IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 165 OF 2020 (RPJ)

IN THE MATTER OF THE COMPANIES LAW (2020 REVISION)

AND IN THE MATTER OF GLOBAL-IP CAYMAN

BETWEEN:

BRONZELINK HOLDINGS LIMITED

Plaintiff

AND

(1) GLOBAL-IP CAYMAN
(2) STM ATLANTIC N.V.
(3) FARAMARZ YOUSEFZADEH
(4) SHAFIGH YOUSSEFZADEH
(5) RAMIN YOUSSEFZADEH

Defendants

Appearances: Mr Daniel Lightman QC, Mr Guy Dilliway-Parry and Mr David Lewis Hall of Priestleys Attorneys-at-Law (for the Plaintiff)

Mr Mark Russell of KSG Attorneys-at-Law (for the Third to Fifth Defendants)

Before: The Hon. Raj Parker

Heard: 25 November 2020

Draft Ruling circulated: 22 December 2020

Ruling Delivered: 31 December 2020

HEADNOTE

Court's discretion to grant declaratory relief-principles to be applied-construction of Articles of Association-principles to be applied.

Introduction

1. Bronzelink, a company registered in the British Virgin Islands on 16 September 2015, applies by way of[1] originating summons dated 22 July 2020 seeking declarations as to the identities of the current Series A Directors of Global IP Cayman (the company), the dates of their appointment as directors, the dates of the resignation/removal of previous Series A Directors, and the identities of the Chief Executive Officer (CEO) and Chief Technical Officer (CTO) of the company. It also seeks a declaration that Mr Shafigh Youssefzadeh (SY) was not appointed as the CEO of the company on 7 February 2020.

2. Pursuant to a share purchase agreement dated 10 May 2016, Bronzelink, in consideration of making a payment of US$175 million and agreeing to extend a US$25 million line of credit to the company, became a 75% shareholder in the company. It holds a controlling interest through 30 million Series A Preferred Shares, albeit that certain powers are reserved for the approval of the common directors in relation to "Supermajority Matters".

3. STM Atlantic (which had previously been a 53% shareholder) holds 13.25%, Steady Space 9.25% and Mr Umar Javed (UJ) 2.5% of the shares in the company (together 'the common shareholders').

4. By special resolution passed on 1 June 2016 the company adopted new Articles of Association and as of 3 June 2016 the parties entered into a Shareholders' Agreement, a key feature of which, together with the Articles, was to give Bronzelink the right to appoint and to remove and replace up to six Series A Directors whose status was different from and in some important respects, which it is not now necessary to detail, superior to, that of the three common directors which the common shareholders have the right to appoint to the board of directors.

5. On 7 February 2020 the common directors purported to pass resolutions to remove the then Series A Directors and Bahram Pourmand (BP) as CEO and to replace him with SY. Bronzelink argues that this resolution is null and void and was in effect a power grab by the common shareholders and directors whilst leaving Bronzelink in the dark. On 11 February 2020 the common directors purported to pass a written resolution *inter alia,* to remove Nagib Chahine (NC) as CTO. Bronzelink argues that this resolution is also null and void.

6. Following the February resolutions Bronzelink discovered what had happened. A series of resolutions were passed on 1 and 17 April 2020 and 20 July 2020 which effectively reflect the position of the relief sought in the summons.

7. The three directors of the company appointed by the common shareholders, SY, Faramarz Yousefzadeh (FY) and Ramin Youssefzadeh (RY) (the common directors) contest the summons.

[1] This Judgment was first dispatched on the 30th December 2020. On the 31st December 2020 corrections were made to the initial words of this Judgment, only up to this point. The final version of this Judgment is therefore dated the 31st December 2020. The Judgment dated the 30th December 2020 is to be discarded.

8. On 20 October 2020, the common directors filed a notice under GCR, Ord.28, r.3 (3) setting out the order that they invite the court to make.

9. The company and STM Atlantic do not participate in this dispute which is between Bronzelink and the common directors.

10. Mr Daniel Lightman QC appeared for Bronzelink and Mr Mark Russell for the common directors.

Agreed matters

11. It is now accepted by the common directors that the current Series A Directors of the company are BP, the CEO; NC, the CTO; Calvin Tang (CT); David Wan (DW) and Kevin (Jianluo) Zhang (KZ) and that they are entitled to be registered as such.

12. It is also 'not opposed' by the common directors that the current CEO is BP and that he was appointed on 21 June 2016[2] and that the current CTO is NC and that he was appointed on 16 October 2017.

13. Finally, it is accepted by the common directors that SY was not appointed CEO of the company on 7 February 2020 and that his purported appointment should be removed from the register of directors and officers of the company.

14. Bronzelink therefore say KZ (appointed 14 January 2019), BP, NC and CT (all appointed 1 April 2020) and DW (appointed 20 July 2020)[3] are the present Series A Directors.

The common directors' opposition to the relief sought

15. The common directors' primary argument is that the only declaration necessary is one confirming the current Series A Directors, which is effectively conceded, and that it is not necessary for the court to make findings or declarations as to when any director was appointed or removed.

16. If the court determines that it would be useful and appropriate to make declarations as to the dates of appointment and removal of the Series A Directors, the common directors' position is that the resolutions passed at the February meeting were valid and should be upheld.

[2] Although his reappointment in July 2017 is in dispute in the Hong Kong arbitration

[3] The common directors do not accept the date of appointment of DW. Bronzelink accepts that if he was appointed on 17 April 2020 then there would have been seven Series A Directors between 17 April and 20 July 2020, whereas six is the limit under Article 151. Bronzelink therefore invites the court to declare DW was appointed under the July 2020 resolution.

The 7 February 2020 resolutions

17. SY called a meeting of the board on 30 January 2020 which was held on 7 February 2020. It was only attended by the common directors and in the absence of any of the Series A Directors and without any prior warning all the Series A Directors were removed. So was the CEO, BP, and SY was appointed in his place. As noted above, on 11 February 2020 the common directors purported to adopt a written resolution of the company whereby, *inter alia*, they purportedly resolved to remove NC as CTO.

18. On the common directors' instructions, Campbells Corporate Services Ltd (CCSL) amended the register of directors and issued a certificate of incumbency on 16 March 2020 stating that the company's current directors were the common directors alone, that SY was the CEO and that BP and NC had been removed as, respectively, CEO and CTO of the company.

19. CCSL resigned as the company's registered office effective 23 April 2020, which has left that information with the Registrar of Companies (the Registrar) in the Cayman Islands as to the present directors (none of the five Series A Directors are listed) and the company without a registered office.

20. Mr Lightman QC argues that the company has no means to correct this position without a court order. The Registrar will not accept a board resolution of the present board because only the common directors are listed on the Register, and the common directors cannot act as a validly constituted and quorate board on their own.[4]

The Hong Kong Arbitration

21. There are other disputes to be resolved between the parties in this court and elsewhere.

22. There is an arbitration in Hong Kong between Bronzelink as claimant and STM Atlantic, Emil Youssafzadeh (EY), UJ (R1-R3) and the company. The dispute arose in 2017 and pursuant to the arbitration clause contained in the Shareholders' Agreement an arbitration was commenced on 14 May 2019 claiming that R1-R3 had breached their obligations under the Shareholders' Agreement.[5] The substantive hearing is due to be in mid- 2021[6].

23. On 11 August 2020 the arbitral tribunal issued a decision and award on the application of R1-R3 that the cross claims of the company[7] should be struck out because there were questions as to BP's authority to bring them. The case had proceeded on the basis that there was a continuing dispute as to the authority of BP in relation to the company, which at that time was not represented by lawyers, but appeared by BP *de bene esse*.

24. The arbitral tribunal was then, unusually, asked to reconsider its decision on the basis that the common directors had, in a significant '*volte -face'*, sworn affidavit evidence in this court in

[4] Yiu 1 at § 35
[5] *Yiu 1 §6*
[6] *Yiu 1 § 15*
[7] *Asserting improper conduct, improper third-party communication, breach of fiduciary duties, tortious interference and defamation*

response to this application that the Series A Directors are in fact who they now accept them to be, and that BP had been the CEO of the company all along.

25. The arbitral tribunal said that had it been aware of this at the time it would not have struck out the cross claims of the company[8]. At the time the tribunal relied on the certificate of incumbency (presumably that which had been prepared by CCSL on the instructions of the common directors) which was considered to be the best evidence of the governance of the company, which was incorrect as shown by the change in position of R1-R3.

26. Since that formed a major plank of the reasons for the arbitral tribunal arriving at the conclusion that the cross-claims of the company should be struck out, it overturned its previous decision[9]. The right of the company to bring the cross claims was restored on 16 November 2020.

The Cayman Winding Up Petition

27. A winding up petition in respect of the company was heard by this court on 3 April 2020 which found that it had no jurisdiction to hear the application as the purported petitioning creditor (Campbells) was no longer a creditor of the company and had no standing. The petition was not dismissed, however, so as to allow a substitution application to be made, and which is understood was made by STM Group, which is pending.

28. STM Atlantic seeks the appointment of joint provisional liquidators in respect of the company. The application is opposed by Bronzelink. There is apparently an impediment for the company to proceed to obtain legal representation in respect of that application without its first obtaining a registered office and an accurate and valid certificate of incumbency and register of directors and officers[10].

29. I will now deal with the question of the necessity to consider the declaratory relief as sought by Mr Lightman QC.

The court's approach

a) The court has a wide discretion when deciding whether to grant declaratory relief[11]. The court needs to determine whether justice to the parties would be served and whether the declaration would serve a useful purpose.

b) The court should also ask itself whether declaratory relief is the most effective way of resolving the issues raised and should consider the other options available to resolve the issue[12].

[8] *See § 36 of the award*
[9] *§§ 46-47 of the award*
[10] Yiu 1 § 7
[11] *FSA v Rourke [2001] Lexis 2268 per Neuberger J at §5*
[12] *Rolls Royce v Unite [2010] 1 WLR 318 CA per Aikens LJ at §120 (dissenting)- approved in Milebush v Tameside [2011] 2 EGLR 143 per Mummery LJ at §46 and per Moore-Bick LJ at § 86-88*

c) The court is willing in appropriate cases to make declarations as regards rights which may arise in the future or which are academic as between the parties[13].

30. I am of the view that these tests are satisfied and that this is an appropriate case to consider granting the further declaratory relief sought by Bronzelink.

31. Having reviewed the evidence[14], and notwithstanding the common directors' primary argument, there remains some uncertainty as to the company's ability to restore itself to proper governance and compliance.

32. In any case it is clear to me that the parties would benefit from the court's determination of the relief sought by Bronzelink. The power struggle at the company has given rise to numerous disputes in the Cayman courts and elsewhere which should not be allowed to proliferate due to a lack of clarity.[15] The identity of the company's directors and principal officers, as well as the validity of recent resignations and removals, are important matters.

33. In addition, although I accept this is primarily a matter of compliance for the company, there is an obligation pursuant to section 55 (1) of the Companies Law for the company to notify the Registrar of the correct date of appointment and removal/resignation of its directors. The Directors & Officers General Guidance Notes dated 10 September 2019 (at page 12) also make it clear that accurate dates of appointment and removal must be notified. A failure to comply may result in a financial penalty to the company under section 56 of the Companies Law.

34. The register of directors is currently inaccurate both as regards who the current Series A Directors are, when they were appointed, and when previous Series A Directors ceased to be directors. It should in my view be corrected. The Registrar may then update the Register and enable the company to appoint a new registered office provider.

35. Having decided that it is necessary to consider the declaratory relief sought by Bronzelink, I will now consider the substantive issues which arise.

The legal effect of the February Resolutions

36. On 7 February 2020, the common directors passed a resolution pursuant to Article 150 (d) of the company's Articles of Association that the four Series A Directors reflected on the register as of that date, had vacated their offices. In the lead up to that meeting each of those directors had been unresponsive to communications from the common directors and from Campbells, the company's then attorneys. The common director's evidence is that they formed the view that they had simply abandoned the company[16].

[13] *Pavledes v Hadjisavva [2013] EWHC 124 Ch per Richards J at §§ 25* ,40 and 47-48
[14] *Yui 1, 22 July 2020; FY 1, 20 October 2020, and Yiu 2, 2 November 2020*
[15] Yiu 2 § 19
[16] FY,1 §16

Article 150 (d) states:

> *'The office of Director shall be vacated if the Director:… (d) is absent (without being represented by an alternate appointed by him) from* ***three consecutive meetings of the board of Directors without special leave of absence from the Directors and they pass a resolution that he has by reason of such absence vacated office****;…'(my emphasis)*
>
> **'*Directors*'** (in the Interpretation Section of the Articles of Association) "*means the persons for the time being occupying the position of directors of the Company, or as the case may be, the directors assembled as a board and the term a "Director" shall be construed accordingly and shall, where the context admits, include an alternate Director*".

The common directors' construction

37. Mr Russell does not dispute that the 7 February 2020 meeting did not meet the quorum threshold set out at Article 154 of at least two common directors and three Series A Directors.

38. However, he argues that on a proper construction of Article 150 (d) the resolution is valid. This is because giving the words their ordinary and natural meaning the remaining non-absent directors must be entitled to pass a resolution that the absent directors had vacated their offices, regardless of whether they were quorate under Article 154.

39. To hold otherwise would allow a set of directors to paralyse the management of the company by simply refusing to attend board meetings. That would leave the non-absent directors in the lurch as they would not be quorate to effect any business. They could not fulfil their duties by correcting the issue. Their only option would be to resign, which would be against any commercial logic.

40. The better construction would be that the non-absent directors could declare that the absent directors had vacated their offices under Article 150 (d) and then convene a shareholders' meeting under Article 155 to appoint new directors.

41. This would lead, on the common directors' case as set out in the Order 28 Notice, to the result that three Series A Directors[17] had ceased to be directors and there were no Series A Directors until Bronzelink took steps to appoint replacements in April 2020.

42. The effect of Bronzelink's April and July 2020 resolutions, according to the common directors, was that since two of the Series A Directors had been removed by the February resolution[18], the Bronzelink resolution was necessary to re-elect them, as well as to elect BP, NC and CT, so then there were five individuals named in the 1 April 2020 resolution who were the Series A Directors as of 1 April 2020.

[17] *Shiwan Fan, Hai Ming Zhang and Jianluo Zhang*
[18] *Shiwan Fan and Jianluo Zhang*

Principles to be applied in construing the Articles

43. The principles of contractual interpretation as applied to a company's constitutional documents are well-known.

i) The court will identify the objective meaning of the contract by reference to what a reasonable person, having the background knowledge which would have been available to the parties, would have understood the parties to have intended by the language they used[19]. The court will use an iterative process that requires checking each suggested interpretation against the provisions of the contract and its commercial consequences[20].

ii) The meaning of the language used must be assessed in the light of the natural and ordinary meaning of the clause, any other relevant provisions of the contract, the overall purpose of the clause in the contract, the facts and circumstances known or assumed by the parties at the time the contract was made, and commercial common sense, but disregarding the parties' subjective intentions[21].

iii) However, when construing articles of association the surrounding circumstances will have very limited application[22]. The focus is predominantly on the text itself. There must be close attention paid to the particular words.[23]

iv) Where there are competing interpretations, the court may adopt the interpretation that is more consistent with business common sense[24]. In doing so the court must consider the quality of the drafting and the possibility that one side may have agreed to do something which, with hindsight, did not serve its interest. Similarly the court must keep in mind the possibility that a provision was a negotiated compromise or that the parties could not agree more precise terms[25].Corporate constitutional documents must be construed in a way that gives them commercial efficacy[26].

v) As Jenkins LJ observed, the articles of association of a company:

"… *should be regarded as a business document and should be construed so as to give them reasonable business efficacy, where a construction tending to that result is admissible on the language of the articles, in preference to a result which would or might prove unworkable*'[27].

[19] *Ennismore v Fenris 2016 (1) CILR (PC) at § 17 per Lord Clarke of Stone-cum-Ebony*
[20] *Ennismore supra at § 17*
[21] *Ennismore supra at § 17*
[22] *HSBC Bank v Clarke [2007] 1 LRC 544 (PC) at § 4 per Lord Walker*
[23] *Jones v BWE International Ltd [2003] EWCA Civ 298 at § 23 per Arden LJ*
[24] *Tempo v Fortune 2015 (2) CILR Note 5 (CA), applying Rainy Sky v Kookmin [2011] 1 WLR 2900*
[25] *Wood v Capita [2017] AC 1173 at § 11 per Lord Hodge*
[26] *FIA Leveraged Fund [2012] (1) CILR 248 at § 79*
[27] *Holmes v Keyes [1958] 2 All ER 129 (CA) at p. 138*

Application

44. I accept Mr Lightman QC's argument that whilst it is the case that the Series A Directors were absent from three successive meetings of the board without special leave of absence from the directors, a proper construction of Article 150 (d) does not lead to the result contended for by the common directors.

45. Mr Lightman QC accepted that the stark position put forward at paragraph 47 of his skeleton argument that the power of removal granted to the board by Article 150 (d) does not apply to either Series A Directors or common directors, and is confined to the removal of directors who are neither, could not be maintained. A quorate board can act by passing a resolution in accordance with Articles 154 and 150 (d) that a director has vacated office.

46. Article 150 (d) requires the passing by the board of ***'… a resolution*** *that he has by reason of such absence vacated office' (*my emphasis).

47. The '*they*' in Article 150 (d) must mean the quorate board, not just the non-absent directors.

48. Both the Articles and the Shareholders' Agreement of 3 June 2016 require that a quorum of at least five directors, of which at least three must be Series A Directors, is needed for the passing of a resolution by the company's board.

49. Article 154 provides under the heading '*Proceedings of directors'* that:

> "*The quorum necessary for the transaction of the business of the Directors* ***shall be at least two (2) Common Directors and three (3) Series A Directors*** *(provided that if a meeting of Directors has been duly convened and adjourned due to lack of quorum caused by the absence of at least two (2) Common Directors, the continued absence of a Common Director at the next subsequently convened meeting shall not constitute a lack of quorum and the presence of any five (5) Directors as such reconvened meeting shall be deemed to form a quorum…'* (my emphasis).

50. Similarly, clause 3.7 of the Shareholders' Agreement provides:

> *'Any Board meeting shall have a quorum* ***if at least two (2) Common Directors and three (3) Series A Directors are present*** *provided that if a meeting has been duly called and adjourned due to lack of quorum caused by the absence of at least two (2) Common Directors the continued absence of a Common Director at the next subsequently called meeting shall not constitute a lack of quorum except with respect to any board meeting called to address the Supermajority Matters set forth in clause 3.9"* (my emphasis).

Decision

51. It follows that the 7 February 2020 meeting was not quorate, so the transaction of any business of the directors and any resolutions passed at that board meeting were of no effect and are null and void.

52. This makes commercial sense as it cannot be right, as the common directors contend, that a resolution removing Series A Directors can be passed without a quorum. Article 154 and clause 3.7 of the Shareholders' Agreement must apply to any resolution of the board under Article 150(d).

53. Moreover, it is not correct to assert that the common directors were left in the lurch and had no effective options given the non-attendance of the Series A Directors. They could have convened an extraordinary general meeting under Article 100 or Article 155. They did not do so and chose to embark on a different course of action, no doubt for their own reasons.

54. It also follows that the 11 February 2020 resolution signed by the common directors purporting to remove NC as CTO is null and void. This is because Article 161 provides that "A resolution in writing… signed by all the Directors for the time being… shall be valid and effectual as if it had been passed at a meeting of the Directors… duly convened and held". Since the 11 February resolution was only signed by the common directors, it was of no effect and is null and void. Accordingly, the purported removal of NC as CTO by the written resolution dated 11 February 2020 is of no effect and is null and void.

55. I will grant the relief sought in the summons dated 23 July 2020 save that the date of appointment of Mr Wan will be declared to be 20 July 2020, and not 17 April 2020, for the reasons given by Mr Lightman QC.

THE HON. RAJ PARKER
JUDGE OF THE GRAND COURT