



## Filling the Void on the Death of a Sole Shareholder/Director

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It is not unusual for a BVI company to have a single shareholder and a single director. It is not uncommon for that shareholder and director to be an individual, and for that individual to be both the shareholder and director. Although a counsel of perfection would suggest that in such circumstances, the sole shareholder/director would take steps to nominate a reserve director<sup>1</sup> to act in his place as director in case of his death, more often than not no reserve director is nominated and, on the death of the individual, the company is left without either shareholders or directors. In circumstances where the company acts as a pure holding vehicle, holding shares or real estate which require no active management, it is often sufficient for the deceased's estate to await a grant of BVI probate or letters of administration or the resealing of a foreign grant, which may take some months, before taking steps to have the executors or administrators registered as members of the company. However, if the company is a trading company, or holds assets the nature of which requires ongoing management or which require urgent steps to be taken to preserve their value, its operations and future existence may be in jeopardy in the absence of an immediate solution.

In such circumstances, the usual course in the BVI has been to apply for an emergency, limited grant of representation. The BVI Court has a general jurisdiction to make a limited grant of administration in order to preserve a deceased's assets within the jurisdiction without waiting until those persons entitled to a full grant apply – a grant *ad colligenda bona*: see BVIHPB 93 of 2011 *In the Estate of Liao Yo Chang (deceased)* per Joseph-Olivetti J at paragraph 11. However, recent English cases raise a further possibility, as yet untested in the BVI, which may provide an alternative route.

In *Kings Court Trust Limited & Others v Lancashire Cleaning Services Limited* [2017] EWHC 1094 ("*Lancashire Cleaning Services*"), the deceased individual was the sole director and sole shareholder in the company. Probate had been applied for but had not yet been granted. Beneficial title to the deceased's shares in the company had passed by transmission to his executors, who were the claimants, under the terms of the company's articles.<sup>2</sup> The company's bank account had been frozen and, as it was a trading company, it was unable to pay staff wages or other creditors, including some overdue VAT.

<sup>1</sup> As permitted by s.113(7) of the Business Companies Act

<sup>2</sup> Which adopted, so far as relevant, regulations 29-31 of Table A contained in SI 805/1985 (as amended) which are in the following terms

"29 If a member dies the survivor or survivors where he was a joint holder, and his personal representatives where he was a sole holder or the only survivor of joint holders, shall be the only persons recognised by the company as having any title to his interest; but nothing herein contained shall release the estate of a deceased member from any liability in respect of any share which had been jointly held by him

30 A person becoming entitled to a share in consequence of the death or bankruptcy of a member may, upon such evidence being produced as the directors may properly require, elect either to become the holder of the share or to have some person nominated by him registered as the transferee. If he elects to become the holder he shall give notice to the company to that effect. If he elects to have another person registered he shall execute an instrument of transfer of the share to that person. All the articles relating to the transfer of shares shall apply to the notice or instrument of transfer as if it were an instrument of transfer executed by the member and the death or bankruptcy of the member had not occurred. "



The Claimants therefore applied for an order under section 125 of the Companies Act 2006<sup>3</sup> for an order rectifying the register of the company so as to substitute the names of the Claimants for those of the deceased as holders of the shares in the company. Once registered, the claimants proposed to exercise their rights as shareholder to pass a written resolution appointing a director.

It was submitted to the Court that an executor derives title from the will of the deceased and the property of the deceased vests in him from the moment of the testator's death<sup>4</sup> so that it is not necessary for the executors to obtain a grant of probate in order to become entitled to be registered as shareholders where there is no dispute as to their title.

The Judge recognised that, in the ordinary course, a company will not register executors until they are able to prove their title by production of a grant of probate so that in the usual case there will have been sufficient cause for omitting the name of the executors and no unnecessary delay in entering their name on the company's register of members in place of that of the deceased. However, the Court held that in determining the question whether there had been an omission, it was entitled to have regard to all the circumstances and it considered the facts of the case before it to be "*quite exceptional*". In particular, the Court took into account the fact that the company was unable to operate its bank account and so unable to pay wages and salaries to its employees and to account for unpaid VAT to HMRC. Those factors meant that there was "*unnecessary delay*" in registering the executors and Rectification of the Register was therefore ordered in order "*to ensure the survival of the company*".<sup>5</sup> The Judge went on to direct that the physical rectification might be carried out by the Executors themselves in the absence of any other officer of the company able to update the Register.

In *Williams & Others v Russell Price Farm Services Ltd* [2020] EWHC 1088 (Ch) ("*Russell Price*")<sup>6</sup> the facts were very similar to those in *Lancashire Cleaning Services*. In *Russell Price*, the company carried on a farm-contracting business. The company's bank had frozen its account and the time at which the application was made was a particularly busy time of year. There was a total of £110,064.99 owing to creditors and the danger was that if the company did not pay its debts, it could not fulfil its contractual obligations the business would fail. The significant difference between *Russell Price* and *Lancashire Cleaning Services* was that in *Russell Price*, because of complexities affecting the deceased estate, no application for probate had yet been made. The solution to this was to require the Applicants to give undertakings to the Court (i) that they would apply for probate as soon as possible, making all reasonable efforts to obtain the necessary information for that purpose; (ii) that they would that they would not renounce probate, and (iii) that they would pay all necessary taxes so that probate could issue.

In *Christopher James Elliot v Cimarron UK Ltd* [2017] EWHC 3872 (Ch) ("*Cimarron*") the Court was again faced with a similar situation. In that case, the Claimant was again the executor (at the date of the application, sole executor) of the will of a deceased shareholder in the company concerned, in whose name all the issued shares in the company were registered and who had also been the sole director. All three beneficiaries under the will were joined as parties to the application and had been served. They raised no objection to the proposed rectification. The company concerned had again adopted clauses 29 and 30 of Table A. The executor argued that he was therefore entitled to be registered as a member of the company should he elect. Again, the company was a trading company with two employees and was under threat of having its bank accounts frozen with the result that it would be unable to trade and would not be able to pay its employees' salaries or its liabilities to VAT etc. The Court found that the entirety of the company's operations and its existence would be in jeopardy should that occur. That being that case, the Judge<sup>7</sup> considered that a delay of even a month or two pending a grant of probate would constitute "*unacceptable jeopardy*" and made an order rectifying the register of members so as to substitute for the name of the deceased, the name of the executor.

In so doing, Barling J considered the case of *New York Breweries Co v the Attorney General* [1899] AC 62. That was a decision where a deceased foreign domiciliary held shares in an English company. His will had been proved in New York but not in England and Wales and his executors did not intend to apply for an English grant. In the meantime, at the executors' request, the company remitted dividends to the executors and transferred certain shares and debentures into their names. The House of Lords held that the company had acted without authority with the result that it was liable to penalties and to duty in the same sum as had probate been obtained in England. However, notwithstanding that authority, the Judge in *Christopher James Elliot v Cimarron UK Ltd* was content to proceed to rectify the register of members. Indeed, he went so far as to

<sup>3</sup> Section 125 allows the Court to rectify the register of members of a company if the name of any person is entered in or omitted from a company's register of members without sufficient cause, or default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member

<sup>4</sup> Relying on *Re Goodman* [2013] EWHC 758, [2014] Cg 186 per Newey J which concerned an application to remove and replace executors of a will

<sup>5</sup> Per HH Judge Hodge QC at para. 17

<sup>6</sup> HH Judge Paul Matthews

<sup>7</sup> The Hon Mr Justice Barling



suggest (in paragraph 15) that "*it is not necessary for the executor to obtain a grant of probate in order to be entitled to registered as a shareholder where there is no dispute as to his or her title*".

The question is whether the BVI Court has jurisdiction to make a similar Order in a suitable case in the BVI.

BVI law<sup>8</sup> confers jurisdiction on the BVI Court to rectify the register of members of a BVI company on an application by (*inter alios*) a person "aggrieved by the omission, inaccuracy or delay" in circumstances where information required to be entered is omitted or inaccurately entered or where there is unreasonable delay in entering the information in the register. For current purposes, in this respect, BVI law is materially the same as English law.

However, BVI law differs from English law in that there is no default set of Articles: no "Table A", and so the Articles of Association of a BVI company will not necessarily include provisions equivalent to those contained in regulations 29 and 30 of 1985 Table A. Nonetheless, many BVI companies do include those provisions or sufficiently similar provisions in their Articles of Association and, where they do, there is no point of distinction in principle between the position of executors who are named in a will but who have not yet obtained a grant of probate in the BVI to those in a similar position in England and Wales.

Accordingly, in a suitable case, and on similar facts to those presented to the Court in *Lancashire Cleaning Services, Russell Price and Cimarron*, there are strong grounds to support the existence of an equivalent jurisdiction in the BVI Court which would allow it to make a similar Order to those made in the English cases.

What conditions, then, would need to be established before the BVI Court's jurisdiction were engaged? The following may be extracted as conditions precedent:

- » The deceased must have been an individual who was the sole Director and shareholder of the BVI company with the result that, following his or her death, the company no longer has any directors or shareholders;
- » The Articles of Association of the BVI company must contain provisions to the same effect as those contained in regulations 29 and 30 of Table A and no other clause which would negate or limit the effect of those provisions;
- » All the Executors named in the Will must be party to the Application, either as Claimants or as necessary parties joined to the Claim and consenting to the relief sought;
- » There must be no dispute as to the Executors' title under the Will;
- » The Application must seek an Order that the shares in the company be registered in the names of all the nominated executors, if there is more than one, as those entitled to the shares by operation of law;
- » An application for probate in the BVI must have been filed but not yet granted or the Applicants must undertake to the Court to make such an application as soon as possible, not to renounce probate and to pay all associated liabilities associated with the grant; and
- » The circumstances must be such as to give rise to a serious risk that, were the parties to wait until Probate had been granted, the company's business would be irreparably damaged or its continued operation be put in jeopardy: these are the facts that would make the delay occasioned by the wait for Probate to be granted "*unreasonable*" so as to bring the case within the words of the BVI statute. The Evidence in support of the application must support such a conclusion, for example, by reference to the need to pay employee salaries or other pressing liabilities or the need to manage a wasting asset which, but for the intervention of the Court, will be lost or its value lost or seriously diminished in the absence of an board of directors able to act.

It should be emphasised that there are not likely to be many cases where the facts are such as to make such relief appropriate. As with the two English authorities, the BVI Court is likely to exercise its discretion only in an extraordinary case where the facts support the granting of exceptional relief.

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<sup>8</sup> S.43 of the Business Companies Act



If those conditions are satisfied, however, there is no reason in principle why the BVI Commercial Court, which is well known for its pragmatic approach, would not be prepared to follow the English precedent on jurisdiction, and to exercise its discretion in favour of rectifying the register so as to include the Executors as holders of the shares in the company.

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