

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

BVIHC(COM) 2020/0126

**IN THE MATTER OF SCHEDULE 2, SECTION 57 OF THE BRITISH VIRGIN ISLANDS
BUSINESS COMPANIES ACT**

AND IN THE MATTER OF CHINOOK WIND ALLIANCE LIMITED (THE COMPANY)

**AND IN THE MATTER OF AN APPLICATION BY THE COMPANY FOR AN ORDER
THAT CHINOOK WIND ALLIANCE LIMITED BE RESTORED TO THE
COMPANIES REGISTER**

BETWEEN:

CHINOOK WIND ALLIANCE LIMITED

Claimant

and

THE REGISTRAR OF CORPORATE AFFAIRS

Defendant

Appearances:

Ms. Nadine Whyte Laing of O'Neal Webster for the claimant
Ms. Dian D Fahie for the defendant

2020 October 8,
October 14

JUDGMENT

[1] **JACK, J [Ag.]:** This is an application by Chinook Wind Alliance Ltd ("the Company") for a declaration that the dissolution of the Company is void pursuant

to paragraph 57 of Schedule 2 to the **BVI Business Companies Act 2004**¹ and for consequential relief.

[2] The Company was incorporated in this Territory as an international business company ("IBC") on 6th June 2002 under the **International Business Companies Act**.² The only issued share in the Company was one bearer share, held throughout by Mr. Klaus C Westphal ("Mr. Westphal"). The only asset of the Company is real estate in Key West in Florida, recently valued at over US\$1.3 million. The Company failed to pay its annual fees and was struck off the Register of Companies on 1st November 2003. Having remained continuously struck off for over ten years, pursuant to paragraph 56(3) of Schedule 2 to the 2004 Act, the Company was deemed dissolved on 31st October 2013.

[3] Paragraph 57 of Schedule 2, so far as material provides:

"(1) Application may be made to the Court for an order declaring the dissolution of a CapCo or an IBC to which subparagraph (2) applies to be void.

(2) This paragraph applies in place of section 218 where:

...(b) In the case of an IBC

- (i) the company was dissolved under the provisions of the International Business Companies Act prior to the re-registration date, or
- (ii) is deemed to be dissolved under paragraph 54.

(3) An application under subparagraph (1)

- (a) may be made by the company or a creditor, member or liquidator of the company;
- (b) shall be made within ten years of the date that the company was dissolved; and
- (c) may be made after the applicable re-registration date, or where the company has been struck off and dissolved prior to the applicable reregistration date, prior to that date.

(4) On an application under subparagraph (1), the Court may declare the dissolution of the company void, subject to such conditions as it considers just.

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

² Chapter 291, Revised Laws of the Virgin Islands.

- (5) Where the Court makes an order under subparagraph (4)
- (a) the company is deemed never to have been struck off the CapCo Register or the IBC Register, as the case may be, or to have been dissolved; and
 - (b) where the order is made on or after the applicable re-registration date, the company is deemed to have been automatically re-registered under this Act in accordance with Part III on the re-registration date.”

[4] Because the Company was not on the Register of Companies on 31st December 2006, it was not automatically re-registered under the 2004 Act: see paragraph 6(1) in Part III of Schedule 2 to the 2004 Act. Further, the bearer share is disabled, so that Mr. Westphal has no rights as a member of the Company: see generally **Sembacher Foundation v Lark Services Inc**³ at paras [30] to [58]. Under the 2004 Act he is only a shareholder if his “name is entered on the register of members”: see the definition of “shareholder” in section 78. Since the bearer share was never converted into a registered share, Mr. Westphal’s name has never been entered on the register of members. He has accordingly in my judgment no status as a member to make the current application.

[5] The sole director of the Company throughout its existence was Juris Magister (BVI) Ltd (“Juris Magister”). This BVI company was dissolved on 30th April 2016, some three years after the Company was dissolved. Mr. Westphal was never a *de jure* director of the Company during its existence. After he discovered in 2019 that the Company had been dissolved, he purported to appoint himself as the *de jure* director of the Company. Since he was not a member, he had in my judgment no status to appoint a director. The purported appointment was therefore ineffective. In any event, Ms. Whyte Laing concedes that it is not possible to appoint a director of a dissolved company. Accordingly, in my judgment Mr. Westphal was never a *de jure* director.

³ BVIHC (COM) 2018/0027 (determined 17th January 2020) (Farara J).

[6] Mr. Westphal asserts in the alternative that he is a *de facto* director. The Court of Appeal in **Ciban Management Cooperation v Citco (BVI) Limited and others**⁴ held:

“The test for the determination of whether a person is a *de facto* director is one of fact and degree. The question to be answered is whether the individual was part of the governing structure of the company. In **Revenue and Customs Commissioners v Holland and another; In Re Pay Check Services 3 Ltd. and others**,⁵ Lord Hope stated:

‘It is plain from the authorities that the circumstances vary widely from case to case. Jacob J declined to formulate a single decisive test in **Secretary of State for Trade and Industry v Tjolle**,⁶ as he saw the question very much as one of fact and degree. He was commended by Robert Walker LJ in **In re Kaytech International plc**⁷ for not doing so, and I respectfully agree that there is much force in Jacob J’s observation. All one can say, as a generality, is that all the relevant factors must be taken into account. But it is possible to obtain some guidance by looking at the purpose of the section. As Millet J said in **In re Hydrofoam (Corby) Ltd**,⁸ the liability is imposed on those who were in a position to prevent damage to creditors by taking proper steps to protect their interests. As he put it, those who assume to act as directors and who thereby exercise the powers and discharge the functions of a director, whether validly appointed or not, must accept the responsibilities of the office. So one must look at what the person actually did to see whether he assumed those responsibilities in relation to the subject company.’”

[7] Ms. Fahie laid some weight on **Hydrodam**, where Millet J held at p 183:

“A *de facto* director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a *de facto* director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the

⁴ BVIHCVAP2013/0001 (determined 13th February 2019) at para [50], appeal dismissed [2020] UKPC 21, [2020] 3 WLR 705 without discussing this point.

⁵ [2010] UKSC 51, [2010] 1 WLR 2793 at para [36].

⁶ [1998] 1 BCLC 333.

⁷ [1999] 2 BCLC 351 at p 423.

⁸ [1994] 2 BCLC 180 at p 182.

company's affairs or undertook tasks in relation to its business which could properly be performed by a manager below board level."

- [8] The Company gave Mr. Westphal a power of attorney on 6th June 2002, the date of the Company's incorporation. Ms. Whyte Laing accepts that nothing Mr. Westphal did prior to the dissolution of Juris Magister could be relied upon to show that Mr. Westphal was a *de facto* director, because any acts performed by him in that period would be by reference to the power of attorney, not to an assumed status as a *de facto* director. Instead, she said that his acts after the dissolution of Juris Magister were the acts of a *de facto* director.
- [9] This submission faces the difficulty that once the Company was dissolved there was no management of the company's affairs to conduct, or business for a director to superintend. It is not possible to act as a director of a non-existent company. Mr. Westphal cannot post-2016 be "part of the governing structure of the company" in my judgment, because there was no company to govern. The power of attorney lapsed as soon as the donor of the power ceased to exist.
- [10] He could not rely on the power of attorney post-dissolution of Juris Magister to be treated as acting as a director under section 109(6) of the 2004 Act. As Ms. Fahie said in her skeleton:

"23. Section 109(6) of the [2004] Act provides that:

'If at any time a company does not have a director, any person who manages, or directs or supervises the management of, the business and affairs of the company is deemed to be a director of the company for the purposes of this Act.'

Therefore, in order to be deemed a director under section 109(6) of the [2004] Act:—

- (i) the Company must be without a director; and
- (ii) while the company was without a director, the person who either managed the affairs of the company or directed or supervised the management and affairs of the company is deemed a director.

24. The acts relied on by Mr. Westphal, occurred between 2019 and 2020, several years after both the Company and its directors were dissolved. The evidence shows that Juris Magister... was the sole director of the

Company for the entire duration of the Company's existence, having only been dissolved in 2016, three years after the Company was dissolved.

25. As the Company's dissolution pre-dates the dissolution of its director, the Company was never without a director, thereby making it legally impossible for Mr. Westphal or anyone else to satisfy the first limb of the test to be declared a deemed director of the Company under section 109(6) of the [2004] Act."

- [11] Ms. Whyte Laing relied on Mr. Westphal continuing to pay various bills in relation to the Key West property after 2016 purportedly on behalf of the Company. The evidence of this is fairly thin, but I am prepared to assume that Mr. Westphal did purport to manage the affairs of the Company after 2016. However, there was simply no business of the Company to manage, because there was no company. Any acts he took purportedly on behalf of the Company could equally be referable to the power of attorney. There is no evidence he intended to act as director.
- [12] Accordingly, I find that Mr. Westphal was never a *de facto* or a deemed director of the Company.
- [13] Is the current application properly brought? Paragraph 57(3)(a) gives an express power to a dissolved company to apply for a declaration under paragraph 57(1) that its dissolution is void. The Act therefore recognises that a dissolved company still has some vestigial existence. The question is then: who can make such an application on the dissolved company's behalf? The answer in my judgment must be: whoever was entitled to make such an application on the company's behalf prior to its dissolution. That would normally be Juris Magister, as director; or Mr. Westphal, as member; or a creditor; or the Financial Services Commission if the Commission was seeking the appointment of a liquidator. Juris Magister no longer exists. Mr. Westphal is not a member, because his bearer share is disabled. There are no creditors. The Financial Services Commission does not seek to wind up the Company. Mr. Westphal was not entitled as attorney-in-fact for the Company to make such an application, unless the requirements of section 109(6) were met, but, as I have held, those requirements were not met.

- [14] The only way in which the application could conceivably get home was if the Court could rely on Mr. Westphal's actions post-2016 to establish that he was a *de facto* or a deemed director. Now it is true that, if the Court makes an order declaring the dissolution of the Company void, the effect is retrospectively to bring the Company back to life, as if it had never been dissolved: see paragraph 57(5)(a). However, allowing Mr. Westphal's post-2016 actions to be treated as the acts of a director would be a complete boot-strapping exercise. Mr. Westphal would be saying: "I do not have any standing to be acting in the name of the Company, but if you grant me the order I am seeking I will retrospectively have standing." That is not in my judgment a proper approach to the matter. Standing needs to be established before the Court entertains an application. (Further, as I have said, his post-2016 actions are equally referable to his acting as the donee of the power of attorney.)
- [15] Moreover, if this argument were correct, it would leave the door open to abuse. A complete interloper could, after a company with only bearer shares was dissolved, purport to act as a director (say by doing a small amount of business purportedly in the company's name), quite possibly without any knowledge on the part of the holder of the disabled bearer shares. He or she could then firstly apply to restore the company under paragraph 57(1), secondly refuse to allow redemption of the bearer shares and thirdly instead pay generous director's emoluments to him or herself until the assets were exhausted or otherwise strip the company. That can hardly have been the legislature's intention.
- [16] Since Mr. Westphal is not and has never been any type of director of the Company, he is not in my judgment entitled to bring proceedings in the name of the Company. Nor is he "a creditor, member or liquidator of the company", so as to fall within the remaining categories of potential applicant under paragraph 57(3)(a) of Schedule 2. There is thus no purpose in substituting him as claimant.
- [17] It follows that the claimant's application should be dismissed.

[18] In case I am wrong in that conclusion and the action is properly brought by the Company, I should briefly express my views on what would happen. Ms. Whyte Laing submits in her skeleton:

“12. ...[T]he shares in the Company are issued to bearer and [Mr. Westphal] holds the original bearer share certificate. The bearer shares certificate was not deposited with a custodian as required by law and therefore the bearer shares are disabled, that is, they do not carry any entitlements which they would otherwise carry. This however does not prevent the company from exercising its right pursuant to (a) clause 19 of its articles of association to redeem those shares or (b) pursuant to clause 11 of its memorandum of association to exchange or convert those shares for registered shares.

13. In the circumstances, the Court ought properly to give a direction that on restoration, the Company, should consider whether to redeem the bearer shares or exchange/convert the bearer shares to registered shares. If the Company does not have any director to act on its behalf, then the Court should consider whether to appoint a receiver to act on behalf of the Company. [Mr. Westphal] states that he is the *de facto* director of the Company and on the restoration of the Company, he will act on behalf of the Company to consider whether to redeem, exchange/convert the bearer shares.”

[19] As I have said I do not accept that Mr. Westphal is a *de facto* director. The position, if the Company’s dissolution was declared void, would be exactly the same as was the case in **The Bank of Nova Scotia Trust Company (Bahamas) Ltd v The Registrar of Companies and others**.⁹ There the only shares were disabled bearer shares. The only director had died. The two companies concerned had, however, been kept in being and did not require restoration. The Court of Appeal appointed a neutral receiver to consider whether to allow redemption of the disabled bearer shares. That is what I would have ordered if I had declared the dissolution of the Company to be void.

[20] This leaves the question of costs. Since I have held that Mr. Westphal did not have authority to issue proceedings in the name of the Company, *prima facie* he is liable for the costs, although he would need to be added as a party. O’Neil

⁹ BVIHCVAP 2016/0009 and 0010 (determined 10th October 2018).

Webster may be liable for the costs too, since they purported to be the legal representatives of the Company. The law in relation to legal practitioners acting without authority is harsh: see **Young v Toynbee**.¹⁰ In general strict liability for the costs is applied: **Re Koshigi Ltd; Pretlove v Koshigi Ltd and another; Conyers, Dill and Pearman, respondents to the costs application**.¹¹ A firm caught acting without authority would, however, normally have a right to an indemnity from the person actually instructing them.

[21] I shall, however, hear counsel as to any consequential orders.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar

¹⁰ [1910] 1 KB 215.

¹¹ BVIHC (COM) 231 OF 2018 (determined 5th December 2019).