

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM NO. BVIHCOM2020/0078

**IN THE MATTER OF SECTION 218 OF THE BVI BUSINESS COMPANIES ACT, 2004
AND IN THE MATTER OF FLOWERY DEVELOPMENTS LIMITED
AND IN THE MATTER OF AN APPLICATION FOR THE RESTORATION OF A
DISSOLVED COMPANY**

BETWEEN:

**JASON HUGHES
(as former director of FLOWERY DEVELOPMENTS LIMITED)**

Claimant

and

THE REGISTRAR OF CORPORATE AFFAIRS

Defendant

Appearances:

Mr. Dave Marshall of Collas Crill LP for the claimant
Ms. Dian D Fahie for the defendant

2020 July 9, 27
September 10

JUDGMENT

- [1] **JACK, J [Ag.]:** Flowery Developments Ltd (“the Company”) was incorporated on 8th February 2012. On 4th December 2018 the Company started the process of voluntary liquidation. The voluntary liquidation was completed on 21st January 2019. The same day the Registrar of Corporate Affairs issued a certificate of dissolution. On 5th June 2020, the claimant issued a fixed date claim seeking an

order from the Court pursuant to section 218 of the **BVI Business Companies Act 2004**¹ restoring the Company to the Register of Companies.

[2] The facts, which were not in dispute, are set out in Mr. Marshall's skeleton argument as follows:

“(a) Pursuant to an Agreement for the Sale and Purchase of Loan dated 20 November 2018 (the ‘Assignment’), the Company assigned its claims against Kensaliv Consultants Ltd. (‘Kensaliv’) to Black Eagle Litigation Investment Fund Limited (‘Black Eagle’) on terms that consideration for the Assignment should be paid to the sole shareholder of the Company, Truetake Limited (‘Truetake’). The Assignment is governed by UK law.

(b) Pursuant to clause 3.1 of the Assignment, the first instalment of the consideration in the sum of US\$1 million for the Assignment was due to be paid to Truetake on the expiry of 14 months from the date of the Assignment, on 20 January 2020.

(c) Under clause 3.2 of the Assignment, in the event that Black Eagle failed to pay any instalment of the consideration due under clause 3.1, the Company had the right to give notice to Black Eagle requiring the latter to immediately execute assignments from Black Eagle back to the Company in substantially the same form as that which was attached to the Assignment. The Assignment did not provide for Truetake to assert any similar rights against Black Eagle.

(d) On 20 January 2020, Black Eagle wrote to Truetake and to the Company indicating that Black Eagle's efforts to raise funding to pay the instalments due under clause 3.1 of the Assignment had failed and that accordingly, Black Eagle was unable to honour its financial obligations under the Assignment. Black Eagle further indicated that it was ready to honour its obligations to execute assignments in favour of the Company pursuant to clause 3.2 of the Assignment.

(e) The Claimant as former director of the Company therefore seeks an order restoring the Company to the Register of Companies so as to allow it to enforce its rights against Black Eagle under clause 3.2 of the Assignment.

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

[3] In addition, by clause 2.2 of the Assignment, Black Eagle acknowledged and agreed that the “Loan [to Kensaliv] is in default and may be non-performing and pending proceedings may have been filed by or against one or more of the Borrower Parties.” Since the assignment is governed by English law, the **Contracts (Rights against Third Parties) Act 1999** (UK)² gives Truetake the right to enforce against Black Eagle the term as to payment of the consideration. The term granting the Company’s right to a reassignment from Black Eagle of the claim against Kensaliv was not granted for the benefit of Truetake, so Truetake cannot *require* Black Eagle to assign the claim to it: see *ibid* section 1(1). (No evidence has been adduced as to Black Eagle’s willingness voluntarily to assign the claim against Kensaliv to Truetake.)

[4] The relevant legislation provides:

“218. Application to restore dissolved company to Register.

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

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

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

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

(3) Notice of the application shall be served on [various officials].

218A. Court’s powers on hearing.

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

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

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

(2) Where the company was dissolved following the completion or termination of its voluntary liquidation under this Act or its liquidation under

² 1999 c. 31.

the **Insolvency Act, 2003**³, the Court shall not restore the company to the Register unless

- (a) the applicant nominates a person to be liquidator of the company, if it is restored to the Register;
 - (b) the person nominated as liquidator consents to act, and is eligible to act, as liquidator of the company on its restoration; and
 - (c) satisfactory provision has been made or will be made for the expenses and remuneration of the liquidator, if appointed.
- (3) For the purposes of subsection (2)(b), a person is eligible to act as the liquidator of a company,
- (a) in the case of a company that was dissolved following the completion or termination of its voluntary liquidation, if he would be eligible to be appointed voluntary liquidator of the company under this Act;
 - (b) in the case of a company that was dissolved following the completion or termination of its liquidation under the Insolvency Act, if he is a licensed insolvency practitioner who would be eligible to act in relation to the company in accordance with section 482 of that Act.
- (4) Where the Court makes an order restoring a company to which subsection (2) applies, it shall appoint as liquidator of the company
- (a) the person nominated by the applicant; or
 - (b) some other person who is eligible to act as liquidator of the company.

218B. Effect of restoration.

- (1) Where the Court makes an order restoring a company to the Register, a sealed copy of the Order shall be filed with the Registrar...
- (2) On receiving a filed copy of a sealed order under subsection (1), the Registrar shall restore the company to the Register with effect from the date and time that the copy of the sealed order was filed and issue a certificate of restoration to the Register.
- (3) Where the company was dissolved following the completion or termination of its voluntary liquidation under this Act or its liquidation under the **Insolvency Act, 2003**,
- (a) the company is restored as a company in liquidation under this Act or the Insolvency Act; and
 - (b) the person appointed by the Court as liquidator is constituted liquidator of the company with effect from the time that the company is restored to the Register.
- (4) Subject to subsection (5), a company is restored to the Register with the name that it had immediately before it was dissolved.
- (5) If the name of a company has been reused in accordance with Regulations made under section 24(c), the company is restored to the Register with its company number name.

³ No 5 of 2003, Laws of the Virgin Islands.

(6) A company that is restored to the Register is deemed to have continued in existence as if it had not been dissolved or struck off the Register.”

[5] It is not in dispute that the claimant, as a former director of the Company, has standing to bring the current application. The former liquidator, Ms. Cassandra Glasgow-Penn, is willing to continue to act as liquidator, if the Company is restored. The various other necessary formalities have been or will be honoured, if restoration is ordered.

[6] There is a difference in the Court’s approach to applications for restoration where a company has been dissolved purely administratively (usually for non-payment of fees) and where a company has been liquidated. Restoring a company after a liquidation has been concluded, is a much more serious matter. Liquidation is intended to be terminal. All rights and obligations of the company will have been settled.

[7] It is now well established in this Territory that the English authorities on restoration of companies are inapplicable, because the legislation here is different to that in the United Kingdom: **Dedyson Enterprises Limited v Registrar of Corporate Affairs**.⁴ In **Yeung Kwok Mung v Attorney-General and another**⁵ Bannister J said:

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

⁴ BVIHC (COM) 2011/0008 (delivered 17th February 2011).

⁵ BVIHC (COM) 2011/0002 (delivered 23rd February 2011).

[13] In my judgment, even in these circumstances restoration should be the course of last resort where companies have been dissolved following liquidation. If a difficulty can be resolved without restoration, then that alternative method is to be preferred. It is undesirable that the owners of companies which they have decided to put into liquidation should be able to revive them otherwise than when restoration is necessary in the interests of justice.”

[8] In **Elite Source Ltd v Registrar of Corporate Affairs**⁶ Ellis J held:

[52] In circumstances where it has already been advanced that liquidation of the Companies was completed and there are no undistributed assets to be administered or claims to be made by or against them which had not been previously made, there is a clear onus on the Claimant to satisfy the Court that there are circumstances which warrant restoration. Such a claimant would have to go further to satisfy the court with cogent evidence that there are good grounds for avoiding the dissolution of a company which has been effectively and completely wound up and to address the potential for prejudice to third parties.”

[9] Mr. Marshall submits:

“that this is a fit and proper case for the Company to be restored to the Register of Companies for the following reasons:

- (a) The restoration is necessary in order for the Company to enforce its right to a reassignment under clause 3.2 of the Assignment;
- (b) The right which is sought to be enforced under clause 3.2 was a contingent right held by the Company prior to its voluntary liquidation;
- (c) The re-assignment contemplated by clause 3.2 is permissible under English law which governs the Assignment;
- (d) There is no alternative to the Company being restored in order to enforce its rights under the Assignment because:
 - (i) the Assignment accords the right of re-assignment to the Company solely and to no other natural or legal person; and
 - (ii) it is true that as a matter of English law, Truetake may enforce its right to the payment by Black Eagle of the consideration due to it under clause 3.1 of the

⁶ BVIHCV2013/0077 (delivered on a date unknown in 2015).

Assignment pursuant to the provisions of the UK
Contracts (Rights of Third Parties) Act 1999.

However, this would be a wholly futile and uncommercial solution given Black Eagle's unequivocal indication that it is not in a position to honour its financial obligations under the Assignment. In all the circumstances therefore, the Court ought to exercise its discretion to restore the Company to the Register of Companies."

[10] Ms. Fahie submits that:

"restoration of the Company would serve no beneficial purpose consistent with justice or its liquidation because:

(a) There is no evidence that the Company has any newly discovered assets to distribute, and in fact the court is entitled to presume in the absence of evidence to the contrary that all assets of the Company were distributed during its liquidation. [The applicant's evidence] confirmed that the Company has no assets.

(b) There is no evidence of any creditors of the Company wishing to make a claim against the Company, or that the Company wishes to make a claim that was not previously made.

(c) Prior to its voluntary liquidation and dissolution, the Company executed the [Assignment], thereby assigning its rights to claim against Kensaliv to Black Eagle 'for good and valuable consideration'. Therefore, even before its dissolution, the Company had no legal rights or obligations with respect to the Original Loan. The Company's restoration is therefore unnecessary, and may prejudice the former shareholder of the Company (discussed at (f) below)...

(d) Clause 3.24 of the [Assignment] which is relied on by the Claimant as the basis for restoring the Company, merely gives the Company the discretion of giving notice to Black Eagle to re-assign the claim. Once the Company decided to voluntarily liquidate and dissolve, clause 3.2 (which in any event is not obligatory), became invalid and unenforceable as a dissolved company does not have the discretion to give notice. However, by Clause 6.2... the validity of the other provisions of the [Assignment] remain unaffected with the effect that Black Eagle can pursue the alleged breach.

(e) Even if the Company was restored, the Company has no means to pursue a claim against Kensaliv as it has no assets according to [the applicant's evidence]. The Company would either have to borrow money or require the shareholder to inject funds.

(f) There is no evidence of prejudice to third parties if the Company is left dissolved. ...Kensaliv is in default of its obligations (i.e. its obligations to Black Eagle). The Company now seeks to be restored to execute the right under the assignment to 'take back the claims from Black Eagle and enforce its rights against Kensaliv.' Although the claimant would prefer the Company to pursue Kensaliv for its purported breach, there is no cogent evidence to suggest that anyone would be prejudiced if Black Eagle (as opposed to the Company) enforced its rights against Kensaliv. On the contrary, restoring the Company and assigning the now defaulted Original Loan back to the Company does not appear to be in the best interest of the former shareholder. Restoration may be prejudicial to the former shareholder of the Company.

There is an alternative to restoration — ...Black Eagle has the legal right to pursue Kensaliv as opposed to restoring the Company to pursue Kensaliv. In other words, there is an alternative to the restoration of the company, which according to **Dedyson** and **Elite Source**... should be preferred. There is nothing in evidence to suggest that Black Eagle cannot pursue the alleged breach against Kensaliv.

There is no evidence of exceptional circumstances in this case — the Original Loan along with all its rights and obligations were assigned to Black Eagle. The Company does not (cannot) have any legal obligations in respect of the Original Loan.”

- [11] In my judgment, Ms. Fahie’s submissions are convincing. Truetake can sue Black Eagle for the sums assigned to it. Truetake can then enforce against Black Eagle, by, for example, obtaining a charging order over Black Eagle’s claim against Kensaliv. There is therefore no *need* for the Company to be restored. If the Company were restored, it has no money to enforce the right to a reassignment from Black Eagle. It would have to borrow funds, presumably from Truetake. The Assignment to Truetake was intended to be final. The benefit of the right to reassignment of the claim against Kensaliv was not assigned to Truetake. Truetake took the Assignment in the knowledge that it had no right either to take the reassignment itself or to force the Company to enforce against Black Eagle the right to a reassignment.

- [12] There are in my judgment no exceptional circumstances which would justify the restoration of the Company. The liquidation was fully completed. Truetake had (and on any restoration of the Company, would have) no right to insist that the Company exercise the right to reassignment against Black Eagle. There is no benefit to the Company in being restored.
- [13] Accordingly, I refuse the application to restore the Company.
- [14] I should add a word about the expert report of Mr. Josh Lewison, which Mr. Marshall sought to introduce. Mr. Lewison is English counsel. He gives expert evidence of English law in relation firstly to the **Contracts (Rights against Third Parties) Act 1999** and secondly of his “opinion on English law in relation to a point governed by BVI law [i.e. section 218ff], in case that the Court finds that BVI law is applicable in the same way.”
- [15] As I held in **Reniston Ltd v Nedlands Overseas Inc**:⁷

“[7] As [for] the need for the expert report, Barrow JA held in **Alfa Telecom Turkey Ltd v Cukurova Finance International Ltd**⁸ that ‘courts in this jurisdiction normally determine for themselves, in normal domestic law litigation, the content and meaning of English law without any thought of receiving expert evidence...’ This is because all judges of the Eastern Caribbean Supreme Court are trained in English law and all states and territories within the jurisdiction (with the limited exception of St Lucia) have imported English common law and often much English statute law. In the Commercial Division, moreover, most of the judges have practiced in England, including Bannister and Wallbank JJ.⁹ Many have judicial experience in England. Eder J was a retired justice of the High Court of England and Wales. Kaye, Davis-White, Green JJ and myself were or are authorized to sit in the English High Court. Obtaining expert evidence of English law is particularly otiose in the Commercial Division.”

- [16] There was no need to adduce any expert evidence about the 1999 Act. The Court is perfectly well capable of interpreting it. So far as the second point is concerned,

⁷ BVIHC (COM) 2020/0047 (determined 31st July 2020).

⁸ HCVAP 2007/027 (determined 22nd April 2008, unreported) at para [3].

⁹ To which number I should add Chivers J.

as **Dedyson, Yeung Kwok Mung** and **Elite Source** show, BVI law is not the same as English law. This part of counsel's expert report on English company law was therefore so much wasted ink. If an application to adduce expert evidence had been made, I would have refused it.

[17] I shall hear counsel on what consequential orders I should make.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar