

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM NO. BVIHC (COM) 2020/0182

IN THE MATTER OF THE BUSINESS COMPANIES ACT 2004

BETWEEN:

**(1) ALI GANJAEI
(In his capacity as attorney in fact of Seapack Investment Ltd)
(2) SEAPACK INVESTMENT LTD**

Claimants

And

**(1) SABLE TRUST LTD
(2) JOSE G GONZALEZ
(3) MICHAEL KELLEHER
(4) NAJIB ZIAZI**

Defendants

Appearances:

Mr. David Chivers QC, with him Mr. Jonathan Addo, Mr. Christopher Pease and Ms Kimberley Crabbe-Adams of Harneys Westwood & Riegels for the Claimants
Mr. Michael Faye QC of Agon Litigation for the First Defendant
Mr. Malcolm Arthurs and Mr. Jamie James of Martin Kenney & Co for the Third and Fourth Defendants
The Second Defendant did not appear

2021 January 26
February 15

JUDGMENT

[1] **JACK, J [Ag.]:** This is a skirmish in what I suspect is a much larger dispute between two sides of the Hinduja family. The claimant side is in the camp of Mr. Srichand P Hinduja ("SPH"); the defendant side is in that of Mr. Ajay Hinduja. The

immediate battlefield is three apartments in Trump Tower on 5th Avenue in New York. These are held by an American company, Seapack Holdings Inc (“Seapack US”). Seapack US is held one hundred percent by the Second Claimant (“Seapack BVI”). The current case concerns the control of Seapack BVI.

Background

- [2] It is common ground that Seapack BVI was incorporated in this jurisdiction in 2011. Until the events to which I shall come, the registered agent has been MMG Trust (BVI) Corp (“MMG”). The first apartment was purchased in 2011; the other two in 2014. They are the main homes and New York residences of various members of the Hinduja family. The management of the apartments through Seapack US and Seapack BVI was under the *de facto* control of the SPH family office, Hinduja Advisory (Switzerland) SA (“HAS”). The first claimant (“Mr. Ganjaei”) is, or at least was, a *de jure* director of Seapack US.
- [3] The ultimate beneficial ownership of Seapack BVI is unclear. For various regulatory and KYC purposes Mr. Prakash P Hinduja (“PPH”), a resident of Monaco, has been named as the UBO of the company. The claimants assert that in fact PPH held his UBO on bare trust for SPH. Mr. Arthurs submitted that this is the key factual issue in the current case, however, he adduced no evidence to show that PPH had better title to be UBO than SPH. Such submissions as were made on this issue were really *en passant*. The parties’ cases show that there are serious doubts as to who is and was the UBO. No one asked me to resolve this issue, even on a good arguable case basis.
- [4] That approach is understandable. There would be potentially difficult issues of law, if PPH was a mere front man for SHP and if his ostensible UBO was being advanced in order to sidestep compliance with KYC requirements, whether of Monégasque or of some other law. The UK Supreme Court in **Mirza v Patel**,¹ in a six-three split, held that deciding whether illegality barred a claimant from asserting

¹ [2016] UKSC 42, [2017] AC 467.

a right required a multi-factorial approach. The majority refused to follow the House of Lords decision in **Tinsley v Milligan**,² which held that the question was to be determined as a matter of how the cause of action was pleaded. If a claimant needed to plead the illegal matters to found his cause of action, then he lost; if he did not, he won (subject of course to proving his pleaded case). The difficulty for this Court is that there are at least three Privy Council decisions which support the **Tinsley v Milligan** approach: **Petherpermal Chetty v Muniandi Servai**,³ **Singh v Ali**⁴ and **Palaniappa Chettiar v Arunasalam Chettiar**.⁵ It is unclear whether this Court is bound to follow those Privy Council decisions or treat them as impliedly overruled by the UK Supreme Court decision. The difficulty is compounded because the Privy Council cases were not even cited in **Mirza**.

[5] Instead of taking any points on illegality, the parties argued the matter solely on the basis of issues of company law. This was an appropriate course, because the issues as to the validity of the appointment of directors are matters for company law, not trust law. If shareholders (i.e. the holders of legal title to the relevant shares) appoint a director, the fact that the shareholders might be acting in breach of trust does not vitiate the appointment: **Inland Revenue Commissioners v J Bibby & Sons Ltd**.⁶ Thus whether SPH or PPH is the UBO of Seapack BVI is irrelevant to the validity of the alleged acts of appointment and dismissal of directors.

[6] I turn first to the facts.

The facts

[7] Seapack BVI was incorporated on 8th August 2011. The initial directors were Luis Davis, Pamela Hall and Gionela Walters (“Mr. Davis”, “Ms. Hall” and “Ms Walters”

² [1994] 1 AC 340.

³ (1908) LR 35 Ind App 98.

⁴ [1960] AC 167.

⁵ [1962] AC 294.

⁶ [1945] 1 All ER 667, followed by the Supreme Court of Bermuda in *St John’s Trust Co (PVT) Ltd v Watlington and others* [2020] SC (Bda) 19 Civ (Hargun CJ).

respectively). They were employees of MMG. The shareholders were Management Nominee Services Ltd and Nominee Services Inc, which were MMG companies, controlled by MMG.)

[8] The Articles of Association are in a standard form. Article 8 contains extensive provisions about shareholders' meetings. Article 8.20 provides: "Directors of the Company may attend and speak at any meeting of Shareholders..." Article 8.21 provides: "An action that may be taken by the Shareholders at a meeting may also be taken by a Resolution of Shareholders consented to in writing without the need for any notice...."

[9] Article 9 deals with directors. Article 9.5 provides:

"A director may be removed from office,

- (a) with or without cause, by Resolution of Shareholders passed at a meeting of Shareholders called for the purposes of removing the director... or by a written resolution passed by at least 75% of the Shareholders of the Company entitled to vote; or
- (b) with cause, by Resolution of Directors passed at a meeting of directors called for the purpose of removing the director..."

[10] Article 14 deals with officers and agents. Article 14.5 provides:

"The directors may, by a Resolution of Directors, appoint any person, including a person who is a director, to be an agent of the Company. Any agent of the Company shall have such powers and authority of the directors, including the power and authority to affix or witness the application of, the Seal, as are set forth in the Articles or in the Resolution of Directors appointing the agent [subject to certain irrelevant exceptions]..."

[11] On 29th August 2011 the third and fourth defendants ("Mr. Kelleher" and "Mr. Ziazi" respectively) replaced Mr. Davis, Ms. Hall and Ms. Walters as directors of Seapack BVI.

- [12] On 25th October 2016, or at least purportedly on that day, minutes of a meeting of shareholders of Seapack BVI were signed by PPH as chairman. Since this is a key document, I shall reproduce it in full.

“On the 25th of October 2016, at 9.30am notice to this meeting as to the time, place and purpose thereof having been waived by all persons entitled thereto, a Meeting of Shareholders was held at the principal office of the Corporation.

The meeting was chaired and declared open by the shareholder of the Corporation who kept the minutes thereof.

The Chairman indicated that the purpose of the meeting was to approve the resignations of [Mr. Kelleher] and [Mr. Ziazi] as Directors of the Corporation and to appoint the new Directors/Officers of the Company with joint signature: [Mr. Davis], [Ms. Hall] & Gionela Chen Walter [*sic*].

After a brief discussion of the matter brought before this meeting and upon motion duly made and seconded, the following resolution was approved:

RESOLVED:

That the resignations of [Mr. Kelleher] and [Mr. Ziazi] as Directors of the Corporation be and are hereby approved.

That the following new Directors/Officers of the Company with joint signature are [Mr. Davis], [Ms. Hall] & Gionela Chen Walter.

There being no further business at this Meeting, it was declared closed, and in witness thereof these Minutes have been issued, signed and sealed on the date and place first above written.

Chairman of the Meeting

[Signed] Seapack

[Signed] [PPH]”

- [13] It is common ground that Mr. Kelleher and Mr. Ziazi never resigned their directorships of Seapeak BVI. Rather the document of 25th October 2016 came into existence following Mr. Kelleher’s resignation and Mr. Ziazi’s dismissal from HAS. They left HAS in order to work for the family office of the rival faction of the Hinduja family, Hinduja Group International (Switzerland) Ltd (“HGIL”).

- [14] On 11th November 2016, Mr. Jorge Luis Reyes (“Mr. Reyes”), of Morgan & Morgan Corporation Services SA, the Geneva outpost of MMG, wrote to Mr. Jos Kat (“Mr. Kat”) of HAS to say that the directors of Seapack BVI at that time were Mr. Kelleher and Mr. Ziazi. He asked for details of the proposed new directors. Mr. Kat asked for MMG directors to be appointed. On 15th November 2016 Mr. Reyes

replied and said: “As shareholders of [Seapack BVI] we accept to appoint our nominee directors as the new board.”

- [15] Although without a trial and cross-examination, I cannot make a finding to this effect, the evidence to date suggests that It is very likely that the purported minutes of the meeting of shareholders were made shortly after this exchange of emails, not on 25th October 2016 when they were purported to have been made. (The first draft of the minutes seems to have been attached to an email of Mr. Kat's of 3rd November 2016.) The minutes do, however, appear to have been signed by 1st December 2016. On that date MMG issued a certificate of incumbency showing Mr. Davis, Ms. Hall and Ms. Walters as the directors of Seapack BVI.
- [16] By letters dated 16th July 2020 Mr. Davis, Ms. Hall and Ms. Walters purported to resign as directors of Seapack BVI.
- [17] On 17th July 2020 a meeting of the board of Seapack BVI was held. The minutes record that “[p]resent at this meeting were the directors of the Corporation to wit [Mr. Davis, Ms. Hall and Ms. Walters]”. Mr. Davis, as chairman, is recorded as stating that “the purpose of the meeting was to approve the resignations of [himself, Ms. Hall and Ms. Walters]”. The minutes then record the resolution of the meeting to accept the resignation of those three directors and to appoint Karam Shanu Srichand Hinduja (“KH”) as the sole director of Seapack BVI.
- [18] The register of directors prepared by MMG and dated 7th August 2020 shows the resignation of the three directors and the appointment of KH, both on 17th July 2020.
- [19] By what is expressed to be the “resolution consent by the sole shareholder amending the memorandum of association and articles of association of [Seapack BVI]” made 20th August 2020, PPH as sole shareholder wrote that “whereas it is deemed to be in the best interest of the Company to revoke the appointment of the

current directors, now therefore it is resolved to appoint the following Director [sic] Angel Ernesto Riera Diaz [and] Jose Guillermo Gonzalez Alvarez.” Despite the title of the document, no amendment of the articles was made, nor was any resolution actually made to revoke the then existing directors’ appointments as directors.

- [20] By what is expressed to be “unanimous written resolutions of the directors of [Seapack BVI] dated 22 August 2020”, signed by Mr. Ziazi and Mr. Kelleher, it was resolved that the registered agent should be changed from MMG to the First Defendant (“Sable”). The BVI law firm, O’Neal Webster, were appointed to take the necessary steps. There is no evidence of the two directors purportedly appointed two days earlier having any involvement in this resolution, so it is unclear how the resolutions can be unanimous, or indeed how the board meeting could have been validly called.
- [21] On 27th August 2020 the BVI law firm, Conyers, Dill & Pearman, wrote to Sable on behalf of KH and purportedly on behalf of Seapack BVI. They protested the change of registered agent and asserted that only KH was a director of Seapack BVI. Sable replied by email the following day saying they had acted in good faith and needed sight of the relevant documentation. Conyers then ceased to act.
- [22] On 9th September 2020 KH, as director of Seapack BVI, granted Mr. Ganjaei a power-of-attorney to act on behalf of Seapack BVI for 360 days. Mr. Arthurs disputes that KH was a director at that time, with the consequence that the power-of-attorney was void. However, he concedes that, if the power-of-attorney is valid, then it gave Mr. Ganjaei the powers of a director under art 14.5.
- [23] On 17th September 2020, Harneys wrote to Sable, again on behalf of KH and purportedly on behalf of Seapack BVI. The letter is in aggressive terms and required Sable to undertake no further action in relation to the administration of the company. It offered to allow Mr. Poole of Sable (and only him) to inspect documents at Harneys’ offices and requested him not to inform Mr. Kelleher and

Mr. Ziazi of Harneys' letter, a request which would put Mr. Poole in a position of conflict.

[24] The same day, pursuant to section 93 of the **BVI Business Companies Act 2004**,⁷ Sable gave notice to the Financial Services Commission of its intention to resign as the registered agent of Seapack BVI and served the company with the notice. Bizarrely Sable did not tell Harneys this, then or subsequently. No reason for failing to do so as been forthcoming.

[25] Mr. Poole was not willing to agree to the arrangement proposed by Harneys. Eventually there was a meeting at Sable's offices on 22nd September 2020 attended by Mr. Addo of Harneys, Mr. Poole and Ms. Rachael Trottmann, Sable's compliance officer. I shall come back to what is said about this meeting.

[26] On 13th October 2020 Mr. Ganjaei applied for a seal and gag order preparatory to making an application for a **Norwich Pharmacal** order.⁸ I have no recollection of this application, which does not appear to have been listed, but I must have indicated, probably through my assistant after I had perused the papers, that this was not an appropriate case for a **Norwich Pharmacal**, because Mr. Ganjaei already had sufficient material to make a substantive application. Subsequently on 30th October 2020 Mr. Ganjaei did make a substantive application for an injunction. In the meantime, however, there were developments.

[27] On 16th October 2020 Mr. Gonzalez, as purported director of Seapack BVI, purported on behalf of Seapack BVI to appoint Ms. Deborah Nilson ("Ms. Nilson") as a director of Seapack US. Ms. Nilson is a New York attorney who practices as The Nilson Law Group PLLC.

[28] On Friday 23rd October 2020, Ms. Nilson asked representatives of the Trump Organization whether there were any arrears or liens on the apartments at Trump

⁷ No 16 of 2004, Revised Laws of the Virgin Islands.

⁸ See *Norwich Pharmacal Co Ltd v Commissioners for Customs and Excise* [1974] AC 133.

Tower. On Monday 26th October 2020, she requested access to the apartments in order to change the locks. No notice of this intention appears have been given to any of the occupiers of the apartments who would stand to be evicted by the change of locks. Ms. Nilson's request was referred by the Trump Organization to Mr. Gajaei and KH. Unsurprisingly they refused the request.

[29] On 29th October 2020 the current application for an *ex parte* injunction was commenced by Mr. Ganjaei, acting as sole applicant in his capacity as attorney-in-fact of Seapack BVI. I heard the application the following day. Mr. Addo, Mr. Pease and Ms Crabbe-Adams appeared on behalf of Mr. Ganjaei. No other party was notified of the application and none appeared. I shall return to the criticisms made of the presentation made at that hearing.

[30] I made an order restraining Sable from acting on the instructions on the other defendants or from taking any steps in the administration of Seapack BVI, including amending the registers of directors and shareholders. I restrained the other defendants from exercising the powers of a director of Seapack BVI or holding themselves out as directors. There were disclosure obligations imposed. The Court gave a return date of 19th November 2020 for the application.

[31] On 16th November 2020 Mr. Ganjaei, as sole applicant, issued an application for a continuation of the injunction. On 18th November 2020, the claim form and statement of claim were issued. The claimants were named as Mr. Ganjaei in his capacity as attorney-in-fact and Seapack BVI itself. 19th November 2020 was the return day on the injunction. Sable appeared, represented by Mr. Fay QC. Mr. Kelleher and Mr. Ziazi also appeared, represented by Mr. Andrew Gilliland. Mr. Gonzales had not and still has not been served. He did not appear and has taken no part in the action. As is usual on a short return date, the hearing was adjourned with directions given. So far as I can see, the order I made on 19th November has never been sealed.

- [32] Sable did not tell me or the claimants that they had served a section 93 notice. Again, no explanation has been given for this failure, despite Mr. Chivers QC pressing Mr. Fay QC on this point on 26th January 2021. The first disclosure to the Court of that fact was in Mr. Poole's second affidavit of 9th December 2020; the first disclosure to Harneys was the previous day in a letter from Agon Litigation. It is true that Harneys could have carried out a search of electronic filings with the Financial Services Commission at an earlier date, but they had no reason to do so.
- [33] MMG have indicated that they are willing to resume their position as registered agent. Discussions are progressing as to how this should be effected. Once MMG are in place as registered agents, it should be possible to release Sable from further participation in the action (subject to any outstanding questions of costs).

The legal test for granting an interlocutory injunction

- [34] There is no dispute between the parties about the principles which the Court will apply when deciding whether to grant an interlocutory injunction. In applying **American Cyanamid**,⁹ the Court must first consider whether the applicant has established a sufficiently arguable case. In **Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG; The Niedersachsen**,¹⁰ before Mustill J and the English Court of Appeal, it was held that "a good arguable case" was "one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success."
- [35] Once an applicant crosses that hurdle, the Court must then consider whether damages would be an adequate remedy (no one suggests that here) and lastly the balance of convenience. "If the scale appears very evenly balanced it is then legitimate to take into account the strength or weakness of [the applicant's]

⁹ *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

¹⁰ [1983] 1 WLR 1412 (CA only); [1984] 1 All ER 398, (Mustill J) at p 400, (CA) at p 415.

case.”¹¹ However, it is well-established that the Court should not carry out any form of mini-trial on an interlocutory application.

Mr. Arthurs’ points

- [36] Mr. Arthurs, who appeared for Mr. Kelleher and Mr. Ziazi, took three substantive points: first, that Mr. Ganjaei had not had and did not have standing to bring a claim on behalf of the Seapack BVI; second that the 25th October 2016 resolution was invalid and did not have the effect of removing his clients as directors; and third that Seapack BVI was struck off at the time of the 25th October 2016 resolution and its subsequent restoration did not retrospectively validate the 25th October resolution (assuming it was otherwise valid). He also said these matters constituted material non-disclosure, but I shall deal with that issue separately.

Standing

- [37] As regards standing, his argument had three separate limbs, which it is convenient to take in a different order. He argued that Mr. Ganjaei’s claim as attorney-in-fact was parasitic on KH being able to appoint him. KH was purportedly appointed as a director on 17th July 2020, but the three directors who purported to appoint him had resigned the previous day. Therefore, KH was never validly appointed as a director and Mr. Ganjaei’s appointment was a nullity.
- [38] That argument is logical, but fails adequately to reflect the likely facts. Now it is true that the minutes of the 17th July meeting reflect a legal theory that a resignation by a director only takes effect on the resignation being accepted by the company. That legal theory does not represent BVI law or the terms of the Articles of Association (see art 9.6). A director’s resignation is a unilateral act by the director. The company need not (and indeed cannot) do anything about it. However, one needs to examine what constitutes “the resignation”. Merely writing a letter of resignation with the director putting it in his pocket does not constitute a resignation. The letter must at a minimum be handed over to the company.

¹¹ Polly Peck International plc v Nadir (No 2) [1992] 4 All ER 769 at p 784 (Scott LJ).

However, the handing over of the letter is not *necessarily* sufficient and does not *necessarily* automatically trigger the resignation: the nature of the handover still needs to be considered. Often, where a degree of formality is required (such as on completion of a sale of a company), a letter of resignation will be held expressly in escrow. In other, less formal, circumstances, it may still be intended that the letter of resignation should not take immediate effect.

[39] There is in my judgment a good arguable case on the facts that the letters of resignation here were only intended to take effect at the conclusion of the board meeting. There is nothing surprising in preparing the letters of resignation in advance of the meeting. Everything was being done in-house. The resignations and the board meeting were part and parcel of a combined project of replacing the directors. It may be that at trial it will be shown that the project was bungled, with the three directors resigning before they appointed their replacement, but that is a matter of evidence. The claimants have in my judgment established a sufficiently good case to satisfy the **Niedersachsen** test.

[40] Another limb of Mr. Arthurs' argument was that it was wrong to grant Mr. Ganjaei an injunction when he had no "skin in the game". In particular, Mr. Ganjaei gave an undertaking as to damages. It was wrong to allow KH to hide behind Mr. Ganjaei in order that KH could avoid giving the cross-undertaking himself. I agree that in appropriate cases this might be an important consideration in exercising the Court's discretion as to whether or not to grant an injunction. However, in the current case the evidence that Mr. Kelleher or Mr. Ziazi will suffer damage from the injunction is lacking. Seapack BVI is not a trading company. The directors' duties are likely to be of a formal nature. If they were and are validly appointed directors then Seapack BVI will be able to pay their directors' emoluments. I cannot see any real prospect of substantial losses to them caused by the injunction which might trigger a liability under Mr. Ganjaei's cross-undertaking.

[41] The last limb is the proposition that Mr. Ganjaei as agent “does not have ‘sufficient interest’ to seek an injunction on behalf of [his] principal.” **Hunter v Nockolds**,¹² the authority on which Mr. Arthurs relied for that proposition, was not available for citation in Court, but I have since read it in the Law Journal’s report. Vincent had mortgaged his estate to Hunter, but fell into arrears. Hunter brought proceedings for the appointment of a receiver over the estate and its profits. He added Nockolds, who was Vincent’s land agent, as an additional defendant, in order to obtain an account of rents from the estate. Subsequently, Hunter took possession of some of the estate and started cutting down trees. Vincent, who was abroad and had not been served, had taken no part in the suit. Instead Nockolds made a cross-claim for an injunction against cutting the trees. Wigram VC refused the injunction, saying that Nockolds “has no interest in the estate itself. He might have filed a bill in the name of his principal for an injunction. A proper application by... Vincent might be entertained by the Court; but the present application is without foundation...”

[42] In the current case, Mr. Ganjaei is not simply an agent of the company. By virtue of art 14.5 of the articles of association he has the powers and authority of a director. As such, in my judgment, he has a good arguable case that he was entitled to apply *qua* director (or *qua* quasi-director) for the relief he seeks. That is the basis on which Mr. Addo put his case on the *ex parte* hearing. Before me, Mr. Chivers QC for the claimants, put an additional argument that Mr. Ganjaei was “protecting his agency” against interlopers. Again, that in my judgment reaches the good arguable case threshold. In **Hunter v Nockolds** there would not to my mind have been a difficulty with Nockolds obtaining an injunction against Hunter, if Hunter started to collect rents from the tenants, thereby denying Nockolds his commission. Nockolds’ problem was that he had no interest in the trees, whereas he would have had in his commission.

¹² (1846) 15 LJ Ch 320, 10 Jur 771.

[43] Further there is some authority that a third party, so long as they have a sufficiently relevant connection to the litigation, has standing to claim a declaration, as is sought in the claim form and statement of claim: **Office of Fair Trading v Foxtons Ltd.**¹³ Thus, Mr. Ganjaei had arguable standing on this basis. He was not a complete interloper.

[44] In any event, any issues of Mr. Ganjaei's standing in my judgment fall away now that Seapack BVI itself has been added as party. Mr. Arthurs and Mr. Fay QC complain that Seapack BVI was not a party to the application for an extension of the injunction. That is true but irrelevant. Now that Seapack BVI is a claimant, it is entitled to the benefit of the injunction. Whatever the position at the *ex parte* stage, the issue has in my judgment fallen away.

The resolution of 25th October 2016

[45] Mr. Arthurs attacks the resolution of 25th October 2016 on the basis that neither Mr. Kelleher nor Mr. Ziazi ever resigned. This is true, but is not necessarily the end of the matter. It is common for sackings to be described euphemistically as resignations. The real issue in my judgment is what, objectively, the meaning of the 25th October resolution is.

[46] A resolution of shareholders is a unilateral act. The well-known principles of construction which apply to bilateral or multilateral contracts have to be applied slightly differently. Thus, for example, if the shareholders erroneously thought that Messrs. Kelleher and Ziazi had in fact resigned, then it may be (at least arguable) that their removal was ineffective by reason of unilateral mistake. Further, a board resolution has, to some extent, a public element. This potentially affects the degree to which the factual background can be taken into account in construing the document, because the public may not have the same access to the factual nexus that more immediate actors possess.

¹³ [2009] EWCA Civ 288, [2010] 1 WLR 663 at para [52]ff.

- [47] In determining whether a good arguable case is shown that the 25th October 2016 resolution did effect the removal of Mr. Kelleher and Mr. Ziazi it is appropriate to consider the matter both from an outsider and an insider view. From an outsider point of view, I consider an unconnected bystander reading the resolution and asked the question: Are Mr. Kelleher and Mr. Ziazi still directors? The answer in my judgment is No. The outsider will know nothing of the rights and wrongs of those gentlemen's position and whether they resigned or not, but the outsider will be able to say that they are no longer directors and that Mr. Davis, Ms. Hall and Ms. Walters are now directors.
- [48] The same will apply, *a fortiori*, to insiders. They will know that there were no resignations and that the notional acceptance of the directors' resignations was mere window-dressing for a forceable removal. Accordingly, I do not need to address the interesting question of what would occur if there were a clash of the two interpretations.
- [49] Mr. Arthurs did not take any point on the likely wrong dating of the resolution. In my judgment he was right not to. The issue is the intention of the shareholders, not the date on which their will was expressed. So far as PPH's signing of the resolution is concerned, it is properly arguable that he signed on behalf of the two nominee shareholders. MMG organized his signing the document: the MMG nominee shareholders' consent to his signing can be inferred.
- [50] Mr. Arthurs submitted that there is no evidence that Mr. Kelleher and Mr. Ziazi were given notice of the meeting 25th October 2016. This, he said, was required by art 8.20. It is true that they were not given notice of the meeting, but I disagree art 8.20 required them to have been given notice. All the article provides is that, if a director does seek to attend a shareholders' meeting, he is entitled to do so. It is not necessary to infer that he be given notice of the meeting and I decline to do so.

[51] I should add that Mr. Chivers QC had a second string to his bow. Even if the resolution was for some reason ineffective, Mr. Reyes' email of 15th November 2016 shows, Mr. Chivers submits, that the nominee shareholders were appointing the three MMG directors to the board. Under **Duomatic** principles¹⁴ this was a sufficiently overt act on behalf of the shareholders to show the replacement of Mr. Kelleher and Mr. Ziazi by Mr. Davis, Ms. Hall and Ms. Walters. I trust Mr. Chivers will not find me disrespectful if I do not deal with the learning and authorities which he cited. It suffices for me to say that this point too reaches the good arguable case threshold.

The effect of restoration

[52] Mr. Arthurs points out that at the time of the 25th October 2016 resolution, Seapack BVI was struck off. He submits that, although the general effect of restoration under section 213(6) of the 2004 Act is that the *status quo ante* is restored as if the company had never been stricken off, this does not apply to acts of third parties. He cited **Davies v Ford**,¹⁵ an English case concerned with claims which a company restored to the register sought to bring in respect of misfeasance by directors during the time before restoration. Mr. Adam Johnson QC, sitting as a High Court judge, considers from para [374] onwards the English approach. The caselaw is not unequivocal, but there is a good argument that directors do not owe the usual duties of a fiduciary to the company whilst the company is struck off. That, however, is quite different to the acts of the shareholders. The acts of the shareholders are not the acts of third parties: they are the acts of the company itself. The current case can therefore be distinguished.

[53] In my judgment Seapack BVI reaches the good arguable case threshold in arguing that restoration retrospectively validated the shareholders' resolution. The usual understanding is that restoration means everything proceeds as if the company

¹⁴ See *Re Duomatic Ltd* [1969] 2 Ch 365 and *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258 at 280 ("a company is bound, in a matter which is intra vires and not fraudulent, by the unanimous agreement of its members"), approved by the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 506.

¹⁵ [2020] EWHC 686 (Ch).

had never been struck off. That, as Mr. Arthurs rightly argues, is not a universal truth (or perhaps only in the Jane Austin sense). However, for the purposes of determining whether the claimants pass the test of a good arguable case it is in my judgment sufficiently compelling for me to say the claimants satisfy the test.

- [54] Before leaving the good arguable case issue, I should mention that the register of directors maintained by MMG is in accordance with the claimants' case. The last of these registers shows KH replacing Mr. Davis, Ms. Hall and Ms. Walters. The register is *prima facie* evidence of the identity of the directors: 2004 Act section 118. This reinforces my view that the claimants have shown a good arguable case.

Balance of convenience

- [55] No issue arises as to the adequacy of damages. As to the balance of convenience, this is in my judgment overwhelmingly in favour of granting the injunction. The real subject matter of these proceedings is the three flats in Trump Tower, which are people's homes. Throwing the occupiers out is massively prejudicial to them, whereas the prejudice to the UBO, assuming he is not SPH, is limited — the inability to install family members or tenants in the flats until this action can be tried.
- [56] Insofar as I need to consider the merits of the claim, in my judgment the claimants have just the better of the argument.

Full and frank disclosure

- [57] I turn then to the duties of an applicant on an *ex parte* application to make full and frank disclosure. The extent of the duties is not in dispute. In **Great Panorama International Ltd v Qin Hui and others**,¹⁶ I described them in this way:

¹⁶ [2020] ECSCJ No 278, BVIHC (COM) 2019/0180 (determined 13th August 2020).

"[70] A party's duty making an *ex parte* application is well-established. The *locus classicus* is the judgment of Ralph Gibson LJ in **Brink's Mat Ltd v Elcombe**.¹⁷

"(1) The duty of the applicant is to make 'a full and fair disclosure of all the material facts.'

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers.

(3) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J¹⁸ of the possible effect of an **Anton Piller** order; and (c) the degree of legitimate urgency and the time available for the making of inquiries.

(5) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains [an *ex parte* injunction] without full disclosure... is deprived of any advantage he may have derived by that breach of duty.'

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

¹⁷ [1988] 1 WLR 1350 at p 1356, citations omitted.

¹⁸ *Columbia Picture Industries Inc. v Robinson* [1987] Ch 38.

(7) Finally, it 'is not for every omission that the injunction will be automatically discharged. A *locus poenitentiae* may sometimes be afforded.' The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the *ex parte* order, nevertheless to continue the order, or to make a new order on terms

'when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant... a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.'"

[71] This was approved by our Court of Appeal in **Enzo Addari v Edy Gay Addari** ¹⁹and most recently in **Paraskevaides and another v Citco Trust Corp and others**,²⁰ where Carrington JA said:

[31] ...The onus is on an applicant for *ex parte* relief to comply with the obligation to make full and frank disclosure as *ex parte* applications are, generally speaking, inconsistent with the adversarial nature of court proceedings under our system of law which usually permits a respondent to be heard before an order is made against them. The key elements are that the duty is not only to disclose what the party or their legal advisers considers to be material but what one reasonably should expect a court to consider to be material in the exercise of its discretion whether to grant the order being sought. This requires not only objective consideration of the matters that the party puts before the court, but also an active duty to make proper inquiries so as to determine whether there is other material that may [be] available for him to place before the court on the application. This is because even an innocent non-disclosure on account of a party not being aware of the fact or not realizing its materiality may be a factor against him whereas a deliberate non-disclosure will always be a factor against him.

[32] A distinction may perhaps be made here between material that is known and material that ought to have been known by an applicant. The extent of the obligation differs between the two categories of material. With respect to the former, the duty appears understandably to be more absolute. Whereas for the latter, the duty is to make proper inquiries as to the existence of further material facts. The extent of this obligation to make such

¹⁹ Civil Appeal No 2 of 2010 (determined 27th June 2005).

²⁰ BVIHCMAP 2018/0046 (determined 30th March 2020). The citation given for Addari in Paraskevaides is to a later appeal in the same case, but the judgment in the previous footnote is the one intended.

inquiries is dependent on all the circumstances including the nature of the case being advanced, the order being sought, the effects of such an order, if granted, on both the applicant and potential respondent and the interplay between the degree of urgency of the application and the time available for making such inquiries.

[33] Once it has been established that there has been non-disclosure of a material fact, and the duty is in relation to facts, the Court must ensure that the party who failed to disclose is stripped of any advantage that he gained from that breach of his duty. This may not always result in the discharge of the *ex parte* order but, even if it does, the Court may nevertheless grant a fresh order if the non-disclosure was innocent only and the balance of convenience in light of all the material facts of which the court is aware demands that a new injunction should be granted. However, the consequences of non-disclosure are not necessarily as severe if the court finds that the non-disclosure relates to a fact that is of lesser importance to the issues to be determined in order to grant the relief being sought.”

[58] Mr. Arthurs takes a number of points on non-disclosure, but most of them overlap with the substantive issues he has raised. He submits that my attention at the *ex parte* hearing should have been drawn more forcibly to Mr. Ganjaei’s lack of standing. However, that issue was drawn to my attention by Mr. Addo, who referred expressly to art 14.5: transcript p 12 lines 10-22. Mr. Arthurs submits in para [21] of his skeleton that this “was a gross oversimplification of the legal and factual position and possibly misleading.” However, I have held that the art 14.5 argument is sufficient to give rise to a good arguable case, so this point on non-disclosure in my judgment falls away.

[59] He complains in relation to the 25th October 2016 resolution that the issue of whether Mr. Kelleher and Mr. Ziazi had resigned or not was not put to me. The documents put before me on Mr. Ganjaei’s behalf do not assert that those men had resigned. The certificate of urgency said they “were previously directors of the Company but were removed from that role in October 2016.” The application of

29th October 2020 was to the same effect (the directors “were replaced”): see para 4. Mr. Ganjaei’s first affidavit was in similar terms: see para 10.

[60] It is true that Mr. Addo muddies the waters in his oral submissions on the *ex parte*. At page 6 of the transcript, he says the resolution of 25th October 2016 “is effectively a record of a meeting where it was resolved that Messrs. Kelleher and Ziazi had resigned or were resigning and those resignations were approved. And that... Davis, Hall and Walters were to be reinstalled as directors.” On the next page of the transcript he says: “And so there may well be some sort of argument that [will be] raised by the other side as to the validity of this particular meeting, but we say that on the face of it, it records the truthful fact that Kelleher and Ziazi resigned because their employment status had ended. And it is their employment status that gave them this authority to act on behalf of the family-owned companies.”

[61] What he says in the first quote is an accurate recital of the document, but the second quote is inaccurate, in that, although Mr. Kelleher resigned from and Mr. Ziazi was dismissed by HAS, which is a family-owned company in the SPH camp in order to join HGIL in the other camp, they did not resign from Seapack BVI. However, as I have held above, the mechanics whereby Mr. Kelleher and Mr. Ziazi were removed are not of central importance. What matters is that the shareholders wanted them removed and the resolution of 25th October 2016 manifested that expression of will.

[62] I do not consider that I was misled in any substantial manner. The misstatement was at most a venial sin. It had no impact on my decision to grant the injunction. In accordance with proposition (6) in **Brink’s Mat**, I refuse to discharge this injunction on this ground.

[63] The other matters raised by Mr. Arthurs are really restatements of his substantive arguments. I shall not consider them separately.

Sable's position

- [64] I turn then to Sable's position. Ostensibly it says that it adopts a neutral position. It has no interest one way or the other in the composition of the board, it says. This assertion of neutrality is, however, belied by the wideness and extreme vigour of its submissions to the effect that the *ex parte* injunction should be discharged. A large number of substantive points have been taken. It asks that in the event that an injunction is reimposed, the order should make clear from whom Sable should take its instructions and permit Sable to resign.
- [65] Sable's approach is to my mind difficult to understand. Obviously no registered agent wants to be the subject of an injunction, but the frequency with which this Court grants **Norwich Pharmacal** orders is such that any registered agent will develop a resilience in the face of injunctions from this Court. As soon as Sable was served with the 30th October 2020 order, it should have indicated that it had started the resignation process. Steps could then have been taken to have MMG substituted as the registered agent. Sable could then have dropped out of the litigation. I shall hear argument about the costs consequences of Sable not having adopted this obvious course.
- [66] Rather than taking this approach, Mr. Fay QC appearing for Sable on the current substantive return date, made very extensive written submissions. In this jurisdiction, parties are expected to serve skeleton arguments and then develop their submission orally. Mr. Fay did not serve a skeleton. Instead he served a closely typed 46 page document. The word-count is 19,296. By contrast Mr. Chivers QC's skeleton was 5,840 words long. This was already a fairly fleshy skeleton, but it is dwarfed by Mr. Fay's submissions which were more than three times as long.
- [67] It is not in my judgment appropriate to make written submissions of such prolixity. It breaches the overriding objective in multiple ways. First, it forces the Court to allot more of its resources to the case than is appropriate, because the Court has to read the submissions: CPR 1.1(2)(e). Second, it imposes unnecessary

additional expense on all the parties: Sable, who are paying for the submissions, and the other parties, who have to employ lawyers to read the submissions: CPR 1.1(2)(b). Third, the intention is to give Sable an advantage in exposing the judge to that party's submissions at greater length than the other parties' submissions, with the intended consequence that the parties are not on an even footing: CPR 1.1(2)(a). In fact, if this was the intention, it fails. It has been recognised since classical times that in advocacy less is more,²¹ but an intended breach of the overriding objective should not be countenanced. Logorrhoea has no place in the Commercial Court.

[68] In due course I will hear counsel on the costs consequences of this unnecessarily long document being served instead of a skeleton argument of more reasonable length.

[69] Mr. Fay QC relies on six points of non-disclosure:

- a. the failure to raise the matters set out in the annexure, and in particular the concerns as to the validity of the resolutions that were specifically mentioned at the meeting between Sable and Harneys on 22 September 2020 (and the HWR Opinion).
- b. the failure to inform the Court that Mr. Addo agreed at the meeting on 22 September 2020 to obtain instructions from his client as to the provision of the documents to Sable.
- c. the making of a complaint that Sable had not taken steps to reverse the change of [registered office] in circumstances where [Mr. Ganjaei]/Harneys knew that there is and was nothing that Sable could do to reverse the change.
- d. the suggestion that Sable may have 'assisted or facilitated such wrongdoing'.
- e. the failure to deal properly with the beneficial ownership of the shares in Seapack.
- f. the failure to draw the attention of the Court to the email from MMG to HAS dated 11 November 2016 in which MMG confirm that 'the current directors of [Seapack BVI] are [Mr. Kelleher] and [Mr. Ziazi]."

²¹ Quintillian, *Institutio Oratoria* 4.2.40 ("Our statement will be sufficiently concise, if, in the first place, we commence the exposition of the case at the point where it begins to concern the judge; next, if we say nothing foreign to the cause; and, lastly, if we retrench everything of which the absence will deduct nothing from the knowledge of the judge or the advantage of our client." (translation John Watson, London 1892))

[70] Dealing with these points in turn, as to a, at page 6 of the transcript of the *ex parte* hearing, Mr. Addo shows me the 25th October 2016 document and points out the odd way in which it was signed. On the next page he deals with the resignation issue, which I have already considered above. Further down the page he draws my attention to the November emails, including the 11th November 2016 email. Mr. Addo then says:

“And what is important to draw out from here is that whilst it has been recorded in the minutes of the meeting that the resignations took place on the 25th of October, the nominee directors were only, it appears, only appeared to have been appointed, or the acceptance of that appointment took place about 14 days thereafter. And I’ve drawn that out — it makes no difference really in terms of our case, but it is just to show that there is a period of time where obviously they were papering this up, and it’s clear that the Company was struck off at that time and needed to be restored. And Your Lordship will see that from the emails at pages 84, 85 and 86. And so I’d ask Your Lordship to read those to yourself.”

[71] That in my judgment points out to me in a fair manner the potential issues about dates and validity of the 25th October resolution. The November emails are discussed at para [42] of Mr. Ganjaei’s first affidavit. The “HWR Opinion” refers to a legal opinion given by Harneys to Seapack BVI immediately prior to the grant of the power of attorney to Mr. Ganjaei by a written resolution of the sole director of Seapack BVI on 9th October 2020. It is clearly a privileged document and I see no basis on which Seapack BVI was obliged to disclose it. Mr. Fay QC submits that the Court should “draw the widest inferences against [Mr. Ganjaei] as to the likely contents of the HWR Opinion.” No authority is cited for this submission and in my judgment it is wrong. A client is entitled to confidentiality in the legal advice obtained from a BVI legal practitioner. I see no basis for drawing inferences against the client in circumstances where the client is not seeking to rely on the advice as part of the case advanced to the Court. The fact that a document, such as that of 9th October 2020, refers to having obtained counsel’s opinion is neither

here nor there: it does not amount to relying on that opinion, or waiving any privilege.

[72] As to b, I do not see what the relevance of such a promise made by Mr. Addo to Sable would have been to the injunction sought. Clearly the claimants had not made the documents available to Sable. That may or may not have been justified, but in my judgment it is irrelevant to the relief sought on the *ex parte* application.

[73] As to c and d, at para [14] of his first affidavit Mr. Ganjaei says that he is “not aware of Stable having taken any steps to reverse the changes [to the registered agent and registered office]”. That is a true statement. No doubt Sable could not affect the change unilaterally; it needed the agreement of Mr. Kelleher and Mr. Ziazi, which was clearly not forthcoming. I cannot see this raises any issue of non-disclosure. As to the assertion that Sable “may have assisted or facilitated [Mr. Kelleher’s and Mr. Ziazi’s] wrongdoing”, that merely reflect the standard language used in seeking **Norwich Pharmacal** relief. It does not assert any substantive cause of action against Sable. To assert, as Mr. Fay QC does, that this allegation is “scandalous and reprehensible” is to condemn virtually all applications for **Norwich Pharmacal** relief against BVI registered agents.

[74] As to e, I have dealt with the issue of beneficial ownership at the start of this judgment. Mr. Addo was right not to go into this issue. Point f I have considered under a.

[75] In my judgment a fair presentation of relevant points was made. I reject Mr. Fay QC’s criticisms.

Conclusion

[76] Accordingly, I shall extend the injunction. I shall hear counsel on what consequential orders I should make.

Adrian Jack
Commercial Court Judge [Ag.]

(
By the Court

Registrar