

## Case update: Travesty avoided in the BVI

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A long-awaited Court of Appeal judgment has clarified the treatment of bearer shares in BVI Companies not dealt with prior to the 'transition date' of 31 December 2009. The Court of Appeal has confirmed that 'disabled' bearer shares can still be returned to the company for redemption.

### The Case

Withers BVI acted for the shareholders in two BVI companies, Wembley Ltd and Sutton Ltd (the 'Companies'), who held only bearer shares (being shares not listed on any share register which could be transferred by the handing over of a physical bearer share certificate), which they had not deposited with a registered custodian, redeemed or exchanged prior to 31 December 2009 (the 'Transition Date'). As a consequence, the shares were disabled and the shareholders were unable to exercise any rights attaching to them. In addition, the sole director of both of the Companies had died three years after the Transition Date but without having deposited or returned the shares, leaving the Companies effectively paralysed. Apart from being unable to deal with the shares in and assets of the Companies, there was a real danger that the BVI Financial Services Commission would apply for the appointment of a liquidator. As the right to receive a distribution from any such liquidation had also been disabled, the Companies' assets would have become bona vacantia – a situation that the Companies successfully argued in the Court of Appeal would be a breach section 25 of the Virgin Islands' Constitution as amounting to the compulsory acquisition of property by the State without compensation.

To enable the bearer shares to be returned to the Companies for redemption, the shareholders sought the appointment of a Receiver over the shares as a mechanism to redeem them. Resiling from her original 'neutral' position, the BVI Registrar of Companies vigorously opposed the appointment on the basis that this would contravene the provisions of the BVI Business Companies Act, which had been carefully drafted to ensure that bearer shares would be eliminated. The Registrar considered that a failure to deal with undeposited bearer shares before the Transition Date was the fault of the shareholder and that any windfall the State would receive as a result of the liquidation of the grandfathered bearer share company was justified. Interestingly, at the High Court stage neither the Registrar considered nor the Judge held that the right to redeem a bearer share following the Transition Date was affected – ie it was still possible for a shareholder of undeposited bearer shares to return the shares for redemption after the Transition Date. The issue for the Companies was that due to the death of the sole director, there was no-one who could receive the shares on the Companies' behalf.

The Judge at first instance declined to appoint a Receiver, which she considered to be against the policy behind the elimination of bearer shares. The shareholders of the Companies appealed.

### The Appeals

The Appeals were unanimously allowed, with the Court of Appeal holding that it was *'prepared to render any assistance which [it was] able to give.'*

Crucially, in handing down judgment, Mendes JA held that *'I am in no doubt that it is just and convenient to make such an order [for the appointment of a Receiver]. Upon the expiration of the transition date, the appellant became entitled to have the companies consider redeeming their shares. It would clearly have been a travesty of justice if this Court were unable to assist the appellant if, though no fault of its own, [the sole director] had died immediately after the transition date.'*

The Court conducted a thorough examination of the power to redeem bearer shares, including when such a power arose. The Appellants' position was that the power to redeem the bearer shares was available to them after the Transition Date. The Registrar on the other hand had initially agreed that the power existed but prior to the Court of Appeal hearing had a change of heart, arguing that the power of redemption ceased to exist after the Transition Date.

The Court of Appeal agreed with the Appellants, holding that *'The power of redemption under paragraph 36 [of sch 2 of the BVI BC Act] is the*

*avenue through with the appellant's right to compensation may be satisfied in the event, as happened, they chose not to exercise the options available under paragraph 35...the Act put no time limit on the exercise of the power of redemption.....The fact that the state may be deprived of a windfall or may otherwise have a good case for the appointment of a liquidator is no basis for refusing the order.' In reaching their conclusion, the Court of Appeal held that the power to redeem arose after the Transition Date, even though the shares had not been dealt with pursuant to the Act, the leading Judge holding that '...I am quite satisfied that justice demands the appointment of a receiver to consider exercising the companies' power of redemption, and in so doing to give effect to the appellant's right not to have its property taken away without compensation.'*

## Forward Thinking

The appointment of a Receiver to return disabled bearer shares to a BVI company demonstrates that the Court of Appeal is prepared to be innovative and flexible to ensure that justice is done. The Court of Appeal made clear that all was not lost just because bearer shares had not been dealt with prior to the Transition Date. Not only can bearer shares still be returned to the Company for redemption, but also, in circumstances where at first glance that may not appear to be possible (for example there are no directors), a Receiver may be appointed for the purpose.

This judgment is welcome news to anyone still holding bearer shares in a BVI company which were not dealt with prior to the Transition Date – they can breathe a sigh of relief at knowing that their rights have not been permanently disabled and that their assets will not be confiscated by the State.

*Niki Olympitis and Sara-Jane Knock of Withers BVI acted for the bearer shareholders in both the High Court and Court of Appeal hearings. Lloyd Tamlyn of South Square was instructed by the shareholders in the High Court and Michael Black QC of XXIV Old Buildings was instructed by the shareholders in the Court of Appeal.*

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