

Redemption of Disabled Bearer Shares in the British Virgin Islands

For many years, bearer shares were viewed as an attractive option by many when it came to holding shares in BVI companies. This was because bearer shares enabled shareholders to maintain absolute privacy and facilitated the easy transfer of ownership. The name of the holder of a bearer share would not feature on the Register of Shareholders of a BVI company and if the holder of a bearer shares wished to sell or transfer his or her shareholding he or she would need only hand over the share certificate to the purchaser at the time of sale.

However, bearer shares are not without their downsides, particularly when trying to identify and locate shareholders.

For many, bearer shares were viewed as a way of facilitating money laundering and fraud and this concern led to external monitoring bodies such as the European Union putting pressure on a number of business centres to outlaw bearer shares and to replace them with registered shares.

The BVI was one of the first territories to put in place a regime to prevent the use of bearer shares. From 1 January 2005 the use of bearer shares has largely been eradicated in the BVI but issues still arise particularly in circumstances where the holder of bearer shares has died or is incapacitated in some way.

Under the provisions of the BVI Business Companies Act, 2004 (“the **Act**”), the custodian regime was introduced whereby all bearer shares had to be placed with a custodian or exchanged for registered shares on or before 31 December 2009. The Act provides that the rights attached to a bearer share will be disabled for any period during which it is held by a person other than a custodian. This means that during the period when the bearer share is disabled the share does not carry any of its usual entitlements (e.g. the right to vote and entitlement to a distribution) and any transfer of it is void and of no effect.

However the Act did make provision to allow bearer shares to be redeemed, exchanged or converted by a company, through a resolution of directors. This could happen even if the shares had not been placed with a custodian.

We have seen, with some regularity, companies becoming disabled following the death or incapacity of the director(s) of a BVI company. In the event that a BVI company is left with no director, it is not possible for the board to pass a resolution to redeem, convert or exchange bearer shares. Equally, because the bearer shares have been disabled, it is not possible for the shareholder to vote the shares to appoint a new board.

To resolve this deadlock it became the practice in the BVI to apply to the court to appoint a receiver and provide

him or her with the power to redeem the shares. In the case of *The Bank of Nova Scotia Trust Company (Bahamas) Limited v The Registrar of Companies & Wembley, Limited*; *The Bank of Nova Scotia Trust Company (Bahamas) Limited v The Registrar of Companies & Sutton, Limited* this approach was held to be an appropriate solution to this problem and the Eastern Caribbean Court of Appeal held that it was just and convenient to appoint a receiver to consider exercising the company's power to redeem the bearer shares.

It is important to note that in the *Bank of Nova Scotia* case, the Court ordered that the receivers be appointed over the company itself for the sole purpose of redeeming, exchanging or converting the shares. This is an important distinction to the usual use of receivers in the BVI. Ordinarily receivers are appointed over the shares held by BVI companies and, once appointed, the receiver effectively steps into the shoes of the shareholder allowing them to vote shares and change the board of a subsidiary. Of course, this would be of little use when it comes to bearer shares that have not been placed with a custodian because they have been disabled and carry no voting rights. It was therefore important to ensure that the receiver was appointed over the BVI company and was given the right to redeem, convert or exchange bearer shares.

Applications to appoint a receiver can be costly and time consuming and in a recent case before the BVI Commercial Court (*Sempacher Foundation v Lark Services Inc. et al*) Farara J gave full consideration to the provisions of the Act and the *Bank of Nova Scotia* case and held that a company with disabled bearer shares may still redeem or convert these into registered shares notwithstanding a failure to deposit those shares with a custodian prior to 31 December 2009.

This was a definitive judgment. It enables a company (in certain circumstances) to circumvent having to incur the costs of appointing a receiver to redeem bearer shares that have become disabled, in the absence of a Board of Directors.

Farara J's judgment is welcome guidance but it is unknown at this stage whether the Registry of Corporate Affairs will seek to appeal the decision and it is always advisable to seek advice before looking to redeem or exchange bearer shares.

If you, or an individual instructing you, is the holder of a bearer share and is uncertain how to take steps to exchange or redeem that share, our lawyers are well placed to guide them through this process.



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