "*Share transfer approval*". In my judgment item 4 was stated concisely but accurately and was not misleading. Neither was the collocation of item 3 with item 4 misleading as in my judgment the notice did not imply that both items concerned the same shares. I am therefore satisfied that these were not tricky notices artfully framed. The upshot is that both Board meetings were validly convened.

73. Mr Froomkin alleges further that Mr Joenoes and Mr Hata acted in breach of the fiduciary duty which as directors they owed to BEL and EACL. As to that, section 97 of the 1981 Act provides in material part:

> *"(1) Every officer of a company in exercising his powers and discharging his duties shall –*
>
> > *(a) act honestly and in good faith with a view to the best interests of the company;*
> >
> > . . . . .
>
> *(4) Without in any way limiting the generality of subsection (1) an officer of a company shall be deemed not to be acting honestly and in good faith if –*
>
> > . . . . .
> >
> > *(b) he fails to disclose at the first opportunity at a meeting of directors or by writing to the directors –*
> >
> > > *(i) his interest in any material contract or proposed material contract with the company or any of its subsidiaries.*"

74. Section 97(4)(b) gives statutory effect to the fiduciary duty of loyalty owed by a director to his company, which has been said to be "*the distinguishing obligation of a fiduciary*". See Bristol and West BS v Mothew [1998] Ch 1 EWCA *per* Millett LJ (as he then was) at 18 B. That duty has various facets. Examples germane to the present case are that a fiduciary must not place

himself in a position where his duty and his interest may conflict and that he must not use his position as a fiduciary to make a secret profit, ie one for which he has not accounted to his principal. See Bott v Southern California Recyclers, 7th February 1986, unreported, SC, *per* Collett J at 15:

"*In those circumstances the Defendants rely upon the well established principle of Equity, which forbids an agent from entering into any transaction in which he has a personal interest which might conflict with his duty to his principal unless the principal with full knowledge of all the material circumstances, and of the exact nature and extent of the agent's interest, consents to it: See Bowstead on Agency, 14th Edition, page 130. A number of legal authorities bearing upon that principle and its application have been cited in argument and counsel for the Plaintiff does not seek to dispute it. Nor does he dispute the further proposition established by Boston Deep Sea Fishing and Ice Co. v. Ansell (1888) 39 Chancery Division 339 that, where an agent makes a secret commission he is ... accountable to his principal for the amount of it ...*"

75. The phrase "*might conflict*" means in this context that a reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict. See Bhullar v Bhullar [2003] 2 BCLC 241 EWCA at 253 *per* Jonathan Parker LJ, giving the judgment of the Court, at 253 d – e, applying the analysis of Lord Upjohn in Boardman v Phipps [1967] 2 AC 46 HL at 124 C.

76. Mr Froomkin submits that Mr Joenoes and Mr Hata breached this duty in that they failed to disclose to their fellow directors that they had a personal financial interest in the HOA. They allegedly had an interest in the $1.9 million, as they were creditors of BEL and would therefore get paid from that sum the money which the company owed them. Moreover, it is submitted, they would be paid in priority to some of the company's other creditors. This information was not disclosed, as Mr Froomkin submits it should have been, in the notices of the Board meetings or to AOL, as the shareholder of EACL, prior to the EACL Board meeting.

77. However, as Mr White points out, the HOA did not give rise to any new contractual benefits for Mr Joenoes and Mr Hata but merely secured the payment of BEL's existing contractual obligations towards them. The

monies which BEL owed them would have been recorded in the company's records. Moreover, as I am satisfied that BEL was insolvent, the interests of Mr Joenoes and Mr Hata were not in conflict with the interests of the other creditors, and so the interests of the company, but were aligned with them. Although Exhibit A to the HOA contained a timetable for the payment of BEL's creditors which provided for the payment of some before others, it provided for payment of them all within a specified timeframe.

78. I have already dealt with the limited requirements for the information to be contained in the notices of the Board meetings: those requirements did not include providing information about the terms of the HOA. Mr Joenoes and Mr Hata were not required to provide that information to the shareholders prior to approving the HOA and the share transfer as such approval was not for the shareholders to give or withhold but for the Board.

79. The share transfer instrument stated that EACL was selling, assigning and transferring to PT Satria its shares in BEL "*for value received*", namely the assumption by PT Satria of the outstanding liabilities of BEL in the amount of $1.9 million. It made no mention of the $2 million which would become payable under the HOA within 30 days of the commissioning of the final unit of the Project. Mr Froomkin alleges that this is evidence that Mr Joenoes and Mr Hata sought to make a secret profit by concealing the $2 million payment form the other members of the Board.

80. I am satisfied that they did not. Bye-law 61 of the bye-laws of BEL states:

> "*An instrument of transfer shall be in the form or as near thereto as circumstances admit of Form C hereto or in such other common form as the Board may accept.*"

81. The share transfer instrument in the present case is in the form of the share transfer instrument at Form C of the bye-laws. The wording "*for value received*" is the wording used in Form C and is a common form of words used in share transfer instruments. The instrument accurately stated the value which had been received as at the date of its execution. There was no need for it to mention the additional $2 million as this was not value

received but a future payment. There was no attempt to conceal that future payment as the obligation to make it was stated in the HOA – and not, say, in a side letter – and the HOA form part of the records of EACL. It is clear from the HOA that the $2 million payment is for the benefit of EACL and not its directors personally.

82. I turn to the question of registration. This is addressed in BEL's bye-laws by bye-law 62, which is headed "*Restriction on transfer*":

> "*(1) The Board may in its absolute discretion and without assigning any reason therefor refuse to register the transfer of a share. The Board shall refuse to register a transfer unless all applicable consents, authorisations and permissions of any governmental body or agency in Bermuda have been obtained.*
>
> *(2) If the Board refuses to register a transfer of any shares the Secretary shall, within three months after the date on which the transfer was lodged with the Company, send the transferor and the transferee notice of the refusal.*"

83. Bye-law 62(1) gives the Board a very broad discretion. Its members must exercise that discretion in what they consider – not what a court may consider – is in the best interests of the company. See In re Smith and Fawcett Ltd [1942] 1 Ch 304 EWCA *per* Lord Greene MR at 306. The directors are *prima facie* assumed to have been acting in good faith and the onus of proving the contrary is on the person who challenges their decision. See Village Cay Marina Ltd v Acland [1998] 2 BCLC 327 PC *per* Lord Hoffmann at 335 i – 336 a.

84. To be effective, refusal by the board to register a transfer must take the form of a board resolution. See Tett v Phoenix Property Co [1984] BCLC 599 Ch D *per* Vinelott J at 620 d – e:

> "*It is well settled that a discretionary power to refuse to register a transfer can only be exercised by a positive resolution not to register and that the resolution must be passed by a duly constituted board within a reasonable time after the transfer has been submitted.*"

In the context of the bye-laws of BEL, a reasonable time would be within three months.

85. Bye-law 62(2) corresponds with section 50(1) of the 1981 Act. Section 50(2) of the 1981 Act provides that the company and every officer who is in default shall be liable to a fine. A company may not ordinarily refuse to register a transfer of shares after the time for giving notice of refusal has expired. This is not an inflexible rule, but exceptional circumstances (broadly corresponding to the grounds on which liability for a default fine under section 50(2) could be challenged) are required to justify a departure from the general rule. Eg (i) where the directors had no actual knowledge of the transfer request; (ii) the refusal occurred within the required time-frame but due to an administrative oversight notice was not timely given; or (iii) for exceptional logistical reasons it was impossible to convene the board to make the refusal decision in time. See Capital Partners Securities Co Ltd v Sturgeon Central Asia [2016] SC (Bda) 68 Com *per* Kawaley CJ at paras 13 and 22.

86. Under the Exchange Control Act 1972, read in conjunction with the Exchange Control Regulations 1973, the transfer of shares from EACL to PT Satria required the prior approval of the BMA as Controller of Foreign Exchange. This was because PT Satria was non-resident within the meaning of those Regulations. Understood within that context, the Board resolution of BEL approving the registration of the share transfer was effective from 27th April 2015, ie the date on which BMA approval was obtained.

87. However Mr Froomkin submits that even assuming that the said Board resolution was valid and effective, as I am satisfied that it was, it has been superseded. For at the purported SGM of BEL held on 4th March 2015 it was resolved:

> "*... that the 1 March Board Meeting which purported to transfer the shares of the Company to [PT Satria] be rejected as being invalid.*"

88. The SGM was followed by a letter to PT Satria from ISIS Law Limited ("ISIS"), an affiliate of OSIRIS, dated 6th March 2015, said to be written "*on behalf of the current Board of BEL*". The letter advised PT Satria that, with effect from 4 March 2015, Mr Joenoes and Mr Hata had been removed as directors of BEL and EACL. The letter continued:

"*We stress that the purported actions taken by Mr. Joenoes and Mr. Hata in respect of the handling of shares of BEL did not result in a valid or effective transfer of the shares of BEL to PT Satria Tirtatama Energindo and therefore no transfer of the shares of BEL has occurred.*"

89. I shall assume for the sake of argument that the SGM was properly convened and quorate and that the 6th March 2015 letter was written on the instructions of the current Board. Even so, Mr Froomkin's submission is not well founded. The statements in the minutes of the SGM and the 6th March 2015 letter that the 1st March 2015 Board meeting of BEL was invalid are incorrect. It was not invalid, and neither a resolution of the SGM nor a letter written on behalf of the Board can make it so. In any case, under the bye-laws the decision as to whether to register the share transfer was a matter for the Board and was not within the competence of the SGM to make.

90. The Board or purported Board of BEL did not pass a resolution within three months after the transfer was lodged with the company (or at all) purporting to reverse its previous resolution and refuse registration. I am therefore not required to consider whether such a resolution would have had that effect. The 1st March 2015 resolution of the Board of BEL approving registration of the transfer stands.

Summary and conclusion

91. Mr White has made out a compelling case for rectification of the share register of BEL to record PT Satria as the registered owner of the 51,135,500 common shares which it has purchased from EACL. Although Mr Froomkin, with his customary eloquence, has made a number of objections

to this course, I am satisfied that they are without foundation. I therefore order rectification of the register as requested. If need be, I shall hear the parties as to the precise terms of the order, eg whether it should include a declaration as to PT Satria's shareholding in BEL. I make no award of damages as no loss has been made out.

92. In resolving the issues in controversy between the parties it has not been necessary for me to resolve the dispute within BEL and EACL as to the current composition of their respective Boards. As sole shareholder of AOL, Mr Watabe has it within his hands to place the position beyond doubt without the need for a ruling from the Court.

93. I shall hear the parties as to costs.

DATED this 21st day of October 2016

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Hellman J