

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

MONTSERRAT

MNIHCVAP2019/0006

BETWEEN:

**[1] KAREN ALLEN
[2] STEVEN FAGEN
[3] MARIE CAROLE LIDBETTER**

Appellants

and

**[1] REGISTRAR OF COMPANIES
[2] FINANCIAL SERVICES COMMISSIONER**

Respondents

Before:

The Hon. Mr. Mario Michel
The Hon. Mr. Darshan Ramdhani
The Hon. Mr. Dexter Theodore

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Ms. Karen Allen, Litigant in person
Mr. Steven Fagen, Litigant in person
Ms. Marie Carole Lidbetter, Litigant in person
Ms. Renee Morgan, for the Respondents

2021: July 28;
2022: January 14.

Commercial appeal — Disqualification of directors — Sections 67, 148A(3), 476, 500, 501, 518 and 519 of the Companies Act — Article 15 of the Institute of Chartered Accountants of the Eastern Caribbean Agreement Act — Part 32 of the Civil Procedure Rules 2000 — Whether the appointment of the inspector was contrary to the laws of Montserrat — Whether the learned judge erred by accepting the inspector's report although it was inadmissible and not in conformity with Part 32 of the Civil Procedure Rules 2000 — Whether the learned judge erred by accepting the inspector's findings although the appellants had produced prima facie evidence that refuted the largely hearsay evidence contained in the inspector's report

On 14th March 2018, the Registrar of Companies applied to the court for the investigation of certain companies, namely Montobacco Limited, Emerald Metal Co. Limited and 888 International Limited along with various individuals. The court appointed an accountant, Mr. Kenneth Kryss, as an inspector to investigate the said companies and individuals. In his report dated 18th June 2018, Mr. Kryss determined that the businesses of Montobacco Limited and the other companies were carried out by “certain” of the individuals under investigation with an intent to defraud and recommended the disqualification of the appellants as officers or directors.

On 31st July 2018, those companies were wound up by the court on the grounds that they were insolvent and that it was in the public interest that they be wound up. The Registrar of Companies then applied to the court on 18th February 2019 seeking inter alia, declarations that the appellants be declared unfit to be concerned either directly or indirectly with the management of a company incorporated within Montserrat. On 7th May 2019, the learned judge delivered his judgment, disqualifying the appellants from serving as directors of a company incorporated in Montserrat for four, three and one year respectively and making no order as to costs.

Being dissatisfied with the learned judge’s decision the appellants appealed against their disqualification on several grounds of appeal which can be condensed into the following issues: (i) whether Mr. Kryss’ appointment as inspector was contrary to the laws of Montserrat; (ii) whether the learned judge erred by accepting the inspector’s report although it was inadmissible and not in conformity with Part 32 of the Civil Procedure Rules 2000 (the “CPR”); and (iii) whether the learned judge erred by accepting the inspector’s findings although the appellants had produced prima facie evidence that refuted the largely hearsay evidence contained in the inspector’s report.

Held: allowing the appeal in part to the extent that the order of the learned judge is varied and ordering that the second and third appellants, without the prior leave of the court, may not, for four and three years respectively, be directors of Montobacco Limited, Emerald Metal Co. Limited or 888 International Limited, setting aside the disqualification order made against the first appellant and making no order as to costs, that:

1. Neither section 518 nor section 519 of the **Companies Act** requires the inspector appointed by the court to be a chartered accountant or an accountant at all. Furthermore, Article 15 of the **Institute of Chartered Accountants of the Eastern Caribbean Agreement Act** is not violated by someone merely holding himself out to be an accountant, as distinct from a chartered accountant. When making an appointment under the **Companies Act** the judge should appoint whomsoever he deems qualified given the scope of the assignment, which will vary from case to case. The learned judge had a discretion to exercise and an appellate court will not interfere with a trial judge’s exercise of his discretion unless it can be shown that he exceeded the generous ambit within which reasonable disagreement is possible and was therefore clearly wrong. In the instant case the tasks to be undertaken seemed reasonably to call for the expertise of an accountant and a fraud examiner and the appellants have not

satisfied this Court that the learned judge erred in appointing the inspector, or that the inspector broke the law by accepting the appointment.

Sections 518 and 519 of the **Companies Act** Cap 11.12, Revised Laws of Montserrat 2019 considered; Article 15 of the **Institute of Chartered Accountants of the Eastern Caribbean Agreement Act** Cap 16.07, Revised Laws of Montserrat 2019 considered.

2. The inspector's report was obtained pursuant to relevant statutory powers to order an investigation and therefore the learned judge was entitled to admit the report of the inspector notwithstanding any hearsay, opinion evidence or findings of fact contained in it. Moreover, the report of the inspector is not the report of an expert as defined by the CPR and was not therefore required to be compliant with CPR Part 32.

Section 67 of the **Companies Act** Cap 11.12, Revised Laws of Montserrat 2019 considered; **Secretary of State for Business Enterprise and Regulatory Reform v Aaron and others** [2008] EWCA Civ 1146 followed; **Hoyle v Rogers and another** [2014] 3 All ER 550 followed; Rule 32.1(2) of the **Civil Procedure Rules 2000** applied.

3. The learned judge had not given the inspector's report the limited weight that a report which is not compliant with CPR Part 32 should have received. Furthermore, the learned judge used the 'need for disqualification to protect the public' test in his determination, however, the test of "unfitness" is whether the director's conduct, viewed cumulatively and taking into account any extenuating circumstances, had fallen below the standards of probity and competence appropriate for persons fit to be directors of companies.

Hoyle v Rogers [2014] 3 All ER 550 followed; **Re Barings plc and others (No. 5), Secretary of State for Trade and Industry v Baker and others (No. 5)** [2000] 1 BCLC 523 followed; **re Grayan Building Services Ltd (In Liquidation)** [1995] 3 WLR 1 followed; Section 67 of the **Companies Act** Cap 11.12, Revised Laws of Montserrat 2019 considered.

4. While the judge considered the first appellant's conduct troubling, he did not ascribe to her the sufficiently high degree of incompetence that should warrant disqualification. He also found that she had acted without dishonesty. In those circumstances, the judge was plainly wrong to visit disqualification upon the first appellant. It was also an error to disqualify all of the appellants from holding office as directors of 'any company' in Montserrat where section 67(1) of the **Companies Act** only restricts disqualification to the management of 'the company' concerned. Notwithstanding those errors, the learned judge did find that there was an element of dishonesty in the dealings of the second and third appellants, and there was ample evidence upon which he could have made such a finding. Therefore, his decision to disqualify them will not lead to any

miscarriage of justice, so long as their disqualification is restricted to Montobacco Limited, Emerald Metal Co. Limited and 888 International Limited.

Re Barings plc and others (No. 5), Secretary of State for Trade and Industry v Baker and others (No. 5) [2000] 1 BCLC 523 followed; **re Grayan Building Services Ltd (In Liquidation)** [1995] 3 WLR 1 followed; Section 67 of the **Companies Act** Cap 11.12, Revised Laws of Montserrat 2019 applied; **Shankar Khushalani et al v Lindsay Mason (trading as Tropical Home Designs Architectural & Construction Services)** GDAHCVAP2016/0017 (delivered 11th June 2021, unreported) followed.

JUDGMENT

Introduction

- [1] **THEODORE JA [AG.]**: This is an appeal against the judgment of the learned judge delivered on 7th May 2019 disqualifying the appellants from being the directors of any company incorporated within Montserrat.

Background

- [2] On 14th March 2018, the Registrar of Companies applied to the court for the investigation of certain companies, namely Montobacco Limited, Emerald Metal Co. Limited and 888 International Limited along with various individuals. The court commissioned a report by accountant Mr. Kenneth Krys as an inspector.
- [3] The inspector was appointed under section 518 of the **Companies Act**¹ under which the Registrar may apply to the court for an order that an investigation be made of a company. Under section 518(2) the court may make such an order if it appears that:
- “(a) the business of the company or any of its affiliates is or has been carried on with intent to defraud any person;
 - (b) the business or affairs of the company or any of its affiliates are or have been carried on in a manner, or the powers of the directors are or have been exercised in a manner, that is oppressive or unfairly prejudicial to, or that unfairly disregards, the interest of a shareholder or debenture holder;
 - (c) the company or any of its affiliates was formed for a fraudulent or unlawful purpose, or is to be dissolved for a fraudulent or unlawful purpose;

¹ Cap 11.12, Revised Laws of Montserrat 2019.

- (d) persons concerned with the formation, business or affairs of the company or any of its affiliates have in connection therewith acted fraudulently or dishonestly, or
- (e) in any case it is in the public interest that an investigation of the company be made, ...”

- [4] In his report dated 18th June 2018, Mr. Kryz determined that the businesses of Montobacco Limited and the other companies were carried out by “certain” of the individuals under investigation with an intent to defraud and recommended the disqualification of the appellants as officers or directors.
- [5] On 26th June 2018, the Registrar petitioned the court for the winding up of Montobacco Limited, Emerald Metal Co. Limited and 888 International Limited. On 31st July 2018, those companies were wound up by the court on the grounds that they were insolvent and that it was in the public interest that they be wound up.
- [6] The Registrar of Companies then applied to the court on 18th February 2019, seeking, inter alia, declarations that the appellants be declared unfit to be concerned either directly or indirectly with the management of a company incorporated within Montserrat. The main ground of the application was that the court-appointed inspector, having conducted an investigation into the businesses of Montobacco Limited, Emerald Metal Co. Limited and 888 International Limited, had submitted a report to the court which revealed grounds upon which the appellants ought to be declared unfit to be concerned in the management of companies.
- [7] Section 67 of the **Companies Act** provides as follows:
 - “(1) When, on the application of the Registrar, it is made to appear to the court that an individual is unfit to be concerned in the management of a company, the court may order that, without the prior leave of the court, he may not be a director of the company, or, in any way, directly or indirectly, be concerned with the management of the company for such period—
 - (a) beginning—
 - (i) with the date of the order; or
 - (ii) if the individual is undergoing, or is to undergo a term of imprisonment and the court so directs, with the date on which he

completes that term of imprisonment or is otherwise released from prison; and
(b) not exceeding five years,
as may be specified in the order.

(2) In determining whether or not to make an order under subsection (1), the court shall have regard to all the circumstances that it considers relevant, including any previous convictions of the individual in Montserrat or elsewhere for an offence involving fraud or dishonesty or in connection with the promotion, formation or management of any body corporate.”

Issues in the court below

- [8] The sole issue before the learned judge in the court below was whether each of the appellants should be disqualified under section 67 of the **Companies Act** from holding the office of director of any company in Montserrat.

Judgment of the court below

- [9] Following a two-day hearing the court, on 7th May 2019, made an order:
- (a) disqualifying the second appellant from being a director of any company on Montserrat for four years, as being unfit to be concerned either directly or indirectly with the management of a company incorporated within Montserrat for that period;
 - (b) likewise disqualifying the third appellant for three years; and
 - (c) likewise disqualifying the first appellant for a period of one year;
- [10] The learned judge accepted the analysis of the inspector in his report and found in essence that there had been an element of dishonesty in the conduct of the second and third appellants while the first, the learned judge found, had demonstrated a lack of competence. The second appellant’s period of disqualification exceeded that of the third appellant due to the fact of a prior conviction involving dishonesty in another jurisdiction.
- [11] The appellants have appealed against their disqualification.

Grounds of Appeal

- [12] The appellants filed ten (10) grounds of appeal with 63 sub-grounds which, in the main, took issue with the qualifications of the court-appointed inspector, the non-conformity of his report with the **Civil Procedure Rules 2000** (“the CPR”) and what they viewed as the lack of documentary evidence to support the application notice for their disqualification as directors.

Issues on appeal

- [13] At the hearing of the appeal Ms. Karen Allen helpfully condensed her grounds as follows:

- (i) whether Mr. Kenneth Krys’ appointment as inspector was contrary to the laws of Montserrat;
- (ii) whether the learned judge erred by accepting the inspector’s report although it was inadmissible and not in conformity with Part 32 of the CPR; and
- (iii) whether the learned judge erred by accepting the inspector’s findings although the appellants had produced prima facie evidence that refuted the largely hearsay evidence contained in the inspector’s report.

Submissions on behalf of the appellants

The inspector’s appointment was unlawful

- [14] The appellants took aim at the inspector’s qualifications, asserting that, contrary to Article 15 of the **Institute of Chartered Accountants of the Eastern Caribbean Agreement Act** (“the Chartered Accountants Act”),² he had misrepresented himself as being a chartered accountant authorised to engage in public practice in Montserrat. Article 15 provides:

- “(1) With effect from the expiration of the period of 6 months from the date of commencement of this Agreement, no person shall—
 - (a) offer himself to be in public practice as or under the name of a Chartered Accountant;

² Cap 16.07, Revised Laws of Montserrat 2019.

- (b) use, in relation to himself, the designation “Chartered Accountant” either alone or in conjunction with any other words or initials; or
 - (c) use, in relation to himself, any designation, title, name, initials or description indicating or implying that he is entitled to so use the designation “Chartered Accountant”;
- unless he has been registered as a member of the Institute and possesses a valid certificate issued by the Council which entitled him to be in public practice

- (2) A person shall not be deemed to be in public practice by reason only that—
- (a) he engages in public practice in the course of his duties as an employee of any person; or
 - (b) he engages in book-keeping or cost accounting or the installation of book-keeping business or cost systems, or in such work as may be prescribed for the purpose of this sub-article.”

[15] The appellants relied on the fact that the inspector was not a chartered accountant to posit that he was therefore unqualified to undertake public practice in Montserrat and that accordingly his appointment as inspector was unlawful.

The inspector’s report was inadmissible and not in conformity with CPR Part 32

[16] The appellants submitted that the inspector’s report was replete with hearsay and, relying on **Ormiston Arnold Boyea and another v Eastern Caribbean Flour Mills Ltd**,³ submitted that if an expert report contains hearsay or irrelevant matters such evidence should be excluded.

[17] The appellants challenge the learned judge’s acceptance of the inspector’s report and his reliance on its contents, contending that the inspector, whom the court regarded as an expert, had been required, but failed, to comply with CPR Part 32 in the compilation of his report to the court.

³ [2006] ECSCJ No. 305 (delivered 27th September 2006).

- [18] The appellants highlighted numerous instances where the inspector's report had deviated from CPR Part 32 and argued that in the circumstances the learned judge erred by accepting the inspector's report.

The learned judge erred by failing to consider, adequately or at all, the appellant's evidence, including the books of the Company

- [19] The appellants submitted that pursuant to section 476 of the **Companies Act** the books and papers of companies being wound up constitute prima facie evidence of the truth of all matters recorded in them, yet the learned judge preferred to believe the unsubstantiated allegations of the inspector.

- [20] The appellants further relied on sections 500 and 501 of the **Companies Act** which provide as follows:

"Certificate by company

500. A certificate issued on behalf of a company stating any fact that is set out in the articles, the by-laws, any unanimous shareholder agreement, the minutes of the meetings of the directors, a committee of directors or the shareholders, or in a trust deed or other contract to which the company is a party, may be signed by a director, an officer or a transfer agent of the company.

Evidentiary value

501. When introduced as evidence in any civil, criminal or administrative action or proceeding—

- (a) a fact stated in a certificate referred to in section 500;
- (b) a certified extract from a register of members or debenture holders of a company; or
- (c) a certified copy of minutes or extracts from minutes of a meeting of shareholders, directors or a committee of directors of a company,

is, in the absence of evidence to the contrary, proof of the fact so certified without proof of the signature or official character of the person appearing to have signed the certificate."

- [21] In their submissions the appellants questioned 25 unsubstantiated findings of the inspector.

Submissions for the respondents

The inspector was not operating as a chartered accountant

[22] Learned counsel for the respondents submitted that to breach Article 15 of **the Chartered Accountants Act** a person must hold himself out to the public as a chartered accountant. Ms. Morgan contended that the inspector had not breached Article 15 because in the first place he had not marketed himself to the public at large but simply accepted a court appointment to report on a specific matter. In his report, learned counsel stated, the inspector relied on his years of experience as a fraud inspector and insolvency practitioner.

[23] Learned counsel further submitted that, in any event the inspector was indeed a chartered professional accountant (CPA) in the province of Alberta, Canada, who was entitled to automatic registration as a chartered accountant.

The inspector's report was admissible under an exception that applied to statutory fact-finding legislative schemes and was not required to be in conformity with CPR 32

[24] Ms. Morgan relied on an English judgment of the Court of Appeal, **Secretary of State for Business Enterprise and Regulatory Reform v Aaron and others**⁴ where the court ruled that in disqualification proceedings brought under the Company Directors Disqualification Act 1986 there is an implied exception to the strict rules of evidence on hearsay evidence and opinion evidence and that, as a result, reports relied on by the Secretary of State obtained under a statutory scheme for investigation were admissible.

[25] Learned counsel for the respondents sought to distinguish **Ormiston Arnold Boyea v Eastern Caribbean Flour Mills** because that case followed **Three Rivers District Council and others v Bank of England (No. 3)**⁵ where the principle emerged that the material contained in a report emerging from a private investigation conducted behind closed doors without any statutory underpinning and

⁴ [2008] EWCA Civ 1146.

⁵ [2001] 2 All ER 513.

without any power to enforce the attendance of witnesses, or the production of documents, was inadmissible hearsay.

[26] Ms. Morgan submitted that the inspector's report was admissible under the exception recognised in **Aaron** that was applicable to reports prepared under a statutory scheme.

[27] Ms. Morgan further submitted that CPR 2.2(3) disapplied the CPR to insolvency proceedings or any proceedings instituted under any enactment whenever Rules made under that enactment regulated those proceedings.

[28] Learned counsel urged that the proceedings were insolvency proceedings since they had previously included the winding up of companies. Ms. Morgan argued in the alternative that these proceedings were instituted under section 519 of the **Companies Act** which contained its own detailed rules to which the inspector's report was subject and that accordingly the CPR had no applicability.

The company's books and records were in an unsatisfactory state and cannot be relied upon

[29] The respondents have submitted that section 148A(3) of the **Companies Act** requires a company to keep accounting records containing daily entries of all sums of money it receives and expends and details of all sales and purchases.

[30] The inspector found that Montobacco's financial records were in an "abysmal state and cannot be relied upon".

[31] In their written submissions to the court the respondents have also contended that Montobacco's membership records were similarly unreliable, pointing to the fact that although the appellants maintain that no shares were formally issued until July 2015, annual returns filed at the end of 2012, 2013 and 2014 detail the shareholding of the company.

Discussion and Conclusion

Whether the inspector's appointment was contrary to the laws of Montserrat

[32] The inspector was appointed under section 519 of the **Companies Act** which is silent on the question of the required qualifications of the inspector appointed by the court. He was however constrained to act within certain clearly defined terms of reference which were summarized as follows:

- (1) The High Court on 15th March 2018 ordered that an investigation be made into the business and ownership structure of three affiliated companies pursuant to sections 518 and 519 of the **Companies Act**;
- (2) Allegations among the shareholders are that the funds have been fraudulently transferred and/or diverted from the corporate accounts and that unlawful attempts have been made to alter the shareholding and directorship of one of the companies; and
- (3) An inspector is therefore required to investigate the allegations of fraud as well as the ownership and directorship of the companies.

[33] The inspector was expected to (i) carry out an assessment of the operations and determine the assets of the three companies, (ii) investigate the relationship between them and ascertain whether there had been any unlawful transfers from Montobacco Limited to the other affiliated companies, and (iii) prepare a report of his findings.

[34] The court reviewed proposals received from three firms and the learned judge appointed Mr. Krys of Krys-Global of the British Virgin Islands to carry out the assignment.

[35] At the time of his appointment Mr. Krys was a chartered accountant/chartered professional accountant in Alberta, Canada, a certified fraud examiner, a certified

business valuator, a certified anti-money laundering specialist and a licensed insolvency practitioner in the British Virgin Islands.

[36] The appellants have strenuously argued that Mr. Krys was not a chartered accountant qualified to practise in Montserrat and by presenting a proposal and accepting the court's appointment had held himself out as a chartered accountant in public practice in Montserrat contrary to Article 15 of **the Chartered Accountants Act**.

[37] Neither section 518 nor section 519 of the **Companies Act** requires the inspector appointed by the court to be a chartered accountant. Indeed, there is no requirement that the inspector should be an accountant at all. Furthermore, Article 15 of **the Chartered Accountants Act** is not violated by someone merely holding himself out to be an accountant, as distinct from a chartered accountant. It appears to me to be the case that when making an appointment under the **Companies Act** the judge should appoint whomsoever he deems qualified given the scope of the assignment, which will vary from case to case.

[38] In other words, the learned judge had a discretion to exercise and it is trite law that an appellate court will not interfere with a trial judge's exercise of his discretion unless it can be shown that he exceeded the generous ambit within which reasonable disagreement is possible and was therefore clearly wrong.

[39] In the instant case the tasks to be undertaken seemed reasonably to call for the expertise of an accountant and a fraud examiner and the appellants have not satisfied me that the learned judge erred in appointing him, or that the inspector broke the law by accepting the appointment.

[40] This ground of appeal fails.

Whether the inspector's report ought to have been excluded

[41] The appellants have challenged the inspector's report on the grounds that it did not comply with the CPR and that it was replete with hearsay and was therefore inadmissible.

[42] The appellants contended that since the court had variously referred to the inspector as an expert and an expert accountant and the order appointing the inspector required him to file a final report with the court, the inspector was therefore a court-appointed expert and accordingly his report should have been held to the standards set by Part 32 of the CPR.

Hearsay

[43] Under section 67 of the **Companies Act** the court may, on the application of the Registrar, make a disqualification order if 'it is made to appear to the court that an individual is unfit to be concerned in the management of a company'.

[44] Section 6 of the English Company Directors Disqualification Act 1986 makes a disqualification order mandatory when a person has been the director of a company which has become insolvent and his conduct as a director makes him unfit to be concerned in the management of a company.

[45] In **Aaron Thomas** LJ stated at paragraph 29:

".... it is clearly established that in disqualification proceedings whether brought under s. 8 or under s. 7 for an order under s. 6 that there is an implied exception to the strict rules of evidence on hearsay evidence, opinion evidence and the rule in *Hollington v Hewthorn*. This was developed from the scheme of the Companies Acts on the basis that Parliament must have intended that a court should have regard to the materials produced under clear statutory procedures on which the Secretary of State had relied in bringing the proceedings."

[46] The inspector's report was obtained pursuant to relevant statutory powers to order an investigation and it is clear therefore that the learned judge was entitled to admit

the report of the inspector notwithstanding any hearsay, opinion evidence or findings of fact contained in it.

Non-compliance of the report with CPR Part 32

- [47] It was established in the English Court of Appeal decision of **Hoyle v Rogers and another**⁶ that the English CPR Part 35 (which is in many respects similar to the Eastern Caribbean CPR Part 32) is not a comprehensive and exclusive code for the admission of expert evidence. It only serves to regulate how a particular category of expert evidence is used in court proceedings.
- [48] An expert is defined in the English CPR rule 35.2 as a person who has been instructed to give or prepare evidence for the purpose of proceedings, while the Eastern Caribbean CPR 32.1(2) defines an expert witness as ‘an expert who has been instructed to prepare or give evidence for the purpose of court proceedings’.
- [49] In **Hoyle**, the crash of a small aircraft resulted in proceedings in negligence against the pilot. The claimant sought to rely on the report of inspectors of the Air Accident Investigation Branch (the AAIB) of the Department of Transport appointed under the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996. The inspectors had the right to call and examine witnesses. The AAIB report contained observations of eye-witnesses, expressions of opinion and findings of fact. The defendant sought a declaration that the report was inadmissible under the rule in *Hollington v Hewthorn* and that it was non-compliant with the English CPR Part 35. The judge ruled that the report was admissible and the defendant appealed.
- [50] In the Court of Appeal Clarke LJ, in a judgment with which the other members of the Court of Appeal concurred, declared:
- “The purpose of CPR Pt 35 is to regulate the evidence of experts ***instructed by the parties*** [emphasis supplied], to ensure that they act as experts, and to regulate the use and content of their reports. The expert evidence in the

⁶ [2014] 3 All ER 550.

Report does not fall within CPR Pt 35. The AAIB was not instructed by, and is wholly independent of, any of the parties.”⁷

- [51] The court therefore dismissed the appeal, ruling that the report of the AAIB was admissible with the caution that since it was not the evidence of an expert as defined in the English CPR it should be subject to very limited weight⁸.
- [52] By the same token, the report of the inspector, Mr. Krys, is not the report of an expert as defined by the CPR and was not therefore required to be compliant with CPR Part 32.
- [53] This ground of appeal therefore fails.

Whether the learned judge’s findings were against the weight of the evidence

- [54] In **Shankar Khushalani et al v Lindsay Mason (trading as Tropical Home Designs Architectural & Construction Services)**,⁹ Blenman JA expressed the general principle governing appellate interference in the following terms:

“...it is not open to the appellate court to overturn the learned trial judge’s findings of facts and evaluations of those facts, unless those facts were not open to the judge on the evidence. An appellant must show that the trial judge fundamentally misunderstood the issue or the evidence or that he plainly failed to take the evidence into account or that he arrived at a conclusion which the evidence could not support. This is because the trial judge, as the initial factfinder, would have been exposed to a wider range of impressions that influenced a decision on factual matters than would not be available to an appellate court. These impressions cannot be replicated by an analysis of the transcript of the evidence. It is for this reason that the appellate court exercises restraint and gives some measure of deference to the conclusions reached by the trial judge.”

- [55] The application of this principle to appeals against the disqualification of directors was considered by the English Court of Appeal in **Re Barings plc and others (No.**

⁷ Hoyle v Rogers [2014] 3 All ER 550, paragraph 62.

⁸ Ibid, paragraph 66.

⁹ GDAHCVAP2016/0017 (delivered 11th June 2021, unreported).

5), **Secretary of State for Trade and Industry v Baker and others (No. 5)**¹⁰ where Morritt LJ cited with approval the following remarks from the judgment of Mr. Jules Sher QC in **Re Hitco 2000 Ltd**:¹¹

“The ultimate determination for the trial judge is whether the proven charges render the director unfit to manage a company. That determination is not one of primary fact. It is a determination which involves the evaluation of the seriousness of the charges which have been proved and a judgment of the trial judge as to whether, taking all the circumstances into account, including all matters of mitigation and extenuation, the director is or is not unfit ... Nonetheless, the ultimate conclusion as to fitness or otherwise is itself a conclusion of fact. In the words of Dillon LJ in *Re Sevenoaks Stationers (Retail) Ltd* [1991] BCLC 325 at 330, [1991] 3 All ER 578 at 583: ‘... the true question to be tried is a question of fact, what used to be pejoratively described in the Chancery Division as ‘a jury question’. Plainly, the appellate court would be very slow indeed to disturb such conclusion as to fitness or unfitness. In many, perhaps most, cases the conclusion will have been so very much assisted and influenced by the oral evidence and demeanour of the director and other witnesses that the appellate court would be in nowhere near as good a position to form a judgment as to fitness or unfitness than was the trial judge. But there may be cases where there is little or no dispute as to the primary facts and the appellate court is in as good a position as the trial judge to form a judgment as to fitness. In such cases the appellate court should not shrink from its responsibility to do so, and, if satisfied that the trial judge was wrong, to say so.”

[56] In that case the application for disqualification had been made under section 6 of the Company Directors Disqualification Act 1986 of the United Kingdom which provides as follows:

“(1) The court shall make a disqualification order against a person in any case where, on an application under this section, it is satisfied—(a) ... (b) that his conduct as a director of that company ... makes him unfit to be concerned in the management of a company.”

[57] In **re Grayan Building Services Ltd (In Liquidation)**¹² the test of “unfitness” was expressed to be whether the director’s conduct viewed cumulatively and taking into account any extenuating circumstances, had fallen below the standards of probity and competence appropriate for persons fit to be directors of companies.

¹⁰ [2000] 1 BCLC 523.

¹¹ [1995] 2 BCLC 63.

¹² [1995] 3 WLR 1.

[58] The application for the appellants' disqualification was made under section 67 of the **Companies Act** which provides:

“67. (1) When, on the application of the Registrar, it is made to appear to the court that an individual is unfit to be concerned in the management of a company, the court may order that, without the prior leave of the court, he may not be a director of the company, or, in any way, directly or indirectly, be concerned with the management of the company for such period—

(a) beginning—

(i) with the date of the order; or

(ii) if the individual is undergoing, or is to undergo a term of imprisonment and the court so directs, with the date on which he completes that term of imprisonment or is otherwise released from prison; and

(c) not exceeding five years, as may be specified in the order.

(2) In determining whether or not to make an order under subsection (1), the court shall have regard to all the circumstances that it considers relevant, including any previous convictions of the individual in Montserrat or elsewhere for an offence involving fraud or dishonesty or in connection with the promotion, formation or management of anybody corporate.”

[59] The appellants contended that they had provided *prima facie* evidence in the form of the corporate records which refuted the hearsay evidence relied on by the learned judge.

[60] For this submission they rely on section 476 of the **Companies Act** which provides as follows:

“Where a company is being wound up, all books and papers of the company and of the liquidators shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters purporting to be recorded therein.”

[61] In **Re Armvent Ltd.**¹³ Templeman J considered that the inspector's report ought to be treated as *prima facie* evidence.

¹³ [1975] 3 All ER 441.

- [62] In the court below, the learned judge stated at paragraph 11 of his judgment that: '[r]eflecting on the report, and on the evidence I heard from Krys on 16.07.18, I make it plain I accept its analysis. I note its recommendation at para 4.3 that the respondents should be disqualified as directors.'
- [63] The learned judge then proceeded to consider the extent to which any of the appellants had successfully contradicted the report, concluding in the final analysis that none of them had 'dented it'.
- [64] Bearing in mind the fact that the burden of proof lay with the respondents and given the injunction served up in **Hoyle** that such reports, though admissible, being non-compliant with CPR Part 32, are to be given limited weight, the learned judge's approach of wholeheartedly accepting the report and then considering whether the appellants had disproven it, is concerning.
- [65] The learned judge stated at paragraph 12:
"The only persons from whom I have heard evidence in an attempt to contradict the report are Allen and Meade...concerning the evidence from Allen and Meade, on close questioning sadly for both neither dented it."
- [66] It is clear that the learned judge had not given the inspector's report the limited weight that a report which is not compliant with CPR Part 32 should have received.¹⁴
- [67] This is especially the case since, given the serious nature of disqualification proceedings, the burden on an applicant of establishing unfitness is a heavy one, although the standard of proof remains the normal civil standard, of proof on the balance of probabilities.¹⁵
- [68] At paragraph 17 of his judgment the learned judge referred to the English case of **Re Amaron Ltd; Secretary of State for Trade and Industry v Lubrani (No 2)**¹⁶

¹⁴ See *Hoyle v Rogers* [2014] 3 All ER 550, paragraph 66.

¹⁵ *Re Barings plc (No. 5)* [1999] 1 BCLC 433 at paragraph 484.

¹⁶ [1998] BCC 264.

and declared himself satisfied that there was a need for disqualification of the appellants to protect the public. It was apparent that the learned judge was using the 'need for disqualification to protect the public' test.

[69] It is instructive to note that in **Secretary of State for Trade and Industry v Gray and another**¹⁷ the English Court of Appeal made the point that the purpose of making disqualification mandatory in England was to ensure that everyone whose conduct had fallen below the appropriate standard was disqualified for at least two years, whether in the individual case the court thought that this was necessary in the public interest, or not.

[70] The emphasis, therefore was on determining whether the director in question had fallen below the appropriate threshold of acceptable behaviour, and to that extent, the court's belief that disqualification was necessary in the public interest was neither here nor there.

[71] In my view it makes no difference that disqualification is mandatory in England. The similarity in the phraseology used in section 67 of the **Companies Act** and section 6 of the Company Directors Disqualification Act 1986 of the United Kingdom satisfy me that the test expounded in **re Grayan Building Services Ltd (In Liquidation)** is the applicable one under section 67 of the **Companies Act**.

[72] The learned judge then went on to make a finding to the effect that he was unable to attribute dishonesty to the first appellant, but rather mere lack of competence.

[73] Although it is undoubtedly the case that a finding of dishonesty is not a prerequisite to a determination under section 67 of the **Companies Act** that an individual is unfit to be concerned in the management of a company, in cases of incompetence

¹⁷ [1995] 1 BCLC 276.

without dishonesty such incompetence must be of a high degree before a finding of unfitness can be made against a director.¹⁸

- [74] The learned judge summarised his thoughts regarding the first appellant as follows:
“As to Allen, I am troubled by her handling the brothers’ shares, but in light of how she has presented herself, impressing the court, including knowing now of her earlier military service, which to my mind militates against shady practice, showing instead her background is hardworking and reliable, I will not place her work at Montobacco in the category of seeming dishonest, but instead as over-eager, lacking competence, and without appropriate leadership from Fagen.”¹⁹
- [75] The learned judge adverted to the difference between incompetence and dishonesty, but only in relation to his consideration of disqualification periods, stating, ‘... when considering disqualification periods there is a difference between incompetence and dishonesty’.
- [76] It is clear that he considered the first appellant’s conduct troubling but there is nothing to suggest that the learned judge ascribed to her the sufficiently high degree of incompetence that should warrant disqualification.
- [77] The learned judge appeared to be satisfied that merely troubling incompetence sufficed to constitute unfitness.
- [78] In my view, the learned judge was plainly wrong to visit disqualification upon the first appellant for incompetence which he found to be nothing more than troubling.
- [79] Further, in light of the learned judge’s finding that the first appellant had acted without dishonesty I feel sure that had he applied the probity test he would likely not have disqualified her at all, since he attributed no dishonesty to her.

¹⁸ Re Barings (No. 5), at para 35 where Morritt LJ recited, without adverse comment, the applicable principles of law stated in the lower court.

¹⁹ See paragraph 20 of the judgment below.

[80] It was also an error to disqualify all of the appellants from holding office as directors of 'any company' in Montserrat. Unlike the English section 6, which permits disqualification from the management of any company, section 67(1) of the **Companies Act** restricts disqualification to the management of 'the company' concerned. This means therefore that any disqualification ought not to have extended beyond the companies which were the subject of the investigation, and which were accordingly referenced in the application.

[81] Notwithstanding those errors the learned judge, in his consideration of the conduct of the second and third appellants, did find that there was an element of dishonesty in their dealings, and there was ample evidence upon which the learned judge could have made such a finding. In the circumstances, his decision to disqualify them will not lead to any miscarriage of justice, so long as their disqualification is restricted to Montobacco Limited, Emerald Metal Co. Limited and 888 International Limited.

Conclusion

[82] For the reasons given above, I would make the following orders:

- (1) The appeal by the second and third appellants is allowed to the extent that I would vary the order of the learned judge and order that they, without the prior leave of the court, may not, for four and three years respectively, be directors of Montobacco Limited, Emerald Metal Co. Limited or 888 International Limited.
- (2) The appeal by the first appellant is allowed and the disqualification order made against her is set aside.
- (3) There shall be no order as to costs.

I concur
Mario Michel
Justice of Appeal

I concur

Darshan Ramdhani
Justice of Appeal [Ag.]

By the Court

Chief Registrar