

THE EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF SAINT CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE
SAINT CHRISTOPHER CIRCUIT

CLAIM NO. SKBHCV2021/0108
BETWEEN:

FAIR ISAAC CORPORATION

Claimant/Judgment Creditor

AND

CREDIT INFO LIMITED

Defendant/Judgment Debtor

Appearances:

Mr. Damian Kelsick KC for the Claimant
Ms. Midge Morton for the Defendant

2025: June 26
July 17

JUDGMENT

- [1] **SAUNDERS, M:** This Judgment concerns the Court’s decision regarding a preliminary issue in the proceedings, that is, whether the Court can Order an alleged de facto director, or, de facto officer of a corporate Judgment Debtor to attend for oral examination pursuant to CPR 44, “Oral Examination in Aid of Enforcement” (*“the Preliminary Issue”*).

Background

- [2] At the hearing of the matter on 27 May 2025 counsel for the Judgment Creditor (*“Fair Isaac”*) submitted that Fair Isaac sought to examine Ms. Denise Garfield, General Manager of Caribbean Confederation of Credit Unions (*“CCCU”*) which

happens to be the only shareholder of the Judgment Debtor (*"Credit Info"*), pursuant to CPR 44 on the basis that she was a de facto officer of Credit Info. It was submitted that the affidavit evidence showed that CCCU was in sole control of Fair Isaac and Ms. Garfield, being its general manager, was entitled to be examined.

- [3] Counsel for Credit Info opposed the examination of Ms. Garfield for, among other reasons, that Credit Info's latest annual return recorded that Ralph Leroy Wharton was its only Officer or Director and there was therefore no basis upon which Ms. Garfield could be examined as an alleged de facto officer. Counsel relied upon the fact that a corporate "officer" is defined by section 2 of the Companies Act to mean "a director", or, a "liquidator"
- [4] Considering the aforesaid dispute, the Court gave directions for the determination of the Preliminary Issue which included the filing of Written Submissions. When the Court sought a statement of agreed facts from the parties, Counsel for Fair Isaac submitted that the only facts which the parties were prepared to agree were that CCCU is the only shareholder of Credit Info and that Ms. Garfield is its General Manager. Critically, nothing was agreed regarding the role and duties of Ms Garfield in relation to Credit Info.
- [5] Having heard the oral submissions of the parties concerning the Preliminary Issue on 26 June 2025, I have decided that the Court cannot order Ms. Garfield to attend for oral examination as an alleged de facto director, or, de facto officer of Credit Info pursuant to CPR 44 for the reasons set out below.

CPR 44- Oral Examination in Aid of Enforcement

- [6] CPR 44.1-3 provide as follows:

"Scope of this Part

This Part deals with the examination of a judgment debtor to obtain information to assist in enforcing a judgment and is called an "oral examination".

Who may be orally examined

CPR 44.2 (1)

The following persons may be ordered to attend an oral examination –

- (a) the judgment debtor; or*
- (b) an officer or former officer of a judgment debtor which is a body corporate.*

(2) A person referred to in paragraph (1) is called “the examinee”

Procedure to obtain order for oral examination

CPR 44.3 (1) Where permission is not required to enforce the judgment, a request for an order that a person attend an oral examination may be made by filing a request as specified in Form 29 or 30 as the case requires, which contains the information required by the relevant practice direction.

(2) Where permission is required to enforce the judgment, an application for an order that a person attend an oral examination must be made and a copy of the permission must be attached to the application.

*(3) An application under paragraph (2) may be made without notice. 280
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(4) Where a request or an application for the order is against an officer or a body corporate, the request or the application must be supported by evidence on affidavit showing that the person to be orally examined is such an officer

Conduct of oral examination

CPR 44.5 (1) The examination may take place before the registrar or an officer of the court authorised by the Chief Justice.

(2) A person referred to in paragraph (1) is called “the examiner”.

(3) The examination must be on oath or affirmation.

(4) The statement made by the examinee must be recorded and read to the examinee who must then be asked to sign it.

(5) If the examinee refuses to sign the statement it must be signed by the examiner and certified to be a true record of the examination.

*(6) If the examinee – (a) fails to attend;
(b) refuses to be sworn or affirm; or*

(c) refuses to answer any question, the examiner may adjourn the examination to a judge or master.

...”

Analysis

- [7] Fair Isaac has sought to reduce the Preliminary Issue to a construction of the word “officer” in CPR 44 and has consequently contended that the diverse uses of that word in the CPR suggest that the word does not have the same meaning in each instance and that it should be given a wide definition including a “de facto officer”. Counsel relied upon the Sydney Circuit Court decision, **Cole v Quest Software Pty Ltd** [2015] FCCA 1314 in which a corporate officer was given a very wide definition including, “*a servant, with little independent authority and discretion; a senior officer or manager, with wide authority and discretion; or a director or governor, with supreme executive powers*”.
- [8] The Preliminary Point cannot be reduced to an issue concerning the construction of the word “officer” in CPR 44 for the following reasons:
- a. The Preliminary Issue is not whether Ms. Garfield is an “officer” of Credit Info. Both parties accept that Ms. Garfield does not appear as a Director/Officer on Credit Info’s annual returns. The Preliminary Issue is whether the Court may examine Ms. Garfield on the basis that she is allegedly a de facto officer, or, de facto director of Credit Info. “de facto officer”, or, “de facto director”, as phrases, are nowhere defined nor used in the CPR. The phrases are not even used in the Companies Act.
 - b. Insofar as counsel for Fair Isaac submitted that the Sydney Circuit Court decision, **Cole v Quest Software Pty Ltd** [2015] FCCA 1314, is an authority for the proposition that the word “officer” could be construed to mean “de facto officer” a judicial finding, however, was made in that case following the hearing of evidence (including cross-examination) that the individual, “Sheers”, was an officer as being alleged.

Furthermore, section 9 of the Australia Corporations Act 2001, which was being applied in **Cole v Quest Software Pty Ltd**¹, defines a company “officer” very widely, including as follows:

“9AD Meaning of officer

(1) An officer of a corporation (other than a CCIV) is:

(a) a director or secretary of the corporation; or

(b) a person:

(i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or

(ii) who has the capacity to affect significantly the corporation’s financial standing; or

(iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person’s professional capacity or their business relationship with the directors or the corporation)...”² (Emphasis supplied)

Given the above it is hard to see, without an equivalent definition of the word “officer” in the Companies Act, the basis upon which it can be contended that the word can be construed as argued. As Credit Info has submitted, a corporate “officer” in this jurisdiction has been defined by section 2 of the Companies Act only to mean “a director” or a “liquidator”. It is worth noting that under the Australia Corporations Act 2001, being a company “Officer” carries almost the identical duties and responsibilities (such as fiduciary duties) as a corporate Director in St. Christopher (see the provisions at section 180-184 of the Australian Corporations Act 2001).

¹ See e.g. [29] of **Cole v Quest Software Pty Ltd** [2015] FCCA 1314

² Section 9AD of the Australia Corporations Act 2001

- c. In the common law, a “de facto director” of a limited liability company is a legal term of art, for example, as defined by Millet J in **Re Hydrodan (Corby) Ltd** [1994] 2 BCLC 180 as, *“one who claims to act and purports to act as a director, although not validly appointed as such. A shadow director, by contrast, does not claim or purport to act as a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself”*.

In these proceedings, it is Fair Isaac which has alleged that Ms. Garfield is a de facto officer/de facto director, a contention which is hotly contested by Credit Info. A dispute has therefore arisen. Given the common law definition set out above, it is apparent that I will be required, in the course of a request for an oral examination, to conduct an inquiry and make a judicial finding regarding whether Ms. Garfield is a de facto, or, shadow office/director of Credit Info. In the English decisions, **Secretary of State for Trade and Industry v Hollier** [2007] BCC 11 Eng Ch D and **Secretary of State for Trade and Industry v Deverell** [2000] 2 BCLC 133 Eng CA, a judicial finding in relation to whether an individual is a de facto, or, shadow director, respectively, was decided to be an extremely fact sensitive exercise requiring an examination of how the communications and acts of the alleged de facto/shadow director should be construed.

- d. An Oral Examination is, essentially, an administrative exercise which, as CPR 44.5 sets out, may even be conducted by the Registrar. The present proceedings concern Fair Isaac and Credit Info and a final judgment was entered on the pleaded cases of the parties some time ago. It is not possible in what is a quasi-enforcement process to conduct an inquiry such as is being urged upon the Court by Fair Isaac. In other words, an examination under CPR 44 is an information gathering process, it is not a forum appropriate for the trial of a substantive and hotly contested issue between the parties.

- e. Even if the parties were agreed on the particular acts which are being alleged entitle Fair Isaac to treat Ms. Garfield as a de facto Officer/Director, the Court would still be required to set about an inquiry (including cross-examination of Ms. Garfield) regarding how those acts ought to be construed. See, for example, the decision **Aqueduct Limited v Faelesseje** SVGHCVP2014/0017 (18 April 2016) in which the Court of Appeal, in the course of enforcement proceedings, decided that where a highly fact sensitive preliminary issue arises for determination, the Court ought to order the trial of that issue rather than embark on an inquiry on the affidavit evidence:

*“12. It would be useful to make some observations with respect to preliminary issues. The court, and the parties, should give careful consideration to the issues to be determined when making an order for a split trial. Where a claim is highly fact sensitive, it is important to establish the factual premise for the issue of law on which the judge was invited to rule. There is a need for total clarity when a court orders the trial of a preliminary issue of law. Preliminary issues should not be set in motion in a casual and unstructured way. The right approach to preliminary issues should be (inter alia) that the questions should usually be questions of law and should be decided on the basis of a schedule of agreed or assumed facts. Authorities for these propositions are: (1) *Mcloughlin v Jones*¹ in which the Court of Appeal made clear what the approach should be in terms of ordering and hearing the trial of preliminary issues and (2) *Larkfleet v Allison Homes Eastern Limited*² where Mr. Justice Fraser pronounced on the need for total clarity when a court orders the trial of a preliminary issue.*

...

14. It cannot be doubted that the power to order preliminary issues or the separate trial of different issues is a valuable case management tool. Its utility is enhanced where the court is confronted with a key point of law which turns on the interpretation of a statute and which, if decided in one way, can

reduce the need for an expensive trial. This tool, however, has to be used with great care.³ Circumspection in its use is dictated by the fact that, as Lord Scarman said in Tilling v Whiteman,⁴ ‘preliminary points of law are too often treacherous short cuts. Their price can be as here delay, anxiety and expense’ (Emphasis supplied)

- f. Counsel for Fair Isaac has argued that if the word “Officer” in CPR 44 were defined by reference to the Companies Act to mean a director, the word “Officer” would potentially be defined differently in each jurisdiction subject to the relevant companies acts therein. I do not perceive such a state of affairs to be in any way absurd. It is a feature of the rule that the substantive law in each Member State is made by Parliament³ whereas the rules of civil procedure and practice are made by the Court⁴. A limited liability company is a creature wholly of the Companies Act. It is to be expected that the construction of the word “officer” in the CPR must take as a reference point the persons who are considered “officers” according to the Companies Act much as was done in **Cole v Quest Software Pty Ltd**. To do otherwise would result in individuals who are not authorised to speak on a company’s behalf (whether in fact or in law) being examined on oath and speaking on that company’s behalf without its authorisation.

Conclusion

- [9] For all of the above reasons it is not appropriate for the Court to Order in these proceedings that Ms. Garfield should attend for oral examination pursuant to CPR 44 on the basis that she is allegedly a de facto director, or, de facto officer of Credit Info. This Court, in the course of a CPR 44 request, cannot carry out

³ Section 37 of the Constitution

⁴ Section 17 of the Eastern Caribbean Supreme Court Order, 1967 (S.I. 1967 No. 223)

an inquiry on affidavit evidence regarding whether Ms. Garfield is a de facto director, or, de facto officer of Credit Info.

Yuri Saunders

Master

Registrar