IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA 10/ 2013
(CACV010/2013)

The Right Hon Sir John Chadwick, President
The Hon Elliott Mottley, Justice of Appeal
The Hon Ian Forte, Justice of Appeal

ON APPEAL FROM THE GRAND COURT
Justice Andrew Jones QC
FSD 26/2013 (AJJ)

BETWEEN

PORTA REEF
INDIA ENTERTAINMENT CITY

Claimants/Appellants

and

FATENAH HASHIM SAWAN

Defendant/Respondent

Lord Falconer of Thoroton QC with **Mr James Eldridge** of Maples and Calder appeared for the Appellants
The appeal was from an Order made without notice to the Respondent. Notice of Appeal was not served on the Respondent. The Respondent did not appear and was not represented

Hearing: 25 July 2013
Judgment: 26 July 2013

JUDGMENT

Revised from transcript and Approved – released 13 August 2013

Sir John Chadwick, President

1. This is an appeal, with the leave of the judge, from an order, made on 26 April 2013 by Justice Andrew Jones QC, refusing permission to serve the originating summons in these proceedings on the defendant out of the jurisdiction.

2. The claimants are companies incorporated in the Cayman Islands. They each carry on

business as a closed ended private equity fund. In particular, the first named claimant, Porta Reef, invests in the development of a specific real estate project on Reef Island in Bahrain; and the second named claimant, India Entertainment City ("IEC"), invests in a "multi-faceted infrastructure project" in India, near Mumbai.

3. Each fund was promoted by Abu Dhabi Investment House PJSC ("ADIH"), a company incorporated and having its principal place of business in Abu Dhabi in the United Arab Emirates. ADIH has a representative office in Bahrain.

4. ADIH is the investment adviser and fund manager in respect of each of the two Funds. There are no independent directors, and no administrator, of either Fund. All decisions in relation to the Funds and all administrative functions are made and performed by ADIH. In particular, instructions for the conduct of this litigation are given by ADIH on behalf of the Funds.

5. The Funds invited subscription for shares on a limited and confidential basis through Private Placement Memoranda. There was a Private Placement Memorandum in respect of each Fund. The Private Placement Memorandum in respect of Porta Reef invited subscription for 3.3 million shares at US$10 each: a total subscription of US$33 million. Porta Reef was described as an exempted company established in the Cayman Islands for the purpose of investing in the Porta Reef real estate project on Reef Island in the Kingdom of Bahrain. The minimum subscription was US$100,000; and the projected internal rate of return was in excess of 20% per annum over an anticipated 12-month investment period. The Private Placement Memorandum in respect of IEC invited subscription for 40 million shares of $10 each: a total subscription of US$400 million. IEC was described as an exempt company established in the Cayman Islands for the purpose of developing infrastructure and associated works to India's first integrated entertainment city. The minimum subscription was $250,000, and the targeted return on investment was 75% over an anticipated two-and-a-half year investment period.

6. Projected returns of that nature carry associated risks. The Private Placement Memoranda make it clear that subscriptions are offered to sophisticated investors able to appreciate and valuate those risks. The relevant "health warning" appears prominently under the heading "Notice" on the first page of the Porta Reef memorandum in these terms:

> "This private placement memorandum is furnished on a confidential basis for the purpose of evaluating an investment in the shares of Porta Reef (the 'Company'), a Cayman Islands exempted company. The information contained herein is intended solely for selected sophisticated investors having the necessary expertise to determine whether to accept the risks inherent in such an investment."

There is a similar health warning in the first paragraph of the IEC memorandum.

7. Those interested in investing in either Fund did so by applying for shares under Subscription Agreements. In each Subscription Agreement, the applicant confirmed that he or she had read the Private Placement Memorandum and had understood its terms. The applicant declared that he or she knew that the placement was subject to the terms and dates set out in the Private Placement Memorandum and the Memorandum and Articles of Association of the company in which they were seeking to invest. And the applicant confirmed that he or she had had a copy of the Private Placement Memorandum and had been given access to and an opportunity to examine the Principal Documents as defined in the Private Placement Memorandum. Those Principal Documents were the Memorandum and Articles of Association of the company and the Subscription Agreement. The Subscription Agreement provided that it would be governed and construed in accordance with the laws of the Cayman Islands in each case.

8. In each Private Placement Memorandum - in a section headed "Additional Information" - there was set out, under the heading "Redemption", the basis of the Fund's right to redeem the investor's shares:

> "The Company may at any time mandatorily repurchase or redeem Shares on a pro rata basis, and each Shareholder shall receive, pro rata to the number of Shares held, such price as the Directors may determine (net of any Performance Fee due to ADIH, if any, as stipulated in the section headed 'Placement & Subscription - Performance Fee').
>
> In addition, the Company may mandatorily repurchase or redeem any Shares on an individual basis and the price per Share shall be at the discretion of the Directors.
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> Shares cannot be redeemed at the option of a Shareholder."

It is that latter feature which has led the Funds to be described as "closed ended private equity funds". It is open to the Fund to redeem when it chooses; but the investor has no right of redemption.

9. The defendant named in the originating summons by which these proceedings were commenced is Fatenah Hashim Sawan. She is a citizen of the Kingdom of Saudi

Arabia; but she is resident in the Kingdom of Bahrain. She subscribed for shares in each of the two Funds. In particular, by an undated Subscription Agreement which she executed in June or July 2007, she subscribed US$250,000 for the issue of 25,000 ordinary shares in the capital of Porta Reef; and, by a Subscription Agreement dated 26 June 2008, she subscribed US$1 million for 100,000 ordinary shares in the capital of IEC. The shares were issued by the Funds pursuant to the Subscription Agreements, and Ms. Sawan was recorded as a shareholder in the Register of Members of each fund. We were told that the Registers of Members were, in fact, maintained in Abu Dhabi.

10. The judge described, at paragraphs 4 and 5 of the judgment which he delivered on the 26th April 2013, the progress that had been made in the projects in which the Funds were respectively involved. In particular, the judge pointed out that construction of the Porta Reef development had been completed; but that sale of the apartments had progressed much more slowly than envisaged in the Private Placement Memorandum. He observed that, on 27 December 2009, ADIH had written on behalf of Porta Reef to investors, including Ms. Sawan, informing them that, as a result of delay to the project beyond its control, it had decided to buy back 25% of each investors' shares at the subscription price: on the basis that the remaining capital profit share would be paid out when the apartments had been sold. Ms. Sawan replied to that letter on 4 January 2010, raising certain questions and concerns. Those concerns were addressed in a letter from ADIH dated 10 January 2010 As the judge pointed out, she seemed to have been satisfied with the response she obtained because she returned her original share certificate in Porta Reef and accepted payment of 25% of the subscription price - a sum of US$62,500 - without any further question or complaint. The effect of that was to reduce her shareholding in Porta Reef from 25,000 shares to 18,750 shares. Subsequently, in March and June 2010, further partial redemptions (of 10% in each case) were effected in Porta Reef; so Ms Sawan's total holding in that Fund was reduced further, leaving her with 13,750 shares in Porta Reef. The share register was amended accordingly.

11. In May 2012, ADIH wrote to shareholders in Porta Reef to inform them that a number of the apartments remained unsold and that they would have the option of swapping their remaining shares for apartments as a means of realising the Fund's assets more quickly. The letter indicated a projected loss of 38.11%: that is to say, investors could

expect to receive back some 61.89% of their original investment on redemption. Given that they had already received, by way of partial redemptions, 45% of their original investment, the amount to come was some 16.89% of the original investment: reflecting a substantial loss.

12. Some investors took up the "swap" offer: others, including Ms. Sawan, did not. On 4 November 2012, ADIH wrote to Ms. Sawan to bring her up to date with the then current position: informing her that the swap offer on the remaining apartments had been agreed and was closing with the swap participants, that once that had been completed the Fund would go through the process of winding down and distributions would commence, and that investment closure was targeted for the end of that year - that is, the end of 2012 - subject to completion of the swap processes.

13. The position in relation to the IEC project was set out in an Investor Report circulated in or about September 2012. In that report it was stated that the project had encountered delays and difficulties; and it was projected that investors would suffer a negative return of some 11.5% (although that loss was, at that stage, unrealized). A new management team had been engaged in India. An investment bank had been engaged with the intention of a proposed two-stage exit strategy, involving a local joint venture partner yet to be found as a means of attracting new institutional investors who might buy out the existing shareholders.

14. The information in the letter of 4 November 2012 – together with information in the IEC Investor Report – seems to prompted Ms. Sawan to instruct lawyers in Bahrain. Those lawyers wrote to the chief executive officer of ADIH on 12 November 2012, making four points in relation to the investments which Ms. Sawan had made in Porta Reef and IEC. The letter asserted that, in the light of what was alleged to be the unlawful behaviour of ADIH and breach of the Principal Documents, ADIH should immediately refund all monies received from Ms. Sawan in respect of her investments in the Funds. It was said that Ms. Sawan required to be put into the state that she ought to have been in had ADIH complied with its duties, and to be compensated for loss of opportunities which would have been available to her. Her lawyers offered to discuss the matter further, if there was any prospect of finding an amicable way forward; but, in the absence of a positive response, indicated that she would bring actions in the courts of Bahrain against ADIH in Bahrain.

15. The demands made on behalf of Ms Sawan were rejected by lawyers for ADIH, Gibson Dunn, through their office in Dubai, in a detailed letter of 13 December 2012. Ms. Sawan's response was prompt: she commenced proceedings in Bahrain against ADIH. In those proceedings, she claimed: (i) an attachment order in the sum of $1.25 million (being the total of her subscription monies); (ii) a ruling to perform attachment; (iii) a ruling to perform sequestration: (iv) an order voiding all transactions and contracts between ADIH and herself regarding the investments in the two projects named "India's Entertainment City and Porta Reef" for lack of a licence from the Central Bank of Bahrain permitting ADIH to provide the services subject to the contract which, it was said, she had made with ADIH and requiring ADIH to return her to the position in which she had been before that contract by repaying to her an amount of US$1.25 million with 10% interest, until paid in full: and (v), in the alternative – or, as it is put in the claim, "in precaution", an order voiding all the transactions and contracts between ADIH and herself regarding the investments in the two projects due to fraud, and requiring ADIH to return her to the position in which she had been before by repaying to her an amount of US$1.25 million with 10% interest, until paid in full.

16. As I have said, the defendant to the proceedings in Bahrain is ADIH. ADIH filed a response to those proceedings. In the course of that response, it was asserted that the investment contracts had not been made by Ms. Sawan with ADIH. It was said:

> "The Plaintiff's contracts were with each of two Cayman Islands companies being India Entertainment City Limited and Porta Reef Limited. The subject matter of her claim, therefore, is shareholdings in two Cayman Islands companies, and thus the Honourable Court lacks competence to hear the present case.
>
> Thus, if the Plaintiff has any complaint over her two investments, she should file it with the courts of the Cayman Islands."

And it was asserted that her investment contracts with Porta Reef and IEC were regulated by rules and laws of the Cayman Islands and were governed by Cayman Islands law; and, therefore, the courts of Bahrain were not competent to entertain the dispute. There was also a defence on the merits in relation to fraud and the lack of licence.

17. Ms. Sawan filed a response to that pleading in which she referred to the allegation that her contracts were with the Funds. She asserted that:

> "Whereas, this allegation is inadmissible given that Plaintiff did not conclude

> an agreement with the two companies, India Entertainment City and Porta Reef, but had a direct contract with the Defendant, which is the party that marketed those two projects and is the one that received the claimed amounts from Plaintiff, in which case the Defendant's argument for dismissing the lawsuit for being filed without merit must be set aside."

That assertion may seem strange to the eyes of a lawyer in the Cayman Islands: given (i) that the subscription agreements, on their face, do appear to be agreements which Ms. Sawan made with the Funds, not agreements which she made with ADIH, and (ii) that the monies which she paid were paid to the Funds for investment in shares in the Funds rather than monies paid to ADIH. But it is not for the courts in this island to take a view as to what the result of the claim made against ADIH in Bahrain is likely to be.

18. What these courts must appreciate, however, is that the only claim that is made by Ms. Sawan is a claim against ADIH in respect of breach of regulatory requirements in Bahrain, and fraud which, if committed, would have been committed in Bahrain; and that the relief she seeks is payment of $1.25 million from ADIH. She seeks no relief - and has never indicated that she seeks any relief - from either of the Funds.

19. It was in those circumstances that the originating summons was issued in February 2013, and leave to serve out was brought before Justice Andrew Jones. The relief sought in the originating summons by Porta Reef is this:
    (1) A declaration that the Subscription Agreement, undated but signed by the Defendant and delivered to Porta Reef in or about June or July 2007, is a valid and binding contract between the Porta Reef and Ms Sawan.
    (2) A declaration that pursuant to the Subscription Agreement, Porta Reef duly issued 25,000 shares to Ms Sawan, which is properly recorded in the Register of Members.
    (3) A declaration that, as registered owner of the Porta Reef shares, Ms Sawan is bound by the Memorandum and Articles of Porta Reef, including, but not limited to, the provision governing a redemption or repurchase of the Porta Reef shares.
    (4) A declaration that, in the circumstances, there is no legal or factual basis on which Ms Sawan can require Porta Reef to cancel the Porta Reef shares.

    Relief in similar terms, *mutatis mutandi*, is sought by IEC.

20. The Subscription Agreements, as between Ms. Sawan and each of the two Funds, are now spent. The purpose of those agreements was to oblige her to take, and the

relevant Fund to issue of shares in the Funds. She paid the subscription monies and the Funds issued the shares. Thereafter, Ms Sawan's rights in relation to the shares have been governed by the Memorandum and Articles of the Fund; read, perhaps, with the Private Placement Memorandum. Declarations in the terms sought by paragraph (1) of the relief would now serve no purpose.

21. Second, there is no dispute that Ms Sawan was issued 25,000 shares in Porta Reef and 100,000 shares in IEC. There is no dispute that – following the partial redemptions - she is now the registered holder of 13,7500 shares in Porta Reef; or that she continues to be the registered holder of 100,000 shares. She has not asserted, as against the Funds, that she is not the holder of those shares; or that she is not properly entered in the Register of Members as such. The Funds have no need of declarations in the terms sought by paragraph (2) of the relief.

22. Third, there is no dispute that, as registered owner of the shares, she is bound by the Memorandum and Articles of Association; or that her rights in relation to redemption are determined by the Memorandum and Articles of Association. The Funds have no need of declarations in the terms sought by paragraph (3) of the relief.

23. Fourth, Ms Sawan has not sought to require either Porta Reef or IEC to cancel the shares which are registered in her name. There is no dispute in relation to the cancellation of those shares. That is not a matter that is in issue between Ms Sawan and the Funds or either of them. The matter in issue in the Bahrain proceedings, as I have sought to explain, is whether ADIH is obliged to pay her $1.25 million by way of compensation. The Funds have no need of declarations in the terms sought by paragraph (4) of the relief.

24. When the matter came before the judge, he pointed these matters out. He directed himself, correctly, that, before making an order for service out of the jurisdiction, he had to be satisfied that the pleaded claim fell within one or other of the categories specified in Order 11, rule 1(1) of the Grand Court Rules. He was satisfied that it did. He was correct to take that view. If the claim is seen as a claim for declarations that the Subscription Agreements should not be rescinded or treated as null, the case can be brought within paragraph (d) of Order 11, rule 1(1). But, more broadly, if one looks at the matter as a claim relating to the rights or duties of a member of a

company registered within the jurisdiction, the claim plainly falls within paragraph (ff) of the rule.

25. The judge then asked himself whether there was an arguable case for the grant of the declarations sought in the originating summons. He came to the conclusion that there was not. He came to that conclusion because he took the view that a court in the Cayman Islands could not sensibly be asked to make a declaration that the subscription agreements were valid and binding in circumstances where, first, Ms. Sawan was not asserting that whatever agreements (if any) she had made with the Funds were not valid and binding - in that, in the Bahrain proceedings, she is asserting not that she made agreements with the Funds which are not valid and binding, but, rather, that she made no agreements with the Funds at all – and, second, that, insofar as she was asserting that some agreement that she had made with ADIH was not valid and binding, it was impossible to ascertain with any degree of particularity from the material at present before the court the basis upon which that assertion was founded. So, the judge took the view that, in pursuing the relief sought in these proceedings, the claimants would be, as he put it, "boxing at shadows." There was no issue which the court could be asked properly to decide or on which the court could sensibly make a declaration.

26. The judge went on to consider whether the declarations, if made, would achieve any useful objective. He referred to the argument that the Funds needed to know whether their share registers are accurate. He pointed out that Ms Sawan had made no challenge to the accuracy of the share registers. There was no reason why, both as against Ms Sawan and as against other shareholders, the Funds should not treat their share registers as accurate unless and until faced with a claim for rectification. As matters stand, Ms Sawan is entitled to the same pro rata distribution on redemption as the other shareholders. No one has suggested otherwise. He referred, also, to the submission that the declarations sought in these proceedings (if made) might be of assistance as a defence to the claims made against ADIH in Bahrain. But, as the judge pointed out, it was quite impossible to know (on the material presently before these courts) what effect (if any) declarations made by a court in the Cayman Islands would have in the Bahrain proceedings. He might also, perhaps, have pointed out that it is difficult to see why the assets of the Funds should be expended in pursuing relief in

this jurisdiction in order to assist ADIH resist a claim made against it in Bahrain.

27. In my view, the judge was entitled to take the view that the declarations sought in the originating summons, as presently formulated, are not declarations which a court in the Cayman Islands could sensibly be asked to make on the basis of the material at present available. Indeed, as it seems to me, the judge was not only entitled to take that view, he was correct to do so.

28. I do not dismiss the possibility that it might become necessary, in the future, for the Funds (or one or other of them) to pursue proceedings in this jurisdiction to which Ms. Sawan was a defendant. It is possible to envisage circumstances in which Porta Reef, if it were about to make a distribution to its shareholders on completion of the development project in Bahrain, would want to know whether it should treat Ms. Sawan as the holder of 13,750 shares for the purpose of making that distribution. But it is pertinent to have in mind, first, that Ms Sawan's interest in a distribution to be made by Porta Reef would be relatively very small in the context of the whole distribution that would have to be made and, second, that the other shareholders might need to be represented in those proceedings. It seems to me that, in those circumstances, Porta Reef might need to consider whether it would cost more to pursue proceedings for the purpose of obtaining a ruling from the Cayman Islands court on the question whether or not Ms Sawan is to be treated as the holder of 13,750 shares than to distribute on the basis that she is. Be that as it may, the first step to be taken when Porta Reef is in a position to distribute is to ask Ms. Sawan whether she wishes to be redeemed pro rata as the holder of 13,750 shares; and whether if the redemption monies are paid to her she will accept them. Given her previous willingness to accept partial redemption monies, the probability is that she would accept the final redemption monies in satisfaction of her interest in the Fund. If so, the likelihood of any other shareholder complaining must be regarded as unreal: given that the cost of bringing proceedings, which would fall on the Fund as a whole, would be likely to exceed the distribution to Ms Sawan. If a problem does arise, it seems to me that the directors of Porta Reef can come to these courts and ask for assistance in resolving it. But no problem has yet arisen; and it may never do so.

29. In relation to the IEC project - where Ms Sawan's investment is larger, but still relatively small in relation to the whole – the need to determine whether or not Ms

Sawan should be treated as a shareholder in respect of the 100,000 shares registered in her name is unlikely to arise until the investigations that are taking place in India and the search for an alternative institutional investor have either borne fruit or failed. If, at that stage, there is to be a distribution on redemption, the Fund can come to the Cayman Islands courts and ask for directions. In particular, they can ask whether the appropriate course is simply to invite Ms. Sawan to say whether or not she wishes to accept a pro rata distribution in respect of her investment. By that time, it may be that the proceedings in Bahrain will have concluded; or, at the least, will have reached a position in which it is clearer than it is now just what allegations are being made by Ms. Sawan in those proceedings, how far they impinge on the Fund and, in particular, whether they could lead to a claim for rectification of the register.

30. As things stand at the moment, Ms. Sawan is a member registered on the registers of shareholders. Unless and until the registers are rectified, there is no reason under the law of the Cayman Islands why the directors of the Funds should not treat her as such. In those circumstances, although ADIH may perceive that it would achieve some advantage by taking a declaration from these courts to the court in Bahrain, the Funds themselves have no dispute with Ms Sawan which needs to be determined in the Cayman Islands courts. There is no reason why these courts should determine issues of fact as between ADIH and Ms Sawan which are plainly best tried, if they are to be tried, in Bahrain where the events took place and all those concerned appear to live.

31. So, although I would not strike out the originating summons, I would dismiss this appeal on the basis that the judge was entitled to take the view that no case for service of the originating summons outside the jurisdiction. Events can be left to take their course for the time being.

Elliott Mottley, Justice of Appeal:

32. I agree with the decision of the President.

Ian Forte, Justice of Appeal

33. I also agree.