IN THE SUPREME COURT OF BELIZE, A.D. 2015

CLAIM NO. 208 OF 2015

IN THE MATTER **of an application pursuant to sections 141 and 142 of the International Business Companies Act, Chapter 270 of the Laws of Belize**

AND

IN THE MATTER **of a decision of the Registrar of the International Business Companies Act, Chapter 270 of the Laws of Belize**

BETWEEN:

SMARTWAY BRASIL S.A. **Claimant**

AND

THE REGISTRAR OF INTERNATIONAL BUSINESS COMPANIES **Defendant**

In Court.

BEFORE: Hon. Chief Justice Kenneth Benjamin.

July 22 & 24, 2015.

Appearances: Mr. Eamon Courtenay, SC for the Claimant.
Ms. Anika Jackson, Solicitor General and Ms. Samantha Matute, Crown Counsel for the Defendant.

JUDGMENT

[1] This matter requires the Court to interpret the International Business Companies Act, Chapter 270 of the Laws of Belize ("the Act"). The Claimant is an international business company incorporated by continuation under the Act. The Claim seeks to

challenge the decision of the Registrar of IBCs refusing to register an amendment to the Claimant's memorandum of association.

BACKGROUND

[2] On March 6, 2007, Smartway Brasil S.A. (Smartway BVI) was incorporated in the British Virgin Islands under the Business Companies Act, 2004. Smartway BVI was authorised by its Memorandum of Association to issue a maximum of 50,000,000 no par value shares of a single class. Thereafter, 34,501,834 fully paid up shares of no par value were issued and Smartway BVI had a paid up capital of $2,383,320.00.

[3] Smartway BVI was continued in Belize and on December 27, 2013 the Claimant was duly incorporated and registered under the International Business Companies Act, Chapter 270 by a registered agent. In the Memorandum of Association, the authorised capital of the Claimant is stated to be $50,000.00 divided into one class of 50,000 shares of one dollar par value. The Claimant says that the stated authorized share capital is an error and the authorized capital ought to be identical to that under the BVI Memorandum of Association. With a view to rectifying the anomaly, the Claimant passed a resolution dated May 1, 2014 to amend the authorised capital to a maximum of 50,000,000 of a single class with no par value. Letters were written to the Deputy Registrar of IBCs and to the Director General of the International Financial Services Commission on May 28, 2014 and July 16, 2014 respectively seeking to explain the error and to have same corrected by means of the Resolution. By an email dated November 11, 2014, the Director General refused to entertain the amendment. The Registrar has refused to register the amendment to the Memorandum of Association for the reasons set out in the said email.

[4] The Claim Form seeks the following orders:

> "1. A Declaration that the 50 million shares of no par value of a single class held by Smartway BVI represents the actual authorised shares which applies in Belize upon continuation of Smartway Belize.

In the alternative,

2. A Declaration that once both requirements found in section 16(1) and (2) of the IBC Act are satisfied for the amendment of the Memorandum, the Registrar has no discretion and "must retain and register the copy of the amendment" to the Memorandum.

3. A Declaration that the Resolution of the members of Smartway Belize made pursuant to sections 2(6)(b)(i) and 70 of the IBC Act to authorise it to issue a maximum of 50 million shares with no par value of a single class, is valid.

4. Costs.

5. Such further or other orders as may be just."

The Claim was supported by the affidavit of a representative of the registered agent, Mitchell O'Brien.

[5] In the affidavit, it was deposed that when Smartway Belize was continued in Belize the share capital and authorised shares were "erroneously" stated to be 50,000 shares of one dollar par value instead of 50,000,000 no par value shares of one class. Hence, the passing of the Resolution amending the Memorandum of Association to correct the error pursuant to the right so to do under clause 7 of the Memorandum and in accordance with section 2(6)(b)(i) of the Act.

[6] The Articles of Continuance attached to the Resolution of Smartway BVI dated December 15, 2013 were exhibited. The Articles of Continuance do not state the authorised capital.

[7] The response of the Defendant was set out in an affidavit sworn to by the Deputy Registrar. It was contended that there was no error at the time of continuation and further that the Defendant acted lawfully in refusing to register the amendment to the Memorandum of Association. The main contention was that the Claimant had failed to comply with the requirements of section 12(1)(f) of the Act.

THE ISSUES

[8] The Claimant filed a Pre-trial Memorandum and the Defendant filed a Statement of Facts and Issues. The following issues have emerged from a combined reading of both documents:

(a) Was there an error when the Claimant was registered with an authorised capital of 50,000 shares of one dollar par value instead of 50,000,000 no par shares of a single class?

(b) Does the Act allow for the registration of companies which have shares of a single class of no par value and therefore without an authorised share capital?

(c) If (b) is answered in the affirmative, whether the Registrar acted lawfully in refusing to register the amendment to the Memorandum of Association of the Claimant to reflect the power to issue 50 million shares of a single class with no par value?

[9] The Claimant submitted that the Act has been complied with as it does permit registration of a single class of shares with no par value and no authorised share capital. It was further said that on that basis the Registrar was not legally entitled to refuse to register the Resolution.

[10] The Defendant argued that there was no error at the time of confirmation and that, in any event, section 12(1)(f) of the Act had not been complied with.

IS THE CLAIMANT A PROPER PARTY?

[11] By way of Notice of Application dated June 15, 2015, the Defendant applied to have the Claim struck out. The Court took the view that the contentions in the application were subsumed in the substantive Claim which had already been set for trial. Accordingly, arguments were entertained as part of the response to the Claimant's submissions.

[12] The Defendant asserted that the proper Claimant ought to be the registered agent and not the Claimant. This contention is entirely without foundation as the registered agent acted as an agent for the Claimant, which is the principal and hence entitled to act in its own name. Learned Senior Counsel for the Claimant drew attention to section 141(1) of the Act which reads:

> "141(1) A company incorporated under this Act may, without the necessity of joining any other party, apply to the court, by summons supported by an affidavit for a declaration on any question of interpretation of the Act or of the Memorandum or Articles of the company."

It cannot be gainsaid that by virtue of being continued in Belize, the Claimant is a company incorporated. This is the purport of section 16(1) of the Act. It follows that the Claimant has statutory mandate to bring the present claim. For completion, section 142 empowers a judge in chambers to exercise any jurisdiction vested in the Court by the Act. It ought not to have escaped the attention of the defendant that the very rubric of the claim ought to ground the foundation for bringing suit on sections 141 and 142 of the Act.

[13] I therefore hold that the Claimant is possessed of standing based on the statutory right to seek an interpretation of the Act as is the intent of the Claim.

WAS THERE AN ERROR BY THE CLAIM?

[14] The Registrar has rejected the assertion by the Claimant that the authorised share capital was erroneously stated as $50,000.00 divided into 50,000 shares of one US dollar par value instead of 50,000,000 no par value shares of a single class. No evidence was relied upon to support this bald assertion in the affidavit of the Deputy Registrar. Indeed in the affidavit of Marcia Mohabir filed with the notice of the Application to strike out the Claim, it is stated as one of the reasons why no reasonable grounds exist for bringing the Claim the following (at para. 6 iii):

> "The registered agent erroneously filed the Memorandum of Association stating the incorrect number of authorized shares of the Claimant, knowing it to be fifty million (50,000,000) shares."

[15] In the course of argument, the Solicitor General was invited to point out what evidence there was that an error was not made when the Company was continued. The response was that there was attached to the affidavit of Mitchell O'Brien, the Memorandum and Articles of Association approved by the resolution of the Directors for continuation. With respect this does not constitute proof of absence of error.

[16] It would pass strange that, having regard to the number of shares issued by Smartway BVI and the amount of funds invested in that entity, the existing shareholders would be deliberately prejudiced by the setting of an authorised share capital of $50,000.00.

[17] The error is a matter that originates in the human mind. Unless admitted, such error can only be established by external indicia. Such evidence has not been forthcoming and therefore the *ipsa dixit* of Mitchell O'Brien has not been thwarted.

COMPLIANCE WITH SECTION 12(1)(f) OF THE IBC ACT

[18] Both sides were *ad idem* that the construction of section 12(1)(f) of the Act loomed large in this matter. They differ as to interpretation. So far as relevant the provision reads:

> "12.(1) The Memorandum must include:
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> ...
>
> (f) a statement of the authorised capital of the company setting forth the aggregate of the par value of all shares with par value that the company is authorised to issue and the amount, if any, to be represented by share without par value that the company is authorised to issue (emphasis added)."

The clauses under section 12(1) are plainly to be compulsorily incorporated in the Memorandum of Association. Not only must these matters be stated but the individual requirements must be meticulously met and cannot be omitted whether upon initial registration or continuation or upon a subsequent amendment to the Memorandum of Association.

[19] The *fons et origo* is the definition of share authorised capital in section 2(1) of the Act which states:-

> "authorised capital" of a company means the sum of the aggregate par value of all shares with par value which the company is authorised by its Memorandum to issue, plus the amount, if any, stated in its Memorandum as authorised capital to be represented by shares without par value which the company is authorised by its Memorandum to issue."

It is of significance that the language of the definition and section 12(1)(f) is for all intents and purposes identical.

[20] The validity of the resolution in so far as the power of the Claimant to pass same and the procedure adopted under its Memorandum and Articles of Association is not a matter of dispute. The Defendant argues that section 12(1) of the Act states the Memorandum must not only state the authorised shares but must also state the authorised capital of the company. Therefore, the argument concludes, it is impossible to register the amendment pursuant to sections 16(2) and 12(1) as it needed to expressly state the authorized share capital in a dollar amount. The following paragraphs in the email of the Director General are pertinent to the argument:

> "4 There is a clear difference between "Authorised Capital" and "Authorized Shares". The "Authorised Capital" means the **dollar amount**, while the term "authorised share" of no par value has no dollar amount. Under section 12(1) of the IBC Act of Belize the Memorandum of Association must state the authorised capital, whether the shares are to be of par value or of no par value. It would be permissible, for example, to

state that the company has a share capital of US$50,000.00 with shares of no par value. In such a case, the number of shares would depend on the value placed by the Company on its shares.

5. It follows that an IBC cannot be registered in Belize without a share capital in dollars and cents. It would not, therefore, be possible to register a company in Belize simply by stating that it may issue **shares** (or any other number) of no par value."

[21] Learned Senior Counsel for the Claimant commended a different interpretation to the Court. In dissecting the wording of section 12(1)(f), it was urged that there are two scenarios contemplated under the paragraph of the sub-section. First, a statement of the authorised capital of the company setting forth the aggregate of the par value of all shares with par value that the company is authorised to issue. This category was targeted by the amendment as it did not contemplate that an amount is required to be stated as the authorized capital. In other words, the amount of shares must be stated and no par value is required to be included.

[22] In answer to the defendant's contention, it was said that the use of the words "if any" serves to highlight that an amount or monetary figure need not be stated as the authorised capital. The consistency of the wording of the definition of 'authorised capital' with section 12(1)(f) was highlighted to buttress the interpretation.

[23] A *fortiori*, it was submitted, although not be used as a primary source but merely for consistency, section 113(t)(ii) and section 114(1)(c)(ii) allow for fees to be paid in respect of the registration and annual licence respectively of a company that has no authorised capital and all of its shares have no par value. These provisions read as follows:

s. 113(t) $350 upon the registration by the Registrar of a company incorporated under this Act:

(ii) the company has no authorised capital and all of its shares have no par value;

s. 114(1) A company the name of which is on the Register on the 31st December in a year shall, before the 31st July of the following year, pay to the Registrar an annual licence fee as follows:

(c) $350 if -

(ii) it has no authorised share capital and all its shares have no par value

CONCLUSION

[24] The authorised capital as defined by section 2 does not necessarily include the requirement of shares with a dollar amount. The purport of section 12(1)(f) is that there are two distinct categories and it is open to a company to adopt either or both in its Memorandum of Association. In respect of the Resolution, the Claimant seeks to migrate from the first category which contemplates an authorised capital represented by a dollar amount to the second category which allows for shares with no par value. Whether or not it was an error is of no moment, although I have ruled that there has been no evidence to establish absence of error. The use of the word 'and' in section 12(1)(f) according to the meaning ascribed in the Interpretation Act means "and" or "or". This is permissive of the two scenarios urged on behalf of the Claimant.

[25] There is no denial on either side that the Registrar is duty bound to apply section 12(1)(f) and therefore the Claimant is entitled to prevail in these proceedings. I am prepared to make the Declarations that are sought in the alternative and the Claimant is entitled to its costs which, if not agreed, are to be calculated upon the claim being valued at $50,000.00.

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KENNETH A. BENJAMIN
Chief Justice