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 Chambers.

BEFORE: Hon. Chief Justice Kenneth Benjamin.

September 8 & 11, 2015.

Appearances: Mr. Eamon Courtenay, SC for the Applicant/Claimant.
Ms. Anika Jackson, Solicitor General and Ms. Leonia Duncan, Crown Counsel for the Respondent/Defendant.

JUDGMENT

[1] On July 24, 2015, the Court having heard arguments on both sides made the following declarations:

1. A Declaration that once both requirements found in section 16(1) and (2) of the International Business Companies ("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; and

2. A Declaration that the Resolution of the members of Smartway Brazil S.A. 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.

[2] Presently before the Court is an urgent Notice of Application for a post-judgment injunction dated August 28, 2015 by the Applicant/Claimant pursuant to Parts 11, 17 and 63 of the Supreme Court (Civil Procedure) Rules. 2005. The following orders are being sought:

"1. That the Defendant, through its Deputy Registrar, namely, Santiago Gonzalez be ordered to retain and register the amendment to the Claimant's Memorandum of Association filed on the 30th day of July, 2015 at the International Business Companies Registry on or before 4.00 p.m. on the ..... day of 2015;

2. Any further or other relief deemed just;

3. An order for wasted costs be made against Counsel for the Defendant."

The application was supported by the second affidavit of Mitchell O'Brien, the registered agent of the Claimant. In response, the second affidavit of Santiago Gonzalez was filed and in reply thereto, Mitchell O'Brien filed a third affidavit.

[3] The affidavits set out the following facts upon which the application is grounded: Sometime between July 24 and 29, 2015, documents were submitted on behalf of the

Claimant for the amendment to the Memorandum of Association to be registered. Subsequent to a discussion between Mr. Mitchell O'Brien and Mr. Santiago Gonzalez, the documents were returned on July 29, 2015. The said documents were re-submitted on July 30, 2015 with the requisite authority for the correct fees to be paid by way of deduction. At that time, a discrepancy between the Resolution and the Memorandum and Articles of Association of the Claimant was brought to the attention of the Claimant's registered agent. The discrepancy was corrected and the documents were re-submitted to the Registry on July 31, 2015.

[4] The amendment has not been registered up to the date of the hearing of this application. This situation pertained in the face of letters dated July 27, 2015 and August 18, 2015 from the Claimant's Attorneys-at-Law to the Solicitor General acting on behalf of the Registrar of International Business Companies. The second letter threatened legal action by the Claimant for non-compliance with the decision of the Court. The said letters have not been responded to prior to the service of the present application on September 2, 2015. However, a copy of a letter dated September 4, 2015 addressed to Mr. Eamon Courtenay, SC of the Claimant's firm of Attorneys-at-Law was handed up at the hearing but not addressed in the course of argument.

[5] Learned Senior Counsel prefaced his arguments on behalf of the Claimant by reference to Rule 42.8 which reads:

> "42.8 A judgment or order takes effect from the day it is given or made, unless the court specifies that it is to take effect on a different date."

Rule 42.9 mandates that a party must comply with a judgment or order immediately. The rule lists three exceptions, none of which are applicable to the order of July 24, 2015. The learned authors of Blackstone's Civil Practice (2008) had this to say in relation to the comparable Rule 40.7(1) of CPR (UK):

> "Although there is likely to be a delay between judgment being pronounced and the judgment being sealed and served; r.40.7(1) of the CPR provides that judgment in fact takes effect from the day it was given."

The combined effect of Rules 42.8 and 42.9 is that a party is obliged to comply with a judgment or order from the date it is pronounced by the Court. This is the case notwithstanding that the judgment or order has not been entered and sealed.

[6] It was contended on behalf of the Claimant that the requisite documents to support the amendment having been filed, the Deputy Registrar was duty-bound to register the amendment which he has had in his possession since July 31, 2015.

[7] In response, the learned Solicitor General asserted that the documents were still not in order as there ought to be filed a statement as to the authorized share capital, a requirement of section 12(1)(f) of the IBC Act. It was conceded that this position was never communicated to the Claimant's registered agent or Attorneys-at-Law.

[8] The issue of the interpretation of section 12(1)(f) of the IBC Act was thoroughly canvassed by both sides at the original hearing and the arguments need not be here rehearsed. The Court ruled that section 12(1)(f) must be complied with, but that, the section allows for shares with no par value and in such a scenario there is no requirement of a statement as to the authorised capital as canvassed by the learned Solicitor General.

[9] It follows that the Claimant is entitled to insist on the declaration of the Court being carried into effect. It is therefore ordered that the Deputy Registrar register the amendment to the Claimant's Memorandum of Association filed on July 31, 2015 at the International Business Companies Registry forthwith or in any event on or before 4.00 p.m. on September 14, 2015.

WASTED COSTS

[10] The Claimant sought an order for wasted costs against counsel for the Defendant. It was urged that there having been no evidence to support the refusal of the Defendant to obey the order of Court, and having regard to the expenses and costs incurred in bringing the present application in the face of the letters which were sent by

the Claimant's Attorneys-at-Law to the Solicitor General, the Court ought to order wasted costs. The relevant Rule is Rule 63.8 which states:

> "63.8(1) In any proceedings the Court may by order –
>
> (a) disallow as against the legal practitioner's client; or
>
> (b) direct the legal practitioner to pay,
>
> the whole or part of any wasted costs.
>
> (2) "Wasted costs" means any costs incurred by a party –
>
> (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal practitioner or any employee of such legal practitioner; or
>
> (b) which, in the light of any act or omission occurring after they were incurred, the court considers it unreasonable to expect party to pay."

[11] It is to be noted that the prayer for wasted costs is directed at Counsel for the Defendant. The power to make such an order is a discretionary one. The Claimant argued that the reference to section 12(1)(f) and the requirement of a statement as to the authorised share capital was contrived and in blatant disregard for the plain order of the Court.

[12] The learned Solicitor General opposed the making of a wasted costs order and stated that the definition of 'wasted costs' does not meet the facts before the Court. Although she persisted in saying that the Defendant was awaiting the presentation of proper documentation, the Court was asked to find that the order was not warranted as a remedy of last resort (see: **Harrison v Harrison [2009] EWHC 428** at para. 27). Further, on the authority of **Metcalf v Marbell et al [2002] UKHL 27** (at para 56), there has been no damage or loss established as having been visited on the Claimant.

[13] As I see it, the Claimant has established a case of Counsel for the Defendant being dilatory and less than readily responsive to requests for the registration of the amendment to the Memorandum of Association of the Claimant. However, such evidence falls far short of being improper, unreasonable or negligent. The Claimant has not met the evidentiary burden required by Rule 63.8 and the Court declines to invoke the procedure set out under Rule 63.9.

[14] The Claimant is entitled to the costs of the application. In its discretion, the Court awards costs to the Claimant in the sum of $2,500.00 to be paid by the Defendant.

_____

KENNETH A. BENJAMIN
Chief Justice