IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

YANDAL INVESTMENTS PTY LTD., and TAHLIA FAMILY TRUST,	)	CIVIL ACTION NO. 2010-158
Plaintiffs,	)	
v.	)	ORDER
WHITE RIVERS GOLD LIMITED, and HARRY MASON,	)	
Defendants.	)	

FILED

MAY 19 2011

ASST. CLERK OF COURTS
REPUBLIC OF MARSHALL ISLANDS

To : James McCaffrey, counsel for plaintiffs
Davor Pevec, counsel for defendants

On December 14, 2010, the court issued an order granting plaintiffs leave to amend complaint after finding the complaint failed to state a cause of action. Plaintiffs filed their First Amended Complaint in this matter on January 14, 2011 and each defendant filed a motion to dismiss to which plaintiffs responded in opposition. Oral argument on the motions was heard on April 8, 2011.

The court grants defendant Mason's motion to dismiss for failure of personal jurisdiction. The court also grants defendant's motion to dismiss Claim Two (RMI Securities Law Violations) of the First Amended Complaint for failure to state of claim upon which relief can be granted. Finally, the court orders the remaining matters at issue to be stayed until the pending related civil action in Australia has been resolved.

I. The Court does not have personal jurisdiction over defendant Harry Mason.

It is not alleged in the First Amended Complaint ("FAC") that defendant Mason is a resident of the Republic and plaintiffs have made no argument that he resides in the Republic. He is a director (FAC, ¶6) of a non-resident domestic corporation organized under the laws of the Marshall Islands (FAC, ¶5.) Sections 251 and 254 of the Judiciary Act[1] establish the limits of jurisdiction of the court over non-residents. Plaintiffs assert that Mason is subject to the court's jurisdiction on two grounds. First, he "performed an act within the Marshall Islands by signing his name on" share certificates issued to plaintiffs.[2] Secondly, they assert that "personal jurisdiction is proper where a person has performed act *affecting persons in the Marshall Islands.*"[3] (emphasis in original.) The court finds neither ground asserted establishes personal jurisdiction over defendant Harry Mason.

A. Defendant Mason did not perform an act within the Marshall Islands by signing the share certificates.

Defendant White Rivers Gold Limited ("WRG",) the non-resident domestic corporation of which defendant Mason is a director, has its principal place of business in Singapore (FAC ¶5). There is no specific allegation in the FAC that the shares were issued within the Republic. Nonetheless, plaintiffs argue that the shares issued to them were issued in the Marshall Islands as a matter of law and thus Mason's signature upon the certificates constituted an act in the

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[1]27 MIRC Sections 251 and 254.

[2]Plaintiff's Opposition to Defendant Mason's Motion to Dismiss Amended Complaint, p. 4.

[3]Plaintiff's Opposition to Defendant Mason's Motion to Dismiss Amended Complaint, p. 6.

Marshall Islands by him. Plaintiffs rely upon the Delaware case of *Hynson v. Drummond Coal Co., Inc.* for the proposition that the "traditional rule (and still the rule by statute with respect to Delaware corporations) [footnote omitted] is that stock has its legal situs in the domiciliary jurisdiction."[4] Plaintiffs reason that because stock is legally regarded to be in the jurisdiction where the corporation is domiciled, the issuance of the stock by defendant Mason was an act within the RMI.

However, as noted by defendant Mason, no stock was issued, based upon the court's December 14, 2010 order determining the issued shares were void. Further, the rule stated in *Hynson* is based upon a Delaware statute[5] specifically locating stock in the state of incorporation.[6] The Marshall Islands has no similar statutory provision. Indeed, non-resident domestic corporations by definition may not conduct business within the Republic.[7] The court does not find it to be the rule in the Marshall Islands, for a non-resident domestic corporation incorporated in the Marshall Islands, that the place of incorporation is the legal situs of the stock of such corporation. Consequently, based upon the record before the court, defendant Mason did not perform an act within the Marshall Islands sufficient for the court to find personal jurisdiction under Section 251(1)(a), (d), or (i) of the Judiciary Act.

B. Defendant Mason did not commit an act of fraud affecting a person within the

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[4]*Hynson v. Drummond Coal Co., Inc.*, 601 A.2d 570, 576 (1991.)

[5]8 Del.C. § 169 (1983).

[6] "Unlike the 49 other States, Delaware treats the place of incorporation as the situs of the stock, even though both the owner and the custodian of the shares are elsewhere." Justice Stevens concurring opinion, *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977.)

[7]52 MIRC Section 2(i).

Republic.

Section 251(n) of the Judiciary Act provides that a person who "commits an act of commission or omission of deceit, fraud or misrepresentation which is intended to affect, and does affect persons in the Republic" is subject to the jurisdiction of the court based upon those matters. Plaintiffs assert the acts of defendant Mason affect WRG, a non-resident domestic corporation of the Republic, so as to bring him within the jurisdiction of the court. However, while the facts alleged in the complaint may support a claim of fraud, the persons affected by the fraud are plaintiffs. The plaintiffs are not residents of the Republic. WRG is one of the defendants alleged to have committed the fraud. Section 251 (n) does not provide a basis for personal jurisdiction over defendant Mason.

II. The securities law claim must fail because there was no act, with regard to securities, taken within the Republic.

Claim Two (RMI Securities Law violations) in the FAC asserts the defendants violated provisions of the Securities and Investment Act.[8] Specifically, it is alleged that, with regard to both Share Certificates No. 0003 and No. 0006, defendant corporation failed to register the share certificates with the Registrar of Corporations and obtain the approval of Cabinet, in accordance with 18 MIRC Sections 103, 104, and 105. The claim further alleges defendants' actions violated 18 MIRC Section 109, "Right to sue for damages incurred through misrepresentation." Defendants argue the Securities and Investment Act does not apply to the alleged actions for two reasons: first, no stock was issued, and second, even if the shares were valid, they were not

[8]18 MIRC Chapter 1.

issued, sold, exchanged or transferred in the Marshall Islands, as required by the Act.[9]

A. No stock was issued.

This court has previously ruled that Share Certificate Numbers 0003 and 0006 were not validly issued and consequently were void.[10] No stock was issued, sold, exchanged or transferred because the share certificates had no validity and were void.

B. Even if the shares certificates had been validly issued, they were not issued "in the Marshall Islands."

Plaintiffs rely upon *Hynson*, cited above, for the proposition that the legal location of the stock of a corporation is the location of its incorporation. Because the share certificates are stock of a corporation incorporated and domiciled in the Republic, they reason, the stock is not only located in the Marshall Islands, but must have been issued there as well. For the same reasons as noted above in relation to the lack of personal jurisdiction over defendant Mason, the court does not find *Hynson* to be an accurate statement of the law of the Marshall Islands, largely because *Hynson* was based upon a Delaware statute that has no counterpart in the Republic. Based upon the record before the court, the stock, if valid, was not issued in the Marshall Islands and thus would not have been subject to the Securities and Investment Act .

III. With respect to the remaining claims, the doctrine of *forum non conveniens* applies and the matter will be stayed pending completion of the previously filed action in Australia.

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[9]"It shall be unlawful for any person, directly or indirectly, to issue, sell, exchange or transfer any security, as defined in Section 102 of this Chapter, in the Republic unless or until such security has been registered with the Registrar of Corporations and approval of the registered security has been granted by the Cabinet." 18 MIRC Section 103.

[10]ORDER GRANTING PLAINTIFFS LEAVE TO AMEND COMPLAINT, December 14, 2010, p. 5.

The doctrine of *forum non conveniens* allows a court to dismiss or suspend a case if there is a forum better suited to hear the case. The Delaware Supreme Court, in *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.* stated that, through the application of the doctrine of *forum non conveniens*,

> there is avoided the wasteful duplication of time, effort, and expense that occurs when judges, lawyers, parties, and witnesses are simultaneously engaged in the adjudication of the same cause of action in two courts. Also to be avoided is the possibility of inconsistent and conflicting rulings and judgments and an unseemly race by each party to trial and judgment in the forum of its choice. Public regard for busy courts is not increased by the unbusinesslike and inefficient administration of justice such situation produces.[11]

McWane further noted that the discretion of the court "should be exercised freely in favor of the stay when there is a prior action pending elsewhere, in a court capable of doing prompt and complete justice, involving the same parties and the same issues."[12] Here, both parties agree there is a related case pending in Australia[13] which was filed on September 8, 2010, before the present case.[14]

A. An absolute identity of parties and issues is not required for the application of the doctrine of *forum non conveniens*.

The doctrine is designed to prevent waste and inefficiency from the expenditure of time and effort on the same cause of action in two courts, as well as prevent the possibility of

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[11] *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*, 263 A.2d 281, 283 (Del. 1970)

[12] Id.

[13] Western Australia Action CIV 2418 of 2010.

[14] Filed on September 22, 2010.

inconsistent rulings. However, "an absolute identity of issues and participants are not always necessary prerequisites for a stay. Lanova Corporation v. Atlas Imperial Diesel Engine Co., 5 Del.Super. 593, 64 A.2d 419 (Super.Ct. 1949); Western Saving Fund Society of Phil. v. A.V.C. Corp., Del.Super., 305 A.2d 632 (1973)."[15]

1. The facts of the present case.

The plaintiffs Yandall and Tahlia assert fraud and negligence[16] in the issuance of share certificates to them by defendants Harry Mason and WRG.[17] Plaintiffs assert in the FAC the following:

- Yandall is a corporation formed under the laws of western Australia (¶ 3.)
- Tahlia is a discretionary common law trust. (¶ 4.)
- WRG is a non-resident domestic corporation organized under RMI law, domiciled in the RMI, with its principal place of business in Singapore (¶ 5.)
- There is a civil action in Western Australia (Action CIV 2418 of 2010) relating to the Heads of Agreement ("HoA") between Mark Creasy, the beneficial owner of Yandall, and Harry Mason. (¶ 8.)
- At all relevant times to this case, WRG has been under the control of Harry Mason (¶ 9.)
- In 2008 Creasy and Mason entered into a joint venture pursuant to the HoA (¶ 11.)
- Mason owned a South African company, White Rivers Exploration Pty Ltd (¶ 12) which,

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[15]*Life Assur. Co. of Pennsylvania v. Associated Investors Intern. Corp.*, 312 A.2d 337, 341 (1973)

[16]The securities claim has been dismissed.

[17]The claims against defendant Harry Mason have been dismissed.

under the HoA he was to transfer to a new company (¶13.)

- This new company was Thames Holdings Ltd, incorporated in the RMI as a non-resident domestic corporation (¶¶ 14-15.)
- Under the HoA, Creasy was to contribute up to 2 million AUD and provide proof of funding of up to 12 million AUD as consideration for 50% of the new company (Thames Holdings Ltd.) As of the time of the complaint, Creasy had contributed over 2 million AUD and in his own right and through an associated entity provided the necessary proof of funding (¶16.)
- The 50% interest of Creasy in the new company (Thames Holdings) was to be held by Yandal. (¶ 17.)
- Thames Holdings later became White Rivers Gold Limited. (¶ 17.)
- In consideration of Creasy's contribution, the defendants issued Share Certificate No. 0003 to Yandal (¶ 18.)
- A small portion of Mason's and Yandal's interest in WRG was transferred to Tahlia for the benefit of Creasy's associate Stephen Lowe (¶ 21.)
- Share Certificate 0006 issued to Tahlia was in exchange for Stephen Lowe managing the accounts pursuant to paragraph 13 of the HoA (¶¶ 21-22.)

As may be seen from the FAC, the issuance of share certificates in WRG to plaintiffs, the basis for the fraud and negligence claims, was based upon consideration established under the HoA between Mark Creasy and Harry Mason.

2. The facts of the Australia case (Western Australia Action CIV 2418 of 2010)

In the Australia case, filed initially on September 8, 2010, Creasy sued Mason over the

Heads of Agreement, alleging the following in the Amended Statement of Claim:[18]

- breach of the HoA (¶ 9A)
- misleading and deceptive conduct for failure to have WRG issue shares, in breach of the HoA (¶ ¶ 15, 15A) and
- breach of fiduciary obligation under the HoA (¶ 16A)

Mason, in the Defendant's Defence and Counterclaim,[19] has alleged the following:

- that plaintiff Creasy has violated the HoA (¶ 28);
- that plaintiff Creasy made false and misleading representations to induce the defendant to enter into the HoA (¶¶ 33-35) in that Creasy had not provided the necessary proof of funding.

These cases are not identical in that the parties are different and the present case addresses the issuance or non-issuance of stock in a Marshallese corporation as opposed to breach of a joint venture agreement between two Australian individuals. However, the two cases are similar. What the courts have found necessary for the application of the doctrine, in the absence of an identity of parties and issues, is a "common nucleus of operative facts."[20]

B. The common nucleus of operative facts in the present case and the pending action in Australia warrants application of the doctrine of *forum non conveniens*.

There is the same nucleus of operative facts in both cases, specifically the facts

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[18]Exhibit B, attached to Defendant White Rivers Gold Limited's Motion to Dismiss Plaintiff's Amended Complaint or Alternatively Stay Proceedings, filed February 15, 2011.

[19]Exhibit C, attached to Defendant White Rivers Gold Limited's Motion to Dismiss Plaintiff's Amended Complaint or Alternatively Stay Proceedings, filed February 15, 2011.

[20]*Lisa, S.A. v. Mayorga*, 993 A.2d 1042, 1048 (Del. 2010.)

surrounding the Heads of Agreement entered into in Australia by Australian residents Mark Creasy and Harry Mason. In the present case, the consideration predicating the issuance of stock to plaintiffs by defendant grows out of the HoA. The rights and duties of Mason and Creasy under the HoA will be determined by the court in Australia. The rights and duties of the parties in the present case will be based upon those established in Australia.

While the parties in the present action and in the Australia action are not identical, they share similar interests. Creasy (plaintiff in Australia) is the "beneficial" owner of Yandall (plaintiff here), the entity designated under the HoA to hold the 50% interest of Creasy in White Rivers Gold. WRG (defendant here) is under the control of Harry Mason (defendant in Australia.) Tahlia's rights are derived from those of Creasy and Mason, and are predicated upon consideration established under the HoA. There is a common nucleus of operative facts between the present case and the pending action in Australia, warranting the application of the doctrine of *forum non conveniens.*

C. A stay will substantially simplify the proceedings and avoid hardship.

"In Delaware, a stay may be granted if it will substantially simplify the proceeding and the moving party can clearly show that hardship or inequity will be avoided. Identical parties and issues are not required." Harbor Ins. Co. v. Newmont Min. Corp., 564 A.2d 352, 356 (1989) Determination of the rights of Creasy and Mason under the HoA will simplify the proceedings here. Yandal is associated with Creasy, Mason is the managing director of WRG. Any duty or obligation of WRG to plaintiffs will be based upon the rights established under the HoA. Those rights will be determined by the Western Australia pending action.

Substantial hardship will be avoided by awaiting the determination of the court in

Australia in the related case. The primary witnesses are located in Australia. Voluminous documents related to the case are located in Australia. Witnesses important to the case are not subject to compulsory process here in the Republic. The additional costs of pursuing the case in the Marshall Islands compared to Australia would be substantial.

Determination of the case in Australia will not necessarily address all the issues in the present case, so dismissal is inappropriate. Once the case in Australia has concluded and the rights and duties of the parties under the HoA have been determined, the present case may be resumed.

Based upon the forgoing, it is hereby ORDERED as follows:

1. Defendant Harry Mason's motion to dismiss on the ground of lack of personal jurisdiction is GRANTED;

2. Defendant White Rivers Gold, Limited's motion to dismiss Claim Two (RMI Securities Law violations) is GRANTED; and

3. The remaining claims against defendant White Rivers Gold, Limited are STAYED pending completion of the related case pending in Australia (Western Australia Action CIV 2418 of 2010.)

Date: May 19, 2011.

James H. Plasman
Associate Justice, High Court