Neutral Citation Number: [2020] EWHC 2035 (Ch)

Case No: BL-2020-000992

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
COMPANIES COURT (ChD)

DERIVATIVE CLAIM

IN THE MATTER OF PETROPAVLOVSK PLC
AND IN THE MATTER OF THE COMPANIES ACT 2006

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 08/07/2020

Before :

MR JUSTICE MANN

- -

BETWEEN:

EVEREST ALLIANCE LIMITED
(a company registered and incorporated under the laws of Gibraltar)

Applicant

and

(1) Dr PAVEL MASLOVSKIY
(2) HARRY KENYON-SLANEY
(3) JAMES W CAMERON Jr
(4) DAMIEN HACKETT
(5) ROBERT JENKINS
(6) CHARLOTTE PHILIPPS
(7) EKATERINA (KATIA) RAY
(8) DANILA KOTLYAROV
(9) MAXIM KHARIN
(10) FIONA PAULUS
(11) TIMOTHY McCUTCHEON
(12) SIR RODERIC LYNE
(13) PETROPAVLOVSK PLC
(14) PETER HAMBRO
(15) JOHNNY MARTIN SMITH
(16) ALYA SAMOKHVALOVA
(17) ANGELICA PHILLIPS

Respondents

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Francis Tregear QC, Gregory Banner QC and **Caley Wright** (instructed by **Enyo Law LLP**) for the **Applicant**
Richard Gillis QC and David Caplan (instructed by **White & Case LLP**) for the **Second, Fourth, Fifth, Seventh, Eighth, Tenth, Eleventh, Twelfth and Thirteenth Defendants**

Hearing dates: 1st, 6th & 7th July 2020
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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MANN

Mr Justice Mann :

1. This judgment deals with one point that arises in this litigation concerning the validity of the exercise of a power vested in the Board of Petropavlovsk plc ("Petropavlovsk", or "the company") to appoint further directors. It arises in the following circumstances.

2. Article 80 of the Articles of Association of the company contains the power in question. It is in a form which is not unusual:

> "80. Without prejudice to the power of the Company in general meeting under these Articles to appoint any person to be a Director, the Board shall have power at any time to appoint any person who is willing to act to be a Director, either to fill a vacancy or as an addition to the existing Board, but the total number of Directors shall not exceed any maximum number fixed by or in accordance with these Articles. Any Director so appointed shall retire at the first annual general meeting of the Company following his appointment and shall not be taken into account in determining the number of Directors who are to retire by rotation at that meeting."

3. For the sake of completeness at this stage I mention Article 84.2 which reinforces the limited effect of a board appointment of directors, but not in a way which assists the debate in this case:

> "84.2. Any Director appointed pursuant to Article 80 (Power of Board to appoint Directors) shall retire at the first annual general meeting of the Company following his appointment and shall not be taken into account in determining the number of Directors who are to retire by rotation at that meeting."

4. What has happened in this case can be shortly described. The company is listed on the London Stock Exchange and its business is gold mining in Russia. On 6th June 2020 the company called an AGM for 30th June, which was the last day on which it could be lawfully held pursuant to section 336 of the Companies Act 2006. One of the items of business at that meeting was to be the election of directors. 11 of the 12 directors were up for re-election (the 1st to 11th Defendants). 6 new directors were proposed (the 6th to 11th defendants). Voting by proxy was permitted. The claimant ("Everest"), a significant shareholder in the company, along with another significant shareholder, opposed the election of all but four of the directors and provided votes

accordingly. The four directors for whom they voted were Mr Cameron, Ms Charlotte Philipps, Ms Ray and Mr Kharin.

5. Before or over the weekend preceding the AGM, it appears that the company assessed the proxies and realised that only the four directors supported by the claimant (and others of apparently like mind) would be re-elected. The current evidence shows that the then board considered that this would seriously affect the management of company, and that the result would have been otherwise if other shareholders who did not vote had supported the election of all 11 directors. The view is apparently taken that some of that would-be majority sat on their hands, thinking they did not have to vote, and that others did not manage to vote because their back-room functions did not operate properly during the current Covid-19 pandemic and they therefore did not organise their proxies properly or in time. There is a suggestion that some may have experienced technical difficulties, but I am not sure if that differs from the last point I have just mentioned. Everest suspected that the company would try a manoeuvre to avoid the loss of so many directors, involving the appointment of directors under Article 80. An email was written to the company asking for confirmation, inter alia, that "there will be no further directors proposed or elected to the board before the AGM, at 11 am on 30 June 2020". The company's solicitors replied that the board could not "confirm" how it would act in the future or agree blanket restrictions on its powers, but did confirm that:

> "4(c) no further directors have been proposed or elected to the board."

6. Despite (but after) that letter, on 29th June the board apparently passed a resolution appointing 4 new directors (the 14th to 17th defendants) to the board, under Article 80. One of them was to be chairman, who would therefore have a casting vote under Article 117. According to a press release issued by the company the appointment was of "Temporary Directors":

> "… to take office at the conclusion of the AGM and remain in office until a further General Meeting of shareholders is convened and a new board can be reconstituted that matches the listing requirements of a Premium Listed company on the Main-Board of the London Stock Exchange …

The important feature of the appointment for these purposes is that the appointment was to take effect after the AGM, so their appointment would not terminate automatically on the holding of the imminent AGM.

7. The apparent intention of the company, according to the press release, is to have a further general meeting within 2 months at which resolutions for the election of a reconstituted board can be put before "fully informed shareholders".

8. The AGM took place on the 30th June, and the announced result was indeed that of the 11 directors standing for election or re-election, only the four supported by Everest (and, of course, others) were elected. The company now says that the board comprises those four directors, plus the Temporary Directors. That board has (I am told) elected by 6 votes to 2 a further independent (according to the company) director who it says can effectively have an independent casting vote on issues on which the four elected directors and the four Temporary Directors split along those lines.

9. Everest challenges the appointment of the Temporary Directors on a number of grounds, mostly based on allegations of the improper use of the directors' powers, but also on the basis that it does not fall within Article 80. It complains that shareholder rights have been wrongfully subverted by the appointment or purported appointment of the Temporary Directors. For its part the company suspects a concert party has been operating and is deeply concerned about the effects of the vote concerning the directors. I do not need to go into the allegations and counter-allegations in this judgment. No determination can be made at this stage as to who is right and who is wrong about all that.

10. Against that background Everest has started these proceedings as a derivative action effectively challenging the appointment of the Temporary Directors and seeking injunctive relief against their acting. It has also launched this interim application seeking permission to bring a derivative action and restraining the Temporary Directors from acting or purporting to act as directors (I abbreviate in the interests of clarity).

11. This application first came before me on an urgent basis on 1st July 2020, with the company and various of the directors being given short notice. It seemed to me to be a realistic possibility that the matter could turn on a short question of construction of Article 80. Everest argues that an appointment to take place after the next AGM (a "straddling appointment") is outside the scope of the Article. If it is right about that then that is effectively an end of the matter. It is entitled to succeed. If it is wrong, or if that cannot be adequately determined in this procedural context, then the other allegations and counter-allegations come into play and it would be necessary to consider what interim relief is appropriate against the background of the unresolved issues. In the light of that, rather than have prolonged arguments about the scope of the whole interim relief, I determined that that point should be considered first because there seemed at the time to be a very real (though not certain) prospect that it could shorten the whole matter, and I directed that it come back to me in 3 working

days to argue it. I therefore heard argument on the afternoon of 6th July and the afternoon of 7th July. Both sides were commendably economical and clear with their arguments.

12. There are no authorities directly in point. Mr Tregear QC, for Everest, relied on *Worcester Corsetry Ltd v Witting* [1936] Ch 640 in which the Court of Appeal described a similar (but not identical) power to appoint as being for "temporary purposes", and "a special emergency power for a limited period". That may be a correct description of the power, but it does not really answer the question that arises in this case. What is required is to ascertain the true construction of this particular Article in its context.

13. The other relevant provisions of the Articles are few. The "Board" is defined as follows:

> "**Board** means the board of Directors for the time being of the Company or the Directors present or deemed to be present at a duly convened meeting of the board of Directors at which a quorum is present"

14. Article 80 itself is in a section of the Articles dealing with the appointment of directors. The main power to appoint is vested in the shareholders, and their appointments are untrammelled by time limits:

> "79. Subject to the provisions of these Articles, the Company may by ordinary resolution appoint a person who is willing to act to be a Director, either to fill a vacancy or as an addition to the existing Board, but the total number of Directors shall not at any time exceed any maximum number fixed by or in accordance with these Articles."

There is in fact no prescribed maximum number of directors.

15. Article 84 provides for the retirement by rotation of one-third of the directors at each AGM, and Article 84.2, which I have set out above but repeat here, confirms the short shelf-life of a director appointed by the board:

> "84.2 Any Director appointed pursuant to Article 80 (Power of Board to appoint Directors) shall retire at the first annual

> general meeting of the Company following his appointment and shall not be taken into account in determining the number of Directors who are to retire by rotation at that meeting."

16. Mr Tregear's submission was that there was a clear hierarchy. The shareholders had the first and main right to appoint. Below that the Board can appoint, but its appointments are time limited, and are not subject only to the power of the shareholders to requisition a meeting and remove appointees. So far as Article 80 is concerned, it does not allow any future appointment, that is to say any appointment under it has to take effect immediately. The expression "existing Board" meant the board which appointed, and not some future board. That of itself precludes any appointment taking effect after an AGM because that would by definition not be an appointment which takes effect immediately. There is nothing in the wording which justifies a future appointment. The words "at any time" qualify the time when the power is exercised, not when the appointment takes effect. Even if that is wrong, on its true construction it would be wrong to allow an appointment which leap-frogged the next AGM. It is clear that the appointment is temporary and it would in fact be semi-permanent if it was allowed to last from after one AGM to the next. It is intended to be subordinate to the powers of the shareholders, and that would not be fully the case if an appointment could start after an AGM. One needs to read down any power to appoint from a future date by reference to the second sentence of the Article which puts a long stop on appointments of the next AGM.

17. Mr Gillis QC for the company (though I suppose there may be a debate about that) and most but not quite all of the defendants (there is no significance at the moment in his not representing the unrepresented ones) submitted that the Article was not so limited. There were good reasons in terms of business efficacy as to why it should not be construed as Mr Tregear submitted and that was supported by what happened in practice. There were perfectly respectable reasons why a board may want to make an appointment to take effect in the future – for example, to secure a valuable new director who was not in a position to join immediately, or one whose appointment required regulatory approval – and those reasons applied to a straddling appointment. This was borne out by what apparently happened in reality – Mr Gillis produced a large number of instances of apparently straddling appointments (made under powers which were apparently the same in effect as Article 80) notified to the Stock Exchange, which he said demonstrated a business need which reflected on the construction of Article 80 and its equivalents in other companies. This was an example of looking to business practices which was within the dicta in the speech of Lord Hodge in *Wood v Capita Insurance Services* [2017] AC 1173 at 1180D. He put the present case (on the facts averred by his clients) as a further demonstration of there being a business need – the former board saw an urgent need to protect the company and the only way of doing it was to make a straddling appointment – and one could think of other examples. Mr Gillis submitted that as a matter of construction the Article obviously allows appointments to take effect in the future and there is no justification for reading in any restriction to prevent such an appointment. The FCA Listing Rules on the notification of board changes in paragraph LR 9.6.11 ("A listed company most notify a RIS of any change to the board including … (4) the

effective date of the change if it is not with immediate effect"), and that was part of the background for the process of construction. So far as a straddling appointment is concerned, there was no justification for a limitation here either. The expression "existing board" means the board immediately before the appointment takes effect, and that is inconsistent with a bar on straddling appointments. Shareholder democracy is not displaced by such a construction because there still has to be a retirement at the next following AGM – the appointment is not permanent. And there are other control mechanisms – the "proper purposes" doctrine, which requires that directors' powers are exercised for proper purposes, and the ability to requisition a general meeting if the shareholders do not like what has been done.

Determination

18. The point at issue in this case is a point of construction. The Articles have contractual effect, and as a contract they have to be construed like any other business document, and in such a way as make them workable (*BWE International v Jones* [2004] 1 BCLC 406 at para 22-3 (with some exceptions which do not apply here). Business efficacy should be looked to so far as the wording allows (*ibid*) and commercial sense should be preferred over commercial absurdity (*Wood v Capita* at para 11). All that is agreed between the parties.

19. The first question is whether Article 80 prevents <u>any</u> appointment taking effect in the future, or at least one to a board which is differently constituted. In my view it does not. The argument to this effect is based on the reference to "the existing Board", to which the new director is to be added. Mr Tregear's argument is that an appointment to take effect in the future would be to a future board and not the "existing Board", or at least it would in the circumstances of the present case in which the board is different (he made both points). I do not consider that argument to be correct. The concept of the board is a fluid one, whose membership changes from time to time. That is recognised in the definition of "Board" set out above which refers to the board of Directors "for the time being". The power of the shareholders to appoint directors is similarly a power to "fill a vacancy or as an addition to the existing Board". Looking at that power, there are sound reasons based in business efficacy for saying that the shareholders can appoint from a future date. A proposed director (who cannot be certain of appointment until it takes effect) may need some notice before taking up office and business efficacy requires that that be catered for by allowing for a future date at which the appointment will take effect. In the context of an appointment as from a future date the expression "existing Board" means the board as at the date on which the appointment takes effect, of the board "for the time being". There is nothing forced in that interpretation and in my view business efficacy compels it. If those words have that effect in Article 79 then they must have the same effect in Article 80 on normal contractual principles of consistency of meaning, construction and business efficacy or common sense.

20. That, however, does not necessarily mean that a straddling appointment is allowed. That raises different questions.

21. In deciding this question I first rule out a couple of matters urged on me by Mr Gillis. First, the FCA rules for listed companies. Those rules contemplate the possibility of future appointments, but do not indicate that they should always be possible whatever the Articles say. The rules apply to appointments falling within them. They are no guide to the construction of Articles, even by way of factual matrix. Second, I give little weight to the instances that Mr Gillis's clients have found of Articles apparently similar to Article 80 being used to effect straddling appointments. They are no guide to construction and one does not know the circumstances of those appointments, and presumably they were not challenged. They may just be material which supports the usefulness of the power in some circumstances (which I would accept) but they do not go further and support an argument of its necessity in terms of business efficacy or business common sense. Nor do I consider them to fall within the sort of material to which Lord Hodge referred in *Wood v Capita Insurance Services*. Lord Hodge was referring to a different type of uncertainty, and the manner of resolving it is not the same as the manner in which Mr Gillis would have me apply the other apparent instances of straddling appointments.

22. The start of the route to the answer to this question lies in the meaning of the words "appoint", "appointed" and "appointment", a point which arose only late in the debate. I have determined that an appointment can be made with effect from a future date. If that is right then one has to consider when such an appointment occurs. Does it occur as at the date of the act of appointment (the resolution of the Board) or does it occur only when it takes effect?

23. In my view by far the more natural view is that the appointment takes effect when the Board decides to do it. That is the date when the appointing happens, as will usually be reflected in the wording of the resolution which would normally record that "The board appoints X … with effect from [date]" or something like that. All that happens thereafter is that the appointment takes effect in the sense that the office starts. This sort of distinction is reflected by the wording of the draft minutes in the present case:

> ""
>
> "The Chairman put the following recommendation to the meeting. That [various individuals] be appointed as [director etc] …
>
> If approved, these appointments would take effect at the conclusion of the Annual General Meeting of the Company to be held on 30 June 2020.

> All Directors present confirmed their approval [with one exception]".

24. The formulation of the wording in any particular instance cannot, of course, determine the construction of the Article, but in my view it does demonstrate the distinction between the appointment and its taking effect.

25. This reading is supported by the reference to appointment in Article 79. Under that Article the shareholders "may by ordinary resolution appoint". So it is the resolution which does the appointing even if the appointment takes effect in the future. That is supported by the opening words of Article 80 - "… the power of the Company in general meeting to appoint …". That indicates that the appointing is done at the general meeting, whenever it might take effect. That is the natural, if not the only, reading of the word "appoint" in those circumstances.

26. If that is correct then the effect of Article 80 in relation to straddling appointments becomes clearer. The appointment is made on the date of the board resolution to appoint. The director's appointment comes to an end "at the first annual general meeting of the Company following his appointment". That meeting is the next one to occur after the appointment – in the present case, the AGM on 30th June. The appointment terminates at that time, and therefore cannot take effect after it precisely because it has been terminated. Thus prima facie it is not possible to have a straddling appointment.

27. This construction is, in my view, consistent with the general purpose of Article 80. It is a temporary appointment to tide matters over until the shareholders next have an opportunity to vote on appointments. The purpose of the "sunset" provision in relation to the AGM is to give effect to its temporary nature and make sure that the shareholder's supremacy over appointments is overridden only to a limited temporal extent. It is true that the temporal limitation would apply if a straddling appointment were allowed, because any such appointment would still last only to the next AGM, and such an appointment would not be objectionable if the Articles allowed it. But these Articles take the "appointment" as the base, and in this case the supremacy is given effect to both by the fact of an automatic termination, and by the fact that the sunset time is the next AGM following the act of appointment. That makes sense, and it makes business sense. It might be that a different power would be more useful, but a different power would have to be worded differently.

28. The contrary argument would have to involve the concept of the "appointment" being one which happens on the date of assumption of office. In some circumstances the

word might be capable of describing that situation as opposed to describing the formal act which created the office (I am deliberately trying to avoid using the words which are in issue in this case). Mr Gillis has found an instance of that, which he relies on as informing the construction of Article 80. He has identified that Companies House records the "Date of appointment" of a director as being the date on which the appointment took effect, not the date of the resolution to appoint. What that demonstrates is that words can be used in different ways in different contexts. I would tend to assume that Companies House takes that date as being the "Date of appointment" because what searchers of the register are interested in is when his powers started. But that does not matter, because that is not the context of words I have to construe. It does not seem to me to be possible to construe the words in the same way in this case. The word "appointment" needs to be taken in the same sense as the preceding words. Everything which precedes the word "appointment" suggests strongly that it is talking about the formal act (the board resolution), and not the date on which it takes effect.

29. There are other references to "appoint" or "appointment" in the Articles. None of them particularly inform the debate on the meaning and effect of Article 80, save that they can all safely be read the same way. None of them contain material pointing the other way.

30. That means that, subject to an alternative route taken by Mr Gillis, the appointments of the Temporary Directors can be seen to be ineffective. However, at this point in the reasoning Mr Gillis invokes Article 86. That Article provides:

> "86. At any general meeting at which a Director retires under any provision of these Articles, the Company may by ordinary resolution fill the vacancy by re-electing the retiring Director or some other person who is eligible for appointment and willing to act as a Director. If the Company does not do so, the retiring Director shall (if willing) be deemed to have been re-elected except in the following circumstances:
>
> 86.1 it is expressly resolved not to fill the vacancy; or
> 86.2 a resolution for the re-election of the Director is put to the meeting it is expressly resolved not to fill the vacancy; or
>
> a resolution for the re-election of the Director is put to the meeting and lost."

31. Mr Gillis submitted that if the analysis was that the Temporary Director (in this case) retired from his/her appointment by virtue of Article 86 then he/she would be a director retiring for the purposes of Article 86. There was no vote to replace that director so the first sentence does not apply. There was no resolution not to fill the vacancy, nor was a resolution to re-elect that director put and lost. Accordingly the retiring director would be deemed to be re-elected.

32. This point arose late in the argument. (Mr Gillis is not to be criticised for that – this situation has presented a fast moving sequence of events and development of argument). Its effect has not been fully considered. Mr Tregear's first answer was that the previous Board and the Temporary Directors have not relied on this – they just relied on the validity of the original appointment. I do not consider that that is an answer. If it is a route open to them to justify their appointments then they are entitled to take it. Then Mr Tregear, supported by late written submissions from Mr Banner QC (which I record as having been taken into account), sought to say that the re-election depended on some resolution before the company to fill the (or a) vacancy. I do not follow that argument. The Article works in circumstances in which there is no resolution about the retiring directors. Other than that, Mr Tregear did not have a clear answer, though again, to be fair to him, he had very little warning of the point. It has occurred to me to wonder whether there is a "vacancy" (which the Article seems to assume) in relation to an appointment which has not yet taken effect, but no argument was addressed to me about that.

33. At first sight the application of this Article produces an odd result. It validates a straddling appointment by a side-wind. However, as Mr Gillis pointed out, if the previous Board had appointed the Temporary Directors from the date of appointment, they would, at least arguably, have come within Article 86 and been deemed to be re-elected anyway, so the appointment from the future date was not actually a necessary gloss. That makes the application of Article 86 to the straddling appointment look less strange, though it is of itself a result which does not lack strangeness.

34. While I do not find the salvation of the Temporary Directors via Article 86 as a particularly comfortable result, it is not apparent to me at the moment that there is a clear answer to it. It is an arguable point. If there are answers as a matter of construction they are not clear to me. If the answer lies not in the technical effectiveness of the appointment and re-election but in the (allegedly) improper purposes of the original appointment then that is not a question which I can decide. It is sufficient for these purposes to say that Everest does not have a clear knock-out blow it can land to the Article 80 appointments on the reasoning thus far. The point, on the basis of that reasoning, remains arguable, but not clear enough.

35. I end by returning to the arguments originally advanced on each side as to why Article 80 could, or could not, as a matter of construction apply to straddling appointments. They did not turn on the meaning of the word "appoint" and its derivatives. All I will say about them at this stage (with all due respect to their thoroughness) is that it is not sufficiently clear they provide the answer that either side contends for, if indeed they are relevant at all in the light of the "appoint" route and approach which seems to me to be the correct one. The question for me at this hearing was whether Everest could deliver a knock-out blow on the point. While I confess that for a time it seemed to me as though it could, I have come to the conclusion that it cannot.

36. The interim relief application by Everest will therefore have to be determined on the footing that it has an arguable, but not apparently conclusively good, complaint under both its principal heads.