

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM No: BVIHC (COM) 2020/0176

IN THE MATTER OF GLOBAL DIVERSITY OPPORTUNITY II LTD

BETWEEN:

**(1) GLOBAL DIVERSITY OPPORTUNITY II LTD
(2) PA-LF2 SECRETARIES LTD**

Claimants

and

THE REGISTRAR OF CORPORATE AFFAIRS

Defendant

CLAIM No: BVIHC (COM) 2020/0177

IN THE MATTER OF PA GRAND OPPORTUNITY VIII LTD

BETWEEN:

**(1) PA GRAND OPPORTUNITY VIII LTD
(2) PA-LF2 SECRETARIES LTD**

Claimants

and

THE REGISTRAR OF CORPORATE AFFAIRS

Defendant

Appearances:

Mr. Terence Mowschenson QC, with him Neil McLarnon of Travers Thorp Alberga
for the Claimants

Ms. Dian D Fahie for the Defendant

2021 March 3, 12

JUDGMENT

[1] **JACK, J [Ag.]:** By two fixed date claim forms, the claimants seek restoration of two companies, Global Diversity Opportunity II Ltd (“Global Diversity”) and PA Grand Opportunity VIII Ltd (“PA Grand”) pursuant to section 218 of the **BVI Business Companies Act 2004**.¹ The two companies were placed into voluntary liquidation on 7th August 2020 and were dissolved on 18th September 2020.

[2] The relevant provisions of the Act, so far as material, provide:

“218(1) Application may be made to the Court to restore a dissolved company to the Register by

(a) a creditor, former director, former member or former liquidator of the company; or

(b) any person who can establish an interest in having the company restored to the Register.

(2) An application under subsection (1) may not be made more than ten years after the date that the company was dissolved.

...

218A(1) Subject to subsection (2), on an application under section 218, the Court may

(a) restore the company to the Register subject to such conditions as it considers appropriate; and

(b) give such directions or make such orders as it considers necessary or desirable for the purpose of placing the company and any other persons as nearly as possible in the same position as if the company had not been dissolved or struck off the Register.

(2) Where the company was dissolved following the completion or termination of its voluntary liquidation under this Act or its liquidation under the **Insolvency Act, 2003**,² the Court shall not restore the company to the Register unless

(a) the applicant nominates a person to be liquidator of the company, if it is restored to the Register;

(b) the person nominated as liquidator consents to act, and is eligible to act, as liquidator of the company on its restoration; and

(c) satisfactory provision has been made or will be made for the expenses and remuneration of the liquidator, if appointed.”

¹ No 16 of 2004, Laws of the Territory of the Virgin Islands.

² No. 5 of 2003, Laws of the Territory of the Virgin Islands.

The facts

- [3] Global Diversity was incorporated in this Territory on 5th May 2017; PA Grand on 16th August 2016. Both are companies in the stable of PAG, formerly known as the Pacific Alliance Group. PAG is an alternative investment management group operating in the Asia-Pacific region and in Europe. It has had an operation in Australia and New Zealand since 2010.
- [4] PAG does business with an Australian property group. Global Diversity was the vehicle for lending hundreds of millions of Australian dollars to the group. To secure the loan PA Grand held a registered mortgage over land owned by a subsidiary of the group in Kellyville on the outskirts of Sydney, about half way between Parramatta and Windsor. PA Grand holds the mortgage as security trustee under an intercreditor deed. About 121 houses have been built on the land and various contracts for the sale of the houses have been entered. Because PA Grand has been dissolved, no release can be made of the mortgages, so the freeholder cannot give good title to purchasers of the land.
- [5] Global Diversity was the vehicle for lending eight tranches of money to the group. It was the original lender (with the loans syndicated to other financial institutions), the facility agent and the arranger. The first tranche was paid in 2017. It was repaid on 17th May 2019. Some other tranches have also been repaid, but substantial sums are still outstanding. As original lender, Global Diversity owed fiduciary duties to the syndicate of lenders.
- [6] After the May 2019 repayment, there was what can only be described as a massive breakdown of internal communications within PAG. The office in Hong Kong which dealt with corporate secretarial matters, was aware of the repayment of the first loan, but not that a further seven tranches of loan had been granted. As a result of its belief that all monies outstanding has been repaid, it authorised the liquidation of both PA Grand and Global Diversity, notwithstanding the

outstanding loans and mortgage. Various other internal controls which should have prevented this mistake also failed.

- [7] The result is pretty catastrophic. Hundreds of millions of loans in Australian dollars are potentially irrecoverable. The houses in Kellyville cannot be sold. The question is whether anything can be done to rescue the situation.

The parties' submissions

- [8] Ms. Fahie for the Registrar submits in relation to PA Grand as follows:

"7. The Registrar notes the following procedural points:

(i) non-compliance with CPR 30.5(2) — the jurat of the affidavit of Derek Roy Crane, falls on a separate page and therefore does not comply with CPR 30.5(2) which stipulates that:

'The statement authenticating the affidavit ("the jurat") must follow immediately from the text and not on a separate page.'

...

8. The following points are not disputed:

(i) that the second Claimant, PA-LF2 Securities Limited being a former director of the Company, has the standing to make this application for restoration of the Company under section 218 of the BC Act;

(ii) that the application was made within the 10-year limitation period.

9. The following points are disputed:

(i) the Registrar disputes that the first Claimant, the Company (now dissolved) has the standing to make an application under section 218 of the BC Act;

(ii) the Registrar disputes that it is necessary to restore the Company as there is an alternative to restoration being the power of the Courts in the BVI and in New South Wales to appoint a replacement trustee and to make appropriate vesting orders under relevant legislation...

10. The Registrar submits that the dissolved Company, who is named as the First Claimant in this application does not have the standing to make an application for restoration, and should be removed as a Claimant. Section 218(1) of the BC Act provides:

'Application may be made to the Court to restore a dissolved company to the Register by:

- (a) a creditor, former director, former member or former liquidator of the company; or
- (b) any person who can establish an interest in having the company restored to the Register.'

11. [PA Grand] is the Security Trustee of the... Security Trust appointed by a Security Trust Deed dated 10th July, 2017 (the 'Trust Deed'). As indicated by the deponent the Claimant has applied for restoration so that the Company can continue to act as a security trustee. However, there may be an alternative to the restoration of the Company. [namely the appointment of a new trustee by this Court or the Courts of New South Wales].

12. In determining applications for restoration in this jurisdiction, even in circumstances where it is found that the company has assets that have been overlooked, or that there are creditors seeking to make a claim or other matters which should have been dealt with in liquidation but were not, the Court has consistently held that when a company is liquidated and dissolved (as opposed to administratively dissolved), and subsequently seeks restoration, if there is an alternative to restoration, that alternative is to be preferred.

13. In specifically addressing his mind to circumstances where there is an alternative to the restoration of a liquidated and dissolved company, Bannister J said the following in **Yeung Kwok Mung v Attorney General**:³

'[12] I held in **Dedyson Enterprises Ltd v Registrar of Corporate Affairs**⁴ that other than in the most exceptional circumstances (which I found to have arisen in that case), there could be no grounds for restoring a company which had been wound up and dissolved under the provisions of Part XII of the BCA for the purpose of enabling it to resume business or commence some new business. Ordinarily, a company which has been dissolved pursuant to section 208 of the BCA after declaring that its liquidation has been completed should be restored only when necessary for the purpose either of dealing with matters which should have been dealt with in the winding up but were inadvertently overlooked or which have unexpectedly arisen subsequently.

[13] In my judgment, even in these circumstances restoration should be the course of last resort where companies have been

³ BVIHCM 2011/0002 (23rd February 2011).

⁴ BVIHCM 2011/0008 (17th February 2011).

dissolved following liquidation. If a difficulty can be resolved without restoration, then that alternative method is to be preferred. It is undesirable that the owners of companies which they have decided to put into liquidation should be able to revive them otherwise than when restoration is necessary in the interests of justice. For the same reason, in cases where the Court does order that the dissolution of a previously liquidated company be avoided, the Court should, in my view, usually require an undertaking that the company will wind itself up once the outstanding matters have been dealt with, in order to ensure that a company which has been restored for a limited purpose of the sort which I have mentioned is not used as a vehicle for the conduct of business generally.’

14. The approach of preferring the alternative to restoration was more recently adopted in **Jason Hughes v. Registrar of Corporate Affairs**,⁵ when the court refused an application to restore a voluntarily liquidated and dissolved company because there was an alternative to restoration.

15. The foregoing passage from para [13] of **Yeung Kwok Mung** also highlights the Court’s disapproval of restoring liquidated and dissolved companies into good standing to be used as a vehicle for conducting business. This is precisely what the Claimant in this case intends to do if the Company is restored.”

Ms Fahie then discusses the power of the BVI and NSW Courts to appoint replacement trustees and continues:

“25. In light of the foregoing, the Registrar submits that:

(i) the First Claimant does not have the standing to apply for restoration, and should therefore be removed as a claimant;

...

(iii) while it is doubtful that it would fall to the BVI Court to make an order appointing a new trustee, the Courts in New South Wales also have powers under section 70 of the NSW Trustee Act to appoint a new trustee to replace the dissolved trustee company and the power to make appropriate vesting orders;

(iv) the power of the Court in New South Wales to make an order appointing a new trustee and consequential vesting orders, is an alternative to restoration which should be preferred, as the grounds for restoration as stated by the Claimant is to continue to act as a trustee.

⁵ Also known as *Re Flowery Developments Ltd*, [2020] ECSCJ No 309, BVIHC (COM) 2020/0078 (10th September 2020) (Jack J).

26. Considering the alternative to restoration as discussed above, the Registrar submits that the Company can be safely left dissolved.”

- [9] In relation to Global Diversity, she makes the same points, save that in relation to this company she says:

“[16] While the Claimants’ desire to restore [Global Diversity] so that it can continue doing business as a facility agent is duly noted, it is contrary to the jurisprudence that has developed with respect to the restoration of the liquidated and dissolved companies. In the case at Bar, there are no defects identified with the liquidation, no un-distributed assets and no creditors wishing to make a claim. Further, the evidence is that the Company wishes to be restored into liquidation, so that it can make a subsequent application under section 207A of the BC Act to terminate the liquidation as be restored as a going concern. As Bannister J puts it with disapproval in **Dedyson** at para [16], the Company is seeking to ‘resume carrying on business through it as if nothing had happened.’”

- [10] The very brief skeleton arguments for the companies were submitted by Mr. McLarnon without input from Mr. Mowschenson QC. Mr. McLarnon submits:

“that it is appropriate on the facts of the case..., namely the need for [Global Diversity] to comply with its obligations as lender, facility agent and arranger [and for PA Grand to comply with its obligations as security trustee] and the fact that third parties are likely to be prejudiced if the Company is not restored for the Court to exercise its discretion and order the restoration of the Companies to the Register...”

Three short points

- [11] As regards the CPR 30.5(2) point, the claimants have now submitted affidavits of Mr. Crane which do not breach this rule, so the point no longer arises. As regards the companies not properly joined as claimants, I agree with Ms. Fahie. However, PA-LF2 Secretaries Ltd is a director of each. It is properly a claimant for the relief sought. There is therefore no purpose removing the companies as claimants. Since, as I shall explain, each needs to give undertakings, it is expedient to keep

them as parties. The claimants have found a debt owed to its solicitors which it says one of the companies should pay. Since other companies in the PAG stable can easily pay the debt, this is in my judgment a makeweight.

Precedent and the exercise of a discretion

- [12] The Court's power to restore a company under section 218A(1) is a discretionary one. Ms. Fahie cites a number of decisions of this Court (including one of my own) which she says I should follow. In this Territory, the classical rule of *stare decisis* applies to decisions of first instance judges. Lord Goddard CJ expressed the rule in **Huddersfield Police Authority v Watson**:⁶

"I think the modern practice and the modern view of the subject is that a judge of first instance, unless he is convinced that the judgment is wrong, would follow it as a matter of judicial comity. He certainly is not bound to follow the decision of a judge of equal jurisdiction. He is only bound to follow the decisions of [higher courts]."

- [13] This dictum cannot, however, be applied unthinkingly to precedents concerning the exercise of a discretion. This is because the exercise of a discretion is always fact-sensitive. In my judgment, there are three situations:

- (a) A judge holds that a particular consideration is relevant to the exercise of his discretion.
- (b) A judge holds that a particular consideration should be given great or (as the case may be) little weight.
- (c) A judge holds that in a particular confluence of facts his discretion should be exercised in a particular way.

⁶ [1947] KB 842 at p 848. See also *Colchester Estates (Cardiff) v Carlton Industries plc* [1986] Ch 80 at p 85 (Nourse J): where two first instance judges have disagreed, the second judge in time should be followed by a third judge.

- [14] In the first category, the judge is making a decision on a point of law. That decision is therefore binding in the **Huddersfield** sense.
- [15] In the third category, he not making a determination of law; he is making a factual assessment which feeds into his discretionary determination. This is not to say that his decision has no precedential value. It is desirable that the Court's exercise of its discretion is, so far as possible, consistent and reasonably foreseeable. All judges have foibles. That is the human condition. But it is undesirable that the exercise of a discretion should vary with the length of a Commercial Court judge's foot.⁷ Thus, examples of how the Court has exercised its discretion are useful in providing guidance to litigants and the profession.
- [16] More difficult is the second category of case. A judge in deciding to attach great (or little) weight to a consideration could be making a statement that, as a matter of law, in all cases the consideration has great (or little) weight. Or he may be saying that on the facts, the consideration has great (or little) weight. In my judgment, this latter view will generally be the better interpretation. In particular, a later judge will always be able to distinguish the earlier holding as to weight on the basis that the facts of the later case are materially different. Nonetheless, it is especially important that the Court tries to be consistent in its approach to the weight to be attached to particular considerations.
- [17] In my judgment Bannister J was making a category two determination when he held in **Yeung Kwok Mung** that "other than in the most exceptional circumstances..., there could be no grounds for restoring a company which had been wound up and dissolved... for the purpose of enabling it to resume business or commence some new business." Likewise falling into category two, is his statement that "restoration should be the course of last resort where companies

⁷ Cf John Selden, *Table Talk*, cited by Michael Evans and R Ian Jack (my father) (Eds) in *Sources of English Legal and Constitutional History* (Sydney, 1984) at p 224 ("One Chancellor has a long foot, another a short foot, a third an indifferent foot: 'tis the same thing in a Chancellor's conscience,")

have been dissolved following liquidation. If a difficulty can be resolved without restoration, then that alternative method is to be preferred.”

- [18] Accordingly, in my judgment these two observations are not binding on me, but are matters to which I should attach importance in order that there is some consistency in the principles applicable to the restoration of companies following the completion of a voluntary liquidation.

Allowing the companies to resume business

- [19] In my judgment, there are no exceptional circumstances which would make it appropriate to restore the two companies for the purpose of carrying on business. All Mr. Crane, who gives the only substantive evidence on the companies’ behalves says in relation to Global Diversity is that the “Company needs to continue in its role as facility agent... for the term of each of the [five outstanding loans].” His evidence is in like terms in relation to PA Grand.

- [20] The loans are in run-off. Only five are outstanding. Performing the outstanding duties of each company can be done whilst the companies are in liquidation. (At any rate Mr. Mowschenson QC did not argue to the contrary.)

- [21] In my judgment, it would be in accordance with the guidance given by Bannister J to require the companies, as a condition of their restoration, to give an undertaking that they would not, without special permission of the Court, apply to terminate the liquidation and restore the companies to good standing. This is in accordance with principle. “Liquidation is intended to be terminal.”⁸

Should the companies be restored?

- [22] In my judgment, a key factor in this case is that both Global Diversity and PA Grand owe fiduciary duties to third parties. Dissolving the companies on completion of the liquidations was a breach of trust, both in the Chancery sense and in the vernacular sense. There is no reason why innocent third parties, such

⁸ Re Flowery Developments Ltd at para [6].

as the purchasers of homes in Kellyville and the syndicated lenders, should suffer from PAG's administrative deficiencies. The fact that both companies owed equitable duties to third parties is a very important consideration in deciding whether to direct that the companies be restored.

[23] I have considered Ms. Fahie's point that it would be open to either the BVI or the NSW courts to appoint another trustee in place of the companies here. If an alternative remedy is available to those effected by the dissolution of a company, then that will be a material factor against restoring the company.

[24] Ms. Fahie submitted that the existence of an alternative remedy was the end of the matter: restoration should be refused. However, Bannister J's statement that "[i]f a difficulty can be resolved without restoration, then that alternative method is to be preferred" should not be elevated into a statutory requirement. The Court always has a discretion. In particular, it is in my judgment very relevant to consider the ease with which an alternative method can be adopted. If the alternative is straightforward, that that will be a powerful factor against restoring the company. By contrast, if the alternative is difficult and complex, then the existence of the alternative may be of much less weight.

[25] In the current case, the claimants have obtained expert evidence of NSW law from Robert Newlinds SC, an eminent practitioner in that jurisdiction. He points out that in NSW, as in this Territory, the appointment of a replacement trustee is a matter for the Court's discretion, so that it is impossible to give a definitive view on how a NSW judge would decide such an application. Even if a new trustee were appointed, there would still need to be steps taken to transfer matters such as legal title to the mortgage into the name of the new trustee. Insofar as Global Diversity acts as facility agent, it would be necessary for all parties to enter into a contract of novation with the new trustee.

[26] In my judgment, this is a case which falls towards the "difficult and complex" end of the spectrum. Now it is true that the claimants have not pursued their restoration

applications with great diligence, which is a factor against granting them relief. Nonetheless, the evidence of Mr. Newlinds SC is that seeking the alternative remedy would involve further substantial delay. Since delay is a further prejudice to third parties, in my judgment this is a relevant consideration.

- [27] Looking at the matter in the round, in my judgment this is an appropriate case in which to order restoration. The prejudice to third parties and the fact that dissolution of the companies was itself a breach of trust are particularly important considerations. The general public policy against the restoration of dissolved companies which have been liquidated does not in my judgment outweigh these considerations and can be partially answered by the undertakings which I shall require.

Conclusion

- [28] Accordingly, I shall order that the two companies be restored to the Register and that Mr. Peter Mo Ching Law, be appointed as liquidator of the companies. This is subject to the proviso that each company undertakes that it will not, without special permission of the Court, apply to terminate its liquidation so as to restore the company to good standing.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar