

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim No. BVIHCV 2022/0279

IN THE MATTER OF SECTION 207A OF THE BVI BUSINESS COMPANIES ACT, 2004 (as amended)

AND IN THE MATTER OF SOLANDRA INC. (BVI Business Company Number 66314), IN LIQUIDATION

BETWEEN

NALA CORPORATE SERVICES LTD.

CLAIMANT

AND

REGISTRAR OF CORPORATE AFFAIRS

DEFENDANT

Appearances: Lorraine La Rose for the Claimant
Valerie Georges –Thomas for the Defendant

2023: December 19th

ORAL DECISION

- [1] **YOUNG J:** Nala Corporate Services Ltd. has applied for the termination of the liquidation of Solandra Inc. (the Company). The Company's voluntary liquidation commenced on 19th July, 2019 with the Claimant being the sole shareholder. At that time, the Company, by its statement of assets and liabilities, had nil assets and nil liabilities. The voluntary liquidator's notice of completion and the certificate of dissolution were filed on the 29th July 2019. The Company was thereafter dissolved and struck from the Register.
- [2] The Claimant states that at the time of completion of the liquidation on 29th July, 2019 the Company in fact continued to hold an asset in the form of shares in a South African Company which had

inadvertently been overlooked. Had this asset been remembered, the Company would not have been put into “premature voluntary liquidation”. On 1st June, 2022, the Company, by court order, was restored to the register, in Liquidation.

- [3] The aforementioned shares currently remain the Company’s only asset. The Company has decided it would be more advantageous to keep that asset under the protection of a corporate structure. The cost and time needed to create a new corporation seemed prohibitive especially when coupled with the inconvenience of new documentation, contracted services and the like. Furthermore, the Company had been in existence since 1992 and had built up considerable goodwill over that time which it wished to continue taking advantage of.
- [4] The appointed liquidator was in support of the termination and all the Directors were prepared to continue on having no objection to the termination of the liquidation. The Company has no creditors and capital injections would be made to ensure the Company meets the statutory solvency threshold. There is no third party prejudice and it is in the best interest of the public for the Company to be permitted to continue as a going concern.
- [5] There could be no issue of the Claimant’s standing and the Defendant takes none. However, the Defendant strenuously opposed the application for termination stating that the Court does not have a statutory power to terminate the liquidation of a restored company. Further, the Court ought not to exercise its discretionary inherent power to do so even if the Claimant could prove that it was the just and equitable thing to do, which it simply could not do.
- [6] While the Court was hearing submissions on the matter it was raised by the Defendant that although the Claim had been filed in 2022 the BVI Business Companies Act (the Act) had been amended with effect from 1st January, 2023. The Court agreed to hear further submissions from the parties as to the possible application of the amendment and its effect on the Claimant’s application now being considered by the Court. The Court thanks Counsel on both sides for their patience and helpful submissions.

- [7] **Whether the Court has jurisdiction to make an order under section 207A of the Act to terminate the liquidation of the Company given that the liquidator was appointed by the Court under section 218A of the Act:**

1. Whether the Old Act or the new Act should apply:

The Old Act:

Section 207 A (1) of the BC Act provides:

The Court may, at any time after the appointment of a voluntary under section 199, make an order terminating the liquidation if it is satisfied that it would be just and equitable to do so.

Section 199 (1) of the BC Act states:

Subject to section 200, a voluntary liquidator or two or more joint liquidators may be appointed in respect of a company

(a) By a resolution of directors passed under subsection (2); or

(b) By a resolution of members passed under subsection (3).

The New Amendment

Section 207A(1) reads as follows:

Subject to section 218B(3A), the Court may, at any time after the appointment of a voluntary liquidator under section 199 and before completion of the voluntary liquidation and filing of a statement of completion of the liquidation in accordance with section 208, make an order terminating the liquidation if it is satisfied that it would be just and equitable to do so.

- [8] **The pertinent parts of section 218B provide:**

(3A) Where a company that was dissolved is restored to the Register as provided in subsection (3), the company shall, if it is restored

(a) in liquidation, file with the Register a statement of completion of liquidation when the liquidation is completed, and the company shall

(i) be dissolved with effect from the date of filing of the statement of completion; and

(ii) not be stored to the Register to carry on business;

(b) with the appointment of a receiver, file with the Registrar a statement of completion of the receivership when the receivership is completed, and the company shall

(i) be dissolved with effect from the date of filing of the statement of completion; and

(ii) not be restored to the Register to carry on business.

(c) Where a company is restored to the Register under this section, the company is deemed never to have been struck off the Register and dissolved.

[9] The Defendant by the additional submissions drew the Court's attention to section 30(2)(c) of the Interpretation Act which provides:

"all proceedings taken under the old enactment shall be prosecuted and continued under and in conformity with the enactment so substituted, so far as consistently may be."

[10] She relied on **Queen v Urban St Brice**¹ which confirmed that the phrase "so far as is consistently so" tempered the mandatory language of the section. The court, in construing the effect of the amendment must seek out any inconsistency between the original Act and the amended and where it is found, the original law must prevail.

[11] The Claimant asked that the new section 207A not be given retrospective or retroactive effect so as to deny the Claimant a right to apply to terminate. She relied on the common law presumption against retrospectivity and retroactivity and pressed that the words "so far as consistently may be" in section 30(2) of the Interpretation Act was a recognition of this common law presumption as an exception. She then discussed section 29(1)(c) and (e) of the Interpretation Act which she urged reinforced the common law presumption against retrospectivity and the need to protect legal rights in relation to legal remedies and proceedings.

[12] Section 29(1)(c) provides:

(1) Where an enactment repeals or revokes an Enactment, the repeal or revocation shall not, except as in this section otherwise provided-

(a) revive any enactment or thing not in force or existing at the time at which the repeal or revocation takes effect; affect the previous operation of the enactment so repealed or revoked, or anything duly done or suffered thereunder;

(b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment so repealed or revoked;

(c) affect any offence committed against the enactment so repealed or revoked, or any penalty or forfeiture of punishment incurred in respect thereof; or

¹ [SLUHCR 2005/0039]

(d) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the enactment had not been repealed or revoked.

(2) Nothing in subsection (1) shall be taken to authorise the continuance in force after the repeal or revocation of an enactment or of any instrument made under that provision.

(3) Where at any time an enactment expires, lapses or otherwise ceases to have effect, this section applies as if that enactment has then been repealed or revoked.

(4) The inclusion in the repealing provisions of any enactment of any express saving with respect to the repeals affected thereby shall not be taken to affect the operation of this section with respect to the effect of those repeals.

The Court's consideration

[13] The Court fully agreed with the submissions of both parties that any inconsistency between the old and the new or impairment of existing rights would militate against the application of the new amendment. When the Court considers whether there was any inconsistency between the two, it is constrained to find, as the Registrar submitted, that the amendment simply stated with more clarity precisely what the law always was even under the original Act. The Court must, therefore now, delve into an interpretation of section 207A under the old Act.

2. An Interpretation of section 207A under the old Act:

[14] The Defendant opined that the words of section 207A(1) are clear. Their plain and literal meaning is that providing it is just and equitable to do so, on the application of the persons listed at section 207A(2) the court may only terminate a voluntary liquidation after the appointment of a section 199 liquidator. Since a liquidator on restoration is not appointed pursuant to section 199, the court no longer has the statutory power to terminate the voluntary **restoration**.

[15] Counsel for the Claimant on the other hand asked the court to find that reference to the appointment of the section 199 liquidator refers only to precisely when the court's power to terminate the voluntary liquidation is engaged. But the period for which it is engaged is "at any time after" the appointment

of the section 199 liquidator. Therefore, the duration of the appointment of the section 199 liquidator does not curtail or limit the power.

- [16] Counsel concluded that to give so restrictive an interpretation as that urged by the Defendant would create an absurdity. The Court would be unable to terminate a voluntary liquidation where for example a replacement liquidator was appointed under section 205D of the Act. To this the Defendant explained that the replacement voluntary liquidator rightfully and effectively stands in the shoes of the section 199 voluntary liquidator so there could really be no merit to this argument.

The Court's consideration

- [17] The words of section 207A(1) are clear and precise. At any time after the appointment of a section 199 voluntary liquidator the court is empowered to terminate the voluntary liquidation. The attractiveness of the Claimant's argument for an interpretation which would include any period of time after the section 199 appointment loses its luster when sections 202, 207A (2) and (3) and 218A (2) and (3) are considered. The court reminds that an Act must be read as a whole (**Bebo Investments v Financial Secretary**² which referred to **Case of Lincoln College**³). Where a section is taken in isolation the true interpretation may not be as clear as it ought to be.
- [18] Section 202 directs that a company in liquidation is only "referred to" as being in voluntary liquidation from the time the notice of the voluntary liquidator's appointment is filed. This state continues until termination in accordance with section 207A or section 208 completion of liquidation. Section 212B (3) assures that on restoration the company is no longer a company in voluntary liquidation but is simply a company in liquidation. The court notes that there is no longer a reference in the Act to the existence of a state of voluntary liquidation or a possible position of a voluntary liquidator upon restoration. This strikes as not only very deliberate language but also meaningful.
- [19] Now section 207A is titled termination of voluntary liquidation, not liquidation. That sends a gentle message that the Court ought to proceed cautiously when interpreting the section. Subsection (2) explains that one of the persons or entities who may make the application for termination of the

² BVIHCV 2007/0151

³ (1595) 137 Taxman 201(RAJ)

voluntary liquidation is the voluntary liquidator (not the voluntary liquidator appointed under section 199) of the company.

- [20] So it would appear that a voluntary liquidator in the context of termination is not only one appointed under section 199. But wherever a voluntary liquidator is appointed under the Act. The section 2 definition allows context to be taken into consideration for the meaning of a voluntary liquidator. If I am wrong about this, then the explanation given by the Defendant that all the other references to a voluntary liquidator in Part XII refer either to a voluntary liquidator appointed under section 199 or a voluntary liquidator who stands in the shoes of that particular appointee. There is absolutely no absurdity here.
- [21] Subsection (3) of section 207A directs that where the application for termination is made by any person or entity other than the voluntary liquidator the application must be served on the voluntary liquidator. The voluntary liquidator is also permitted then to appear at the hearing and be heard.
- [22] However, when the company is restored there is no voluntary liquidator appointed pursuant to section 199 or otherwise. Section 218A(2) and (3), respectively, speak to the applicant for restoration nominating someone who would have been eligible to be appointed voluntary liquidator and the court ordering the appointment, as liquidator (not voluntary liquidator) of that nominated person or some other person eligible to be liquidator (not voluntary liquidator) of the company.
- [23] Since there is no longer a voluntary liquidator appointed, if termination could occur after restoration, why would a voluntary liquidator, only, be empowered to make an application for termination and in the absence of his own application, how is he to be served when he simply does not exist. The Court is convinced that the use of the term liquidator as opposed to voluntary liquidator is not without reason.
- [24] Beyond these sections, section 218B titled Effect of Restoration provides for service of the order of restoration on the liquidator, not the voluntary liquidator and that person is constituted liquidator from the date of restoration. The Court finds it imperative to highlight this as Counsel for the Claimant

relied strongly on section 218B (6) which states that “A company that is restored to the Register is deemed to have continued in existence as if it had not been dissolved or struck off the Register.”

- [25] Counsel seemed to be of the view that this meant that on restoration the company would be in precisely the same position it was prior to dissolution. But section 218A and B are clear indicators that this is not so. If this were so, then the capacity should exist in the statute for the original voluntary liquidator to have simply been reinstated or at the very least a replacement voluntary liquidator appointed pursuant to section 205D. Section 205D makes no such provision.
- [26] Moreover, the court on restoration is allowed to mandate certain conditions to the restoration. This is not a power which the court has for any company in voluntary liquidation. Even the name of the company may have to be changed to its company number if the name is no longer available. These all indicate that the restored company, although deemed to continue in existence, is not necessarily the same nor does it hold the same status as it did before it was dissolved. Rather it is placed as nearly as possible in the same position as if the company had not been dissolved or struck off the Register - Section 218A(1)(b).
- [27] The court is also drawn to the fact that the restored company is not said to be placed in the same position as if the voluntary liquidation had not been completed. There is no reference whatsoever to the completion of the voluntary liquidation. There is only a reference to the dissolution and the strike off. Could the legislators have also been mistaken as to the actual completion of the voluntary liquidation as Counsel for the Claimant insists Bannister J had been in his decision in **Dedyson Enterprises Ltd v Registrar of Corporate Affairs**⁴.
- [28] I can find no reason to depart from Bannister J’s finding that a voluntary liquidation is completed on the filing of the voluntary liquidator’s statement of completion (section 208). Dissolution is different. It occurs when the Registrar issues a certificate of dissolution after she has struck the company from the register. It is for this very reason that the dissolution could be voided and the company could be restored in Liquidation but not in voluntary liquidation.

⁴ BVIHCVM2011/0008

[29] The voluntary liquidation had been completed, it is simply no more. The liquidation of the restored company can no longer be referred to as a voluntary liquidation or even a continuation of the voluntary liquidation. The liquidator appointed by the court on restoration is not a voluntary liquidator appointed under section 199 or otherwise and is not deemed to be or constituted such by the Act for that matter. The court's statutory power to terminate a liquidation ceased on completion of the voluntary liquidation, dissolution and strike off.

[30] For all the reasons stated above this Court finds that it has no power pursuant to section 207A of the old Act to terminate a liquidation where a company is restored after having completed its voluntary liquidation.

The New Act:

[31] The court would also be unable to terminate under the new Act because the power is taken from the moment the section 208 statement of completion is filed. The court notes that while section 207A speaks to a section 208 statement of completion section 218B does not. It simply mandates that a statement of completion of liquidation be filed. This is a procedure created by that section specifically for restored companies only.

[32] **Whether the liquidation could and should be terminated under the court's inherent jurisdiction:**

Both parties agreed from the onset that the Court could invoke its inherent jurisdiction to consider terminating the liquidation. There was no change in their additional submissions.

[33] The Claimant was adamant that the test of exceptional circumstances, beginning with **Dedyson** and following onward in this jurisdiction in **Kwok Mung v Attorney General**⁵ and **Jason Hughes v Registrar of Corporate Affairs**⁶ and even **Global Diversity Opportunity II Ltd, PA-LF2 Secretaries Ltd v The Registrar of Corporate Affairs**⁷ was too high, too stringent and fettered the just and equitable principles which were always meant to be flexible.

⁵ BVIHCM 2011/0002

⁶ BVICOM 2020/0078

⁷ BVIHCM 2022/176

[34] The Claimant relied on a number of cases **Re Warbler Pty Limited**⁸, in re **Telescriptor Syndicate Limited**⁹, **Jamincorp International et anor v Minister of Finance**, Jamaica Supreme Court¹⁰ and sought to distill the real considerations which the court ought to make in exercising its discretion as follows:

- (a) Whether there is a “positive case” for the favourable exercise of the Court’s discretion;
- (b) Whether all debts have been discharged (considering the nature and extent of the creditors);
- (c) What the attitude of creditors, contributories and the liquidator is;
- (d) The current trading position and general solvency of the company;
- (e) Any non-compliance by the directors with their statutory duties;
- (f) Whether the general background and circumstances are leading to the winding up order or liquidation;
- (g) Whether the conduct of the company was in any way contrary to the commercial morality or the public interest considering the nature of the company’s business.

[35] The Defendant argued that the desire to resume business after voluntary liquidation is contrary to the jurisprudence that has developed with respect to the restoration of liquidated and dissolved companies. She postured that restoration is only granted where it is necessary for the justice of the case and usually only for a short period of time. Once the purpose of restoration is completed the company should proceed to wind up. She noted that the restoration order made for the restoration of the Company at paragraph 6 stated that “...upon completion of the liquidation, the company shall be dissolved.”

[36] Counsel urged that the court ought to be slow to move and only in the most exceptional of circumstances should it agree to the restoration of a voluntarily liquidated company or the termination of liquidation following such restoration to enable the company to continue as a going concern.

⁸ (1982) ACLR 526

⁹ [1903] 2 Ch 174

¹⁰ Civil Appeal No. 27 of 2003, decided 29 July 2005, (unreported), Jamaica, CA

The Court's consideration

- [37] The exercise of a discretion is fact sensitive and the court is obligated to consider all the circumstances before it makes a determination. The circumstances as have been presented to the court is that there is a valid court order that the Company is to be dissolved on completion of the liquidation. The Claimant says the order was directory not mandatory. With the greatest respect, this court finds that order to be mandatory. The order remains in full force and that is most compelling.
- [38] The Company made the decision to voluntarily liquidate. Whether it was mistaken as to its assets or even as to the effect of restoration is of no real moment when the court is considering using its inherent power to terminate its liquidation. The forgotten asset could easily be dealt with by the appointed liquidator and the court on restoration was clearly of that view. In fact, the forgotten asset seemed to be the reason for the restoration since the order directed dissolution on completion.
- [39] The beneficial owner's desire to continue holding the shares under the Company rather than create a new corporate structure because of the cost and time involved does little to convince the court that its discretion ought to be exercised. The Company, when it went into voluntary liquidation in 2019, had already built up its goodwill over the 30 years and it was exposed to and in fact accepted losing this when it went into voluntary liquidation. This was not a company which had been forced into liquidation through insolvency. It is also apparent that the shareholding was not of primary importance to the Company prior to its voluntary liquidation as that asset had been entirely forgotten and overlooked.
- [40] Counsel for the Claimant also submitted that the Claimant will suffer greater prejudice while no prejudice or no real prejudice would be suffered by the Defendant. In fact, Counsel said, the Defendant's coffers will be fattened through the termination and the Claimant's compliance with its statutory obligations. Further, if the Company's principles are forced to incorporate a new entity they may be discouraged from conducting business in the BVI which could impact the country's economy. This court is assured that a new company, if incorporated, will equally fatten any coffers. In any event there is far more attraction to the BVI as a commercial destination than the ability to terminate the liquidation of a company restored from voluntary liquidation for the reasons tendered by this Claimant.

[41] So while these reasons may all be worthy of some consideration they are insufficient to convince this Court that it ought to exercise its inherent jurisdiction to terminate this liquidation. This Court agrees that a liquidation is intended to be terminal. This fact is by no means diminished or disproved by the ability to resuscitate temporarily through restoration or completely by termination. There must be sufficient reasons, perhaps even exceptional circumstances to do either. The Claimant has failed to prove this even if the test was only a balancing of the circumstances.

[42] The Claim is dismissed with costs to the Defendant in the sum of \$5,000.00.

**Sonya Young
High Court Judge**

By the Court

Registrar