Judgment 17/2011 **Synergy Classic Limited and D.E.S. Commercial Holdings et al - Royal Court – Civil Action file 1568 - 12th April 2011**

Companies (Guernsey) Law 2008 s.349 application for an order to strike out application by Synergy Classic Limited – order granted – Synergy had no standing to make an application under s.349.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

12th day of April 2011, before Richard John Collas Esquire, Deputy Bailiff alone

SYNERGY CLASSIC LIMITED

Applicant

V.

(1)D.E.S. COMMERCIAL HOLDINGS LIMITED,
(2) MR BORIS KUZINEZ,
(3) MR JACOB KRIESLER,
(4) RGI INTERNATIONAL LIMITED

Respondents

THE DEPUTY BAILIFF having considered an application by the Second Respondent dated 2nd February 2011 for an order that the Applicant's application dated 1st December 2010 under Section 349 of the Companies (Guernsey) Law 2008 be struck out, handed down this day judgment in the terms attached hereto and struck out the said application of Synergy Classic Limited on the ground that it had no standing to apply under Section 349.

S M D ROSS
HM Deputy Greffier

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

ORDINARY DIVISION

In the matter of R.G.I. International Limited

and

In the matter of the Companies (Guernsey) Law, 2008

Between **SYNERGY CLASSIC LIMITED** **Applicant**

- and -

(1) D.E.S. COMMERCIAL HOLDINGS LIMITED
(2) BORIS KUZINEZ
(3) JACOB KRIESLER
(4) R.G.I. INTERNATIONAL LIMITED **Respondents**

First Respondent's Strike Out Application

Judgment approved for publication by Richard John Collas Esq., Deputy Bailiff

Hearing date: 12th April 2011

Judgment delivered: 12th April 2011

Advocate for the First Respondent: A D Laws

1. Synergy Classic Limited ("Synergy") had brought an application dated 1st December 2010, under Section 349 of the Companies (Guernsey) Law 2008 ("Synergy's Application"). This judgment relates to an application by D.E.S. Commercial Holdings limited, the First Respondent, dated 2nd February 2011 seeking an order that Synergy's Application be struck out on the ground that Synergy had no standing to make the Application ("D.E.S' Application") under Section 349.

2. Synergy failed to appear at the hearing of D.E.S.' Application and the hearing went ahead in its absence.

3. Section 349 of the 2008 Law enables a member of a company to apply to the Court for an order under Section 350. (Section 350 is concerned with the powers of the Court to grant relief for unfair prejudice.) Advocate Laws' submission is that *"member of the company"* means only the registered or legal owner and does not confer any rights on a beneficial owner who is not himself registered as the legal owner of shares in the company.

4. In the Synergy Application, Synergy relies upon a proxy granted by an escrow agent who was not the registered owner of shares because the relevant shares in RGI International Limited

("the Company") were registered in the name of a nominee on behalf of the escrow agent. The proxy is to be found at page 49 of an exhibit attached to an affidavit sworn in this matter by James Gordon on 1st December 2010. The proxy authorises Synergy to take certain steps principally in relation to share holders' meetings of the Company and the argument is that it does not confer upon Synergy the power or authority to bring an application under Section 349.

5. In support of that submission Mr Laws relies upon a decision of the Chancery Division (Companies Court) re Brightview Limited (2004) BCC 542, where a similar point arose and the headnote records at paragraph 2 on page 543, that the Court, Jonathon Crow QC sitting as a Deputy Judge of the High Court, held that the right to petition the court under Section 459 of the Companies Act was conferred only on members and those to whom shares had been transferred by operation of law and neither of the applicants in that case fell within those categories.

6. Mr Laws said that was the only relevant authority of which he was aware. I am certainly not aware of any previous decision of the Royal Court and I would accept that a decision of the High Court dealing with the interpretation of similar English legislation is highly persuasive as far as the Guernsey Court is concerned.

7. The defect in Synergy's Application was drawn to the attention of Advocates Ogier (who were then acting on behalf of Synergy) in correspondence from Babbé, exhibited to an affidavit of Todd William McGuffin sworn on 2nd February 2011, namely a letter to be found at page 472 of the consolidated bundle dated 26th January 2011. Ogier responded to that on 31st January saying the following:

> *"As you have seen from paragraph 9 of our client's application, the application is brought on behalf of the registered shareholder under valid authority pursuant to a power of attorney dated 5th July 2010."*

8. After referring to the proxy to which I have already made mention, (which Advocate Laws submits for the reasons already given was insufficient) Ogier's response was an application for leave to amend Synergy's Application in which in paragraph 9 they declared that Synergy is now the registered holder of 10,000 shares in the company, saying that amounted to 1% of the issued share capital of the company although it actually amounted to only a tiny fraction because just over 162 million shares have been issued. Not only was the arithmetic wrong but at the date the amendment application was filed, Synergy was not yet the registered holder. In a second affidavit by Mr Gordon sworn on 18th February, he declared that Synergy had acquired the shares on 17th February but they were not actually registered in the name of Synergy until sometime in March. Leaving that defect aside, the fact that Synergy was attempting to make an amendment application and taking steps to have the shares transferred into the name of Synergy appears to confirm that they accepted that the defect that had been drawn to their attention by Babbé was indeed a fundamental defect to Synergy's Application.

9. So although Synergy has not appeared today, I think I can accept from their conduct in attempting to make an application for leave to amend that they recognise the point that Babbé's had raised was a valid one and that gives me some comfort. An application under Section 349 may only be made by *"a member of a company*" or someone to whom shares have been transferred by operation of law (Section 349(3)). *"Member of a company"* is defined in Section 121 of the Law as a founder member or registered member. There is no provision for somebody to apply if he is a beneficial owner on whose behalf shares are registered in the name of a nominee or someone else. Only a registered shareholder could bring an application under Section 349.

10. Synergy at the date it brought Synergy's application was not registered as a shareholder and for that reason I accept the first paragraph of DES's application and I make an order striking out Synergy's Application on the ground that it had no standing to apply under Section 349.