

**THE HIGH COURT**

**[2013 No. 354 COS]**

**IN THE MATTER OF SECTION 81 AND SECTION 122 OF THE COMPANIES ACTS 1963-2012, AND  
IN THE MATTER OF NEW AGE CONSULTANTS LIMITED**

**BETWEEN**

**VIRGINIA DAY**

**APPLICANT**

**AND**

**RICHARD ADLER, MARIA TERESA MARAVER CORTEZO, INES-EUGENIA STEIN VON LIEBIG, EDWARD JACKSON AND HELEN JACKSON**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Gilligan delivered on the 31st day of October, 2014**

1. These proceedings are brought by the applicant, Virginia Day, seeking the following reliefs pursuant to the provisions of the Companies Acts 1963-2012:-

1. A declaration that the names of the first and or second named respondent is without sufficient cause entered in the Register of Members of new Age Consultants Limited;
2. An order for rectification of the Register of Members of New Age Consultants in such manner and form as to which this Honourable Court may deem meet.
3. A declaration that stock transfers purportedly dated 24th August, 2007 transferring 50 ordinary shares in New Age Consultants Limited to the first and or second named respondents are null, void and of no effect.
4. A declaration the purported shareholders resolution dated 4th September, 2007 and made by the first and or second named respondents is null, void and of no effect.
5. An order for rectification of the Register of Directors of New Age Consultants Limited purportedly showing the second and or third named respondents as directors of New Age Consultants Limited is null, void and of no effect.
6. A declaration pursuant to section 81 of the Companies Act 1963, as amended that no proper instrument of transfer of shares has been delivered to New Age Consultants Limited.
7. Such further or other relief, including an order for costs.

2. A brief resume of the background facts is that the plaintiff was formerly married to the first named respondent, Richard Adler, the marriage having taken place in January, 1975 and this marriage ended in divorce on 14th January, 2003.

3. During the course of the marriage a house situate in the mountains at Deya, Mallorca, Spain was purchased and subsequently three years later a cottage premises nearby, adjacent to the sea was also purchased.

4. It was decided that for tax reasons it would be best that a Spanish company own the houses and the properties were transferred into S.A. Foradada Investments S.L., a Spanish company registered in Mallorca, Spain. In turn, the entire shareholding of this company was held by New Age Consultants Limited, an Irish company incorporated in Dublin, Ireland on 4th January, 1999, with its registered office at Mountain Top, Letterkenny, Co. Donegal, Ireland.

5. The directors and shareholders in New Age Consultants Limited were Edward Jackson, who is recently deceased, and, his widow, Helen Jackson.

6. It is the applicant's claim that at all times the fourth and fifth named respondents were nominee directors and held the shares in New Age Consultants Limited in trust for the applicant and the first named respondent, her former husband.

7. At the time of their appointment as directors and shareholders in the company, New Age Consultants Limited, Edward Jackson and Helen Jackson executed the necessary forms for their resignation and appointment of new directors and also completed and signed stock transfer forms. In both instances, the persons to be appointed and the persons to whom the shares were to be assigned were left blank.

8. Matters then proceeded uneventfully until in January, 2003 the marriage between the applicant and the first named respondent ended in divorce in the High Court of England and Wales. It does appear without making any finding of fact that there was a side agreement entered into by the first named respondent with the applicant, whereby they both agreed that in respect of the two houses in Deya, the applicant would continue to reside in the cottage near the sea and the first named respondent in the house in the mountains and that the situation as regards the ownership of the properties would continue as heretofore.

9. Subsequently, and apparently at a time when the first named respondent was incarcerated in a prison in Texas, the forms as signed both in respect of the directorships and in respect of the shares that they held were completed in or about June and

September, 2007 effectively relinquishing any interest, without her knowledge, that the applicant may have been entitled on the basis as she alleges that the nominee directors could only accept instructions from the applicant and the first named respondent jointly as regards the ownership and residency of the two properties and also pursuant to the side agreement on the divorce of the applicant and the first named respondent. Matters only came to the applicant's knowledge some years subsequently when tenants of the applicant's in the cottage were told that she had no interest in the cottage and that they should leave.

10. It is fair to say that the background scenario is extremely complicated with the first named respondent indicating that the applicant made no financial contribution whatsoever to the purchase of the two properties, that they were properties effectively held by a variety of interwoven companies, that neither of the properties was ever in the individual or joint names as owners of either the applicant or the first named respondent and that the first named respondent was not the owner of either property and never had the authority to enter into any agreement concerning either of them.

11. In essence, it does appear that the issue which arises in these proceedings is as to whether or not the organs of New Age Consultants Limited acted in accordance with Irish law as provided for in the Companies Act 1963-2001, in respect of the appointment of new directors and the transfer of shares.

12. The claim of the applicant is very succinctly set out in her affidavit of 17th July, 2013, having set out the entire background to her case, she avers at para. 21 as follows:-

"I say and believe and I am advised that I am a person "aggrieved" within the meaning of s. 122 of the Companies Act 1963. Additionally I say and believe and I am advised that this Honourable Court pursuant to the provisions of Council Regulation EC 44/2001 of 22nd December, 2000, on the Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters and, in particular, Article 22(3) therein has jurisdiction to determine the matters herein and, in particular, given that these proceedings relate to the validity of entries in public registers and further in circumstances where the registered office of the company is within this Honourable Court's jurisdiction...she prays for the orders as sought."

13. Council Regulation (EC) No. 44/2001 of 22nd December, 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters refers at s. 6 to exclusive jurisdiction and, in particular, Article 22(2) and (3) have relevance to this application. Article 22(2) states:-

"In proceedings which have as their object the validity of the Constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law."

At Article 22(3) It is stated:-

"In proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept."

Article 28 states:

"1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

Article 29 states:-

"Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court."

14. The proceedings before this Court were commenced by originating notice of motion dated 25th July, 2013.

15. The applicant, however, had earlier commenced proceedings in Spain in the commercial court in or about the year 2009, and these proceedings were brought by the applicant against the company, S.A. Foradada Investment S.L. and effectively in these proceedings, having read and considered the lawyers prepared statement of the case, the applicant sets up a claim that she was and is beneficially entitled to joint ownership of the two properties with the first named respondent in these proceedings and that Mr. and Mrs. Jackson were nominee directors who could only act on the instructions of the applicant and the first named respondent. It is clear from the petition of the plaintiff in the Spanish proceedings that she seeks a number of declarations, all of which relate to the actions of the organs of the Spanish company, S.A. Foradada Investments S.L. and, in particular as follows:-

"(i) Declare the total annulment of the social agreements supposedly adopted by the extraordinary general meeting of partners celebrated on 18th September, 2007.

(ii) Declare the total annulment of the social agreements supposedly adopted by the extraordinary general meeting of partners celebrated on 2nd June, 2008.

(iii) Agreement in consequence in inscription in the commercial registry of the dictated sentence and its publication in extract in the official bulletin of the commercial registry.

(iv) Agree the cancellation of the inscription of all those posterior registered seats that result contradictory to the agreements declared null.

(v) Condemn the petitioner corporation to be and pass the anterior pronouncements.

(vi) Agree the imposition of the costs to S.A. Foradada Investments S.L. (sic)."

It is accordingly clear that all the reliefs as sought in the Spanish proceedings relate to S.A. Foradada Investments S.L. who are not a party to the Irish proceedings.

16. In my view, the main issue in the Spanish proceedings relates to the beneficial ownership of the two properties which at any material time appear to have been held by S.A. Foradada Investments S.L., whereas the Irish proceedings relate solely to New Age Consultants Limited and the reliefs as sought relate directly to that company which is not a party to the Spanish proceedings, nor are any of the respondents as named in the Irish proceedings.

17. There is no dispute in these proceedings but that New Age Consultants Limited, a limited liability company, incorporated pursuant to the provisions of the Companies Acts 1963-2001, has its seat in Ireland within this jurisdiction.

18. Having issued the notice of motion in respect of the application before this Court on 7th October, 2013, the applicant then sought a stay on the Spanish proceedings in the court in Mallorca, and on 9th December, 2013, Judge Nuria Ramos Magem set out her ruling suspending the proceedings owing to a civil ruling on a preliminary point until a binding court decision is issued in the proceedings that is at hearing in respect of the pre-judicial issue being, in effect, the applicant's application to this Court in Ireland to decide a preliminary point in respect of compliance with the Companies Acts in accordance with the law of Ireland. That applicant being successful the first and second named respondents, by way of a notice of motion of 7th October, 2013, brought an application in effect to stay the Irish proceedings and this motion came on for hearing on 29th January, 2014, before this Court and after extensive submissions, counsel for the first and second respondents indicated that he was no longer proceeding with the application and the court ordered:-

(a) That the application be struck out,

(b) That full appearances were to be entered on behalf of the first and second named respondents to the Irish proceedings,

(c) That they were to deliver a replying affidavit within six weeks of 29th January, 2014,

(d) The proceedings were adjourned for mention on 20th March, 2014, and the applicant's costs of the first and second named respondents motion was reserved to the hearing of the action.

19. These directions were followed to the extent that full appearances were entered, and points of claim and points of defence were furnished to the court and a trial date was set which had to be abandoned, and by order of this Court of 23rd July, 2014, the applicant was awarded her witnesses' expenses in the sum of €400.00 and a hearing date was then fixed for 14th October, and because of difficulties which Mr. Adler was going to have through illness in attending court, arrangements were made for his evidence to be furnished by video-link and there was never any indication of any difficulty on the part of any other witness attending.

20. In the intervening period the lawyers on behalf of S.A. Foradada Investments S.L. appealed the decision of the Commercial Court to the Provincial Court of Palma de Mallorca, and in a judgment as handed down on 29th September, 2014, the court set aside the ruling of the lower court and directed that the case between the applicant, Ms. Day, and the respondent, S.A. Foradada Investments S.L., be listed for hearing.

21. Accordingly, when the matter came back for hearing on the appointed day and with the plaintiff and her witnesses in attendance, Mr. Hogan has sought leave to revisit his earlier application to have the Irish proceedings stayed pending the determination of the proceedings arising from the judgment of the Provincial Court in Palma de Mallorca as handed down on 29th September, 2014.

22. The difficulty that arises is that, in my view, the Irish court has exclusive jurisdiction to deal with the aspect of matters pertaining in this instance to the actions of the directors of New Age Consultants Limited and as to whether or not the resignation of directors, the appointment of new directors, the transfer of shares and any necessary resolutions were carried out in accordance with Irish law. Further, in proceedings which is the case here, which have as their object the validity of entries in public registers, the court of the member state in which the register is kept shall have exclusive jurisdiction. This Court accepts that any decision of this Court may be helpful to the Spanish court as regards a determination of Irish law, but the two actions do not have an identity of object and cannot be considered as having the same cause of action. In any event, the aspect of related proceedings does not appear to be of any significant importance because as Article 28(2) states:-

"That where the actions are pending at first instance, any court other than the court first seised, may also on the application of one of the parties decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof."

In my view this is a crucial provision for the situation that arises because it has to be accepted that the Spanish court was first seised, but the Spanish court does not have exclusive jurisdiction with respect to the actions of the organs of New Age Consultants Limited and he companies register and this Court could only decline jurisdiction if the Spanish court, being the court first seised, has jurisdiction over the actions in question and its law permits the consolidation thereof.

23. This Court accepts that the Spanish court has jurisdiction in respect of the applicants claim as regards the beneficial ownership of the two properties, but the Irish court has exclusive jurisdiction in respect of any matter touching on the actions of the organs of New Age Consultants Limited and the public register, pursuant to Article 22(2) and (3), Council Regulation (EC) No. 44/2001 of the 22nd December, 2000.

24. This Court is further of the view that the first and second named respondents to these proceedings have accepted jurisdiction by entering full appearances, by delivering points of defence, by seeking an adjournment of the first allocated trial date, by raising issues as regards the capacity of Mr. Adler to attend court, by discussing the giving of video-link evidence with the court so as to facilitate Mr. Adler and that, in effect, the first and second respondents have agreed to the jurisdiction of the Irish court with regard to the present application now before it.

25. They now seek to reopen the application to have the Irish proceedings stayed arising from the decision of the Provincial Court which set aside the finding of the lower court suspending the proceedings. However, the view of this Court is that it is not a situation

whereby the judgments of the two Spanish courts govern the position with regard to the Irish proceedings. These proceedings have to be decided, as does the issue which has arisen, in accordance with Irish law.

26. It also has to be borne in mind that the issue in this application is, in effect, all to do with New Age Consultants Limited.

27. I do not consider that an issue will arise in respect of irreconcilable judgments, because this Court is not deciding any direct issue as regards the actions of S.A. Foradada Investments S.L., but rather is being asked to determine the situation with regard to New Age Consultants Limited, and in any event as previously indicated, the Spanish proceedings relate effectively to reliefs sought against S.A. Foradada Investments S.L. and there is no other respondent/defendant to those proceedings so that, in effect, the parties to the proceeding are inherently different and have different legal capacities and responsibilities and in the view of this Court, it could not be said that legally the actions are related within the meaning of Article 28 accepting as this Court does that, in any event, the issues at stake on this application do not get as far as Article 28 because pursuant to Article 22 this Court has exclusive jurisdiction as regards the actions of the Irish company, New Age Consultants Limited.

28. Accordingly, the view of this Court is that it has exclusive jurisdiction to deal with the matters as raised in the application brought before the court, that the parties in the Irish proceedings and the Spanish proceedings are different and different legal issues arise, that this Court is only being asked for reliefs in respect of the Irish company, New Age Consultants Limited, that the actions are not related in the legal meaning of that phrase but that in any event, Article 28 does not apply by reason of the fact that this Court has exclusive jurisdiction pursuant to Article 22, that the first and second named respondents did bring an application to the Irish court to stay the Irish proceedings, which application was withdrawn at hearing and struck out, that the first and second named respondents consented to the jurisdiction of the Irish court, filed an unconditional appearance, delivered extensive points of defence to points of claim, were given a hearing date, applied to adjourn the hearing date because Mr. Adler was unwell, were granted that adjournment, were given facilities for video-link evidence because of Mr. Adler's state of health and, in my view, were not entitled to renew an application simply because of the view of the Provincial Court overturning the decision of the lower court. The application of Mr. Hogan on behalf of the first and second named respondents is refused.

29. Accordingly, this Court will proceed to hear and determine the application as brought before it and Mr. Adler and any other witnesses will be facilitated in this regard by giving their evidence by video-link and being cross examined by video-link.