[2022 Gib LR 269]

IN THE MATTER OF SAMIR INVESTMENTS LIMITED

IN THE MATTER OF CARUANA (as liquidator of SAMIR INVESTMENTS LIMITED)

SUPREME COURT (Restano, J.): October 14th, 2022

2022/GSC/25

Companies—voluntary winding up—distribution of assets—where four siblings inherited company's shares as joint shareholders but agreed that each should receive 25% of assets, liquidator directed to pay 25% of assets to each of them

A liquidator applied to the court seeking directions.

Samir Investments Ltd. had been incorporated in 2006. Following the death of the sole shareholder, his four children inherited the company's 100 shares. They were registered as joint shareholders. As there was a dispute between one of the children and her siblings regarding their late father's estate, the company's director had sought the voluntary winding up of the company, the appointment of a liquidator and directions as to the distribution of assets among the four siblings. The company's sole asset was an investment bank account. The liquidator calculated that, after paying the company's creditors and debts, each of the four shareholders stood to receive approximately €1.9m.

The liquidator applied under s.378 of the Companies Act 2014 for directions permitting the equal distribution of the company's assets to each of the four joint shareholders. The liquidators referred to the fact that the company's articles of association did not contain a provision governing the distribution of the company's assets following a liquidation. The Table A articles in Schedule 1 to the Companies Act 1930 provided that in the case of joint shareholders, any of them might give "effectual receipts for any dividend or other moneys payable on or in respect of the share" (art. 94) and that any dividend could be paid by cheque or warrant sent through the post (art. 95). The liquidator sought directions allowing him to pay the assets in equal proportions to the siblings to avoid the risk that one sibling would not transfer the appropriate share to another and to avoid the risk of disproportionate tax penalties, as the siblings resided in different countries. The liquidator confirmed that the shareholders agreed that they should each receive 25% of the money.

Held, judgment as follows:

In the circumstances, the just and beneficial course for the liquidator to take was to pay an equal 25% share of the money to each of the joint shareholders when distributing the company's assets. This would be in line with what the shareholders wanted and a practical way to achieve it. Further, it would represent a proper discharge of the liquidator's duty under s.386(1)(e) of the Companies Act 2014 to distribute the assets to the members according to their rights and interests in the company. Whilst art. 95 of Table A referred to payment by way of a cheque or warrant, that was permissive not mandatory and did not prevent the liquidator from making distributions in a liquidation by way of bank transfer which was entirely appropriate in this day and age. The liquidator was at liberty to make the payment to the shareholders by way of bank transfer and the shareholders should provide the liquidator with their banking details (paras. 24–26).

Cases cited:

(1) *Border Counties Farmers Ltd.*, *In re*, [2017] EWHC 2610 (Ch), distinguished.

(2) *Burns* v. *Siemens Bros. Dynamo Works Ltd.*, [1919] 1 Ch. 225, referred to.

Legislation construed:

Companies Act 1930, Schedule 1, Table A, art. 94: The relevant terms of this article are set out at para. 16.

art. 95: The relevant terms of this article are set out at para. 16.

Companies Act 2014, s.378(2): The relevant terms of this subsection are set out at para. 14.

s.386(1): The relevant terms of this subsection are set out at para. 15.

J. Montado and *J. Castle* (instructed by Isolas) for the liquidator.

1 **RESTANO, J.:** This is my extemporary judgment in the matter of Samir Invs. Ltd. (in members' voluntary liquidation) ("the company"). This judgment follows hearings which took place on August 30th, 2022 and October 13th, 2022.

Background

2 The application before me dated July 22nd, 2022 is made by the company's liquidator under s.378 of the Companies Act 2014 and he seeks directions permitting the equal distribution of the company's assets to each of the four joint shareholders of the company. The application was initially supported by the first witness statement of the liquidator, Joseph Caruana dated July 21st, 2022.

3 In this first witness statement, Mr. Caruana explained that the company was incorporated on July 6th, 2006 and that the sole shareholder of the

company's 100 shares was originally Mr. Rafael Aguilera Perez. When Mr. Aguilera Perez died in 2018, his children, namely Armelle Aguilera Liais Du Rocher, Aude Aguilera, Raphael Francisco Aguilera Liais Du Rocher ("Raphael") and Beatriz Teresa Aguilera Liais Du Rocher ("Beatriz") inherited the shares in the company. For some reason, they were registered as joint shareholders of the shares so that they each have an equal interest in the 100 shares rather than 25 shares each. The senior shareholder whose name appears first on the register is Rafael Aguilera Perez.

4 As there was a dispute between Beatriz and her siblings regarding their late father's estate, the company's sole director, Millennium Management Ltd., called an extraordinary general meeting which was held on February 22nd, 2022 seeking the voluntary winding up of the company, an application for the appointment of a liquidator and an application for directions as to the distribution of assets amongst the siblings. These resolutions were unanimously approved by all of the siblings except Beatriz who did not attend the meeting. Further, it was resolved that the assets of the company be distributed amongst the members of the company in such manner as may be determined by the court upon the application of the liquidator. Mr. Caruana has confirmed that the company's sole asset is an investment bank account held with Trusted Novus Bank valued at approximately €7.6m. as at April 5th, 2022. Further, according to his calculations, after paying the company's creditors and debts each of the shareholders stands to receive approximately €1.9m.

5 Mr. Caruana referred to the fact that the company's articles of association do not contain any provision governing the distribution of the company's assets following a liquidation. The Table A articles contained in Schedule 1 to the Companies Act 1930 (which apply in this case as the company was registered prior to the enactment of the Companies Act 2014) provide that in the case of joint shareholders, any of them may give "effectual receipts for any dividend or other moneys payable on or in respect of the share" (see arts. 94 and 95). Further, any dividend may be paid by cheque or warrant sent through the post to any one of the joint holders at his registered address or to such person as he may direct.

6 Although these provisions suggest that the distribution in this case could be made in full to one the shareholders, Mr. Caruana explained that he was reluctant to do this not only because of the risk that one sibling might fail to effect the transfer of funds to the remaining siblings but also because the siblings reside in different countries (Morocco, France and Spain) and this might have adverse consequences in terms of tax and bank charges. Mr. Caruana's preference was therefore for directions to be given allowing him to pay out in equal proportions to the siblings in order to avoid the risk of disproportionate tax penalties and to avoid the risk that one sibling will not transfer the appropriate share of the funds to the other.

7 Beatriz sent an email to Mr. Caruana dated May 22nd, 2022 where she stated that she did not recognize his appointment as liquidator. She said that she would not provide her bank details and made a reference to the need to declare this money to the Spanish tax authorities adding that her siblings had stolen from her. She also mentioned that her late father's estate was not straightforward but that no-one was above the law and that she was not prepared to get into trouble with the law because of her three siblings.

8 Mr. Caruana also referred to an EGM which was held on June 14th, 2022 when Beatriz stated that she would not accept the distribution of any company assets for reasons unrelated to the company's affairs.

9 When the matter came before me on August 30th, 2022, I was provided with the skeleton argument of counsel for the liquidator dated August 25th, 2022. I adjourned the hearing to enable the shareholders to be served with these proceedings and I directed the filing of a supplemental witness statement and skeleton argument.

10 Prior to the hearing which took place on October 13th, 2022, Mr. Caruana filed a second witness statement dated September 20th, 2022 in further support of the application in which he stated that he had again attempted to engage with Beatriz following the first hearing in a telephone conversation which took place on September 14th, 2022. During this call, Mr. Caruana explained that Beatriz repeated the allegations previously made and that when he again asked her to provide him with her bank details, she indicated to him that if the judge saw fit to make an order regarding the equal distribution among her siblings she would take steps to provide the bank account details requested.

11 At the hearing itself on October 13th, 2022, Mr. Caruana provided a third witness statement confirming that service of these proceedings had been effected on all of the siblings and that the only shareholder who had reacted to service of the documents was Beatriz. Mr. Caruana referred to further exchanges with Beatriz from which he concluded that Beatriz recognized that she is only entitled to 25% share of the company's assets and that she would accept an order from this court to that effect.

12 Mr. Caruana's position is that there are two alternatives. The court could direct that each shareholder be paid separately one quarter of the (net) amount that he is holding based on his understanding that they recognize that they each are entitled to an equal beneficial interest in the company. Alternatively, he said that following art. 94 of Table A he could pay any of the joint shareholders the full amount. Mr. Caruana also referred to the fact that art. 95 provided for payments by cheque or warrant.

13 Prior to the hearing, counsel for the liquidator also filed a second skeleton argument dated September 20th, 2022 where he said that the question before the court had been distilled to how, rather than who, is entitled to receive a final distribution pursuant to s.386 of the Companies Act.

Relevant statutory provisions

14 Under s.377 and s.378 of the Companies Act 2014 an application for directions may be made to the court by a liquidator. Section 378(2) of the Companies Act 2014, states that—

> "The Court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it considers fit, or may make such other order on the application as it thinks just."

15 Section 386(1)(e) of the Companies Act 2014 provides that the assets of a company in voluntary liquidation shall be applied: "after paying any debts due to members of the company, by distributing the assets to the members according to their rights and interests in the company."

16 Section 24 of the Companies Act 2014 states that where articles are registered, insofar as they do not exclude or modify the relevant model articles, namely Table A regulations, those model articles apply. Articles 94 and 95 of Table A state that:

> "94. If several persons are registered as joint holders of any share, any one of them may give effectual receipts for any dividend or other moneys payable on or in respect of the share.
>
> 95. Any dividend may be paid by cheque or warrant sent through the post to the registered address of the member or person entitled thereto or in the case of joint holders to any one of such joint holders at his registered address or to such person and such address as the member or person entitled or such joint holders, as the case may be, may direct. Every such cheque or warrant shall be made payable to the order of the person to whom it is sent or to the order of such other person as the member or person entitled or such joint holders, as the case may be, may direct."

Issues

17 The issues which this application for directions raise are as follows:

(1) Is the court's power to give directions sufficiently wide to cover an application such as this one?

(2) If so, should the liquidator be authorized to pay each shareholder separately?

(3) Can payment be ordered other than by cheque or warrant?

Submissions and decision

18 Mr. Montado submitted that this application had been properly brought under s.378 of the Companies Act 2014 but drew the court's attention to *Re Border Counties Farmers Ltd.* (1). In that case, HH Judge

Hodge, Q.C. (sitting as a Judge of the High Court) held that the equivalent provision in England to s.378 of the Companies Act 2014 was not sufficiently wide to enable the court to grant a direction to the liquidators to redistribute unclaimed assets. As Mr. Montado submitted, however, that case unlike this one was one where the court was concerned with an adjustment of rights and interests of the members of the company. There is no adjustment to the rights of the members here especially in the light of the liquidator's confirmation that the shareholders agree that they should each receive 25% of the money and no-one is therefore being prejudiced. I therefore agree with Mr. Montado that this application comes within the scope of s.378 of the Companies Act 2014.

19 Turning to the main issue which is whether the liquidator should be allowed to pay each shareholder 25% of the money, Mr. Montado submitted that the court can grant directions to deal practically with issues which arise in joint shareholdings. He cited as an example (albeit in a different context) *Burns* v. *Siemens Bros. Dynamo Works Ltd.* (2), a case concerning the rectification of the register of members which he said recognized the distinct and separate rights of individual joint shareholders. Further, he said that this was nothing more than a direction as to how as opposed to who, is entitled to receive a final distribution but that the direction was required because the company's registered articles of association on June 27th, 2006 (in particular art. 33 which deals with liquidations) do not provide any guidance to the liquidator. He said that the best guidance available was contained in arts. 94 and 95 of Table A (set out above) which allows any one joint shareholder to receive dividends to joint shareholders.

20 I am not persuaded that this is just a question of how payment should be effected in the sense that that relates to the mere mechanics of a payment. This application goes further than that but, in any event, I agree that this case is one where the court can provide guidance to the liquidator to deal with the practical problem which he is facing.

21 One option open to the liquidator is for the payment of the full amount to be made to Raphael (the most senior shareholder) or another of the siblings as provided for in art. 94. I do not consider that the liquidator's general concern about the effect that a single payment may have on the tax affairs of the shareholders or the additional bank charges this might result in are matters which militate against such a payment. Apart from the fact that there was no firm evidence about this, this is a matter for the shareholders alone to take advice on and resolve.

22 I do, however, consider that the liquidator's concern about the money not being distributed equally amongst the siblings is a proper consideration for him to take into account in deciding how to proceed. The liquidator has confirmed that the shareholders have told him that they are happy to accept a 25% share of the money and they have chosen not to take part in the proceedings. It can therefore be assumed that as far as the shareholders are

concerned, this is the just way in which to distribute the company's assets. As there is a dispute between Beatriz and her siblings which appears to be unrelated to the distribution of the company's money, it would not be appropriate for the liquidator to make payment of the full amount to a single shareholder. This could potentially lead to an unjust outcome as far as the distribution of the assets of this company is concerned.

23 Article 94 refers to the fact that payment in the case of joint shareholders can be made to any one of them in respect of a "dividend *or other moneys payable on or in respect of the share.*" [Emphasis added.] This could well be said to cover the payment of the distribution in a liquidation but it is permissive and not mandatory and there is nothing in the company's articles of association, Table A regulations or the legislation which stands in the way of the proposed payments.

Conclusion

24 In the circumstances, the just and beneficial course for the liquidator to take is to pay an equal share of the money to each of the joint shareholders when distributing the company's assets. This is in line with what the shareholders want and therefore nothing more than a practical way in which to achieve that. Further, it would represent a proper discharge of the liquidator's duty under s.386(1)(e) of the Companies Act 2014 to distribute the assets to the members according to their rights and interests in the company.

25 Whilst art. 95 of Table A refers to payment by way of a cheque or warrant, this again is permissive and not mandatory and does not prevent the liquidator from making distributions in a liquidation by way of bank transfer which is entirely appropriate in this day and age. I therefore also confirm that the liquidator is at liberty to make payment to the shareholders by way of bank transfer.

26 The liquidator has expressed a concern that Beatriz has not been prepared to provide him with her bank details to date although it appears that she is now prepared to do this following this judgment. To avoid any further problems, the shareholders should provide the liquidator with their full banking details as required for an international bank transfer to be made by no later than midday (CET) on Monday, October 31st, 2022. If bank details are not provided by this date, the liquidator is at liberty to apply to the court for further directions which may include a direction for payment of any unclaimed funds be paid to the Insolvency Surplus Account.

Judgment accordingly.