

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MNIHCV2018/0026 & 0014

**In the matter of ss518 and 519 of the Companies Act
cap 11.12; and**

**In the matter of the conduct of an investigation
ordered under s518 of the Companies Act cap 11.12
and receiver management of Montobacco,
and application for orders under section 66 of the
Companies Act, Cap. 11.12**

BETWEEN

REGISTRAR OF COMPANIES

APPLICANT

AND

STEVEN FAGEN

RESPONDENTS

MARIE CAROLE LIDBETTER

KAREN ALLEN

REUBEN MEADE

APPEARANCES

Ms Renee Morgan, appearing for the Petitioner, instructed by the Hon. Attorney-General;

Ms Karen Allen as Litigant in Person, and for Montobacco Limited, and purporting to represent Fagen and Lidbetter;

Ms Marie Carole Lidbetter as Litigant in Person, and for 888 International Limited;

Mr Steven Fagen as Litigant in Person;

Mr Reuben Meade as Litigant in Persons, and purporting to represent Emerald Metal Company Limited.

2019: APRIL 3, 4

MAY 7

JUDGMENT

Concerning disqualification of persons as directors of a company

1 **Morley J:** I am asked by the Companies Registrar to decide whether the respondents Fagen, Lidbetter, Allen and Meade¹ should be disqualified under **s66 Companies Act cap11.12** as directors of any company on Montserrat, and to this end heard evidence and considered submissions on 03-04.04.19 (on which dates, to complete the hearing on Montserrat, where my sitting is for limited periods, by agreement proceedings concluded respectively at 11pm and 9pm).

2 The **Companies Act** states:

(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...; 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.

¹ The parties will be referred to as such for ease of reading, without writing out full names, titles, company standing, and the legalese of whether a first, second, third or fourth respondent, while no disrespect is intended in so referring.

- 3 The respondents have been variously involved in three companies, incorporated on Montserrat, being in short form Montobacco, 888, and Emerald², which I ordered wound up in the public interest on 31.07.18 following litigation under case numbers MNIHCV2018/0026 & MNIHCV2018/0014.
- 4 Winding up occurred following a report dated 18.06.18 into the affairs of the companies by a suitably qualified Inspector named Kenneth Krys. The report had been commissioned by the court on 28.03.18, following complaint being received by the Registrar about how the companies were being operated, leading the Registrar to request the report be ordered.
- 5 Put simply, Montobacco was set up in 2012 to make and sell cigarettes, 888 was set up in 2013 to lease its premises, and Emerald was set up in 2013 to sell scrap metal garnered from Plymouth destroyed by the volcano from 1995. At different times Fagen, Lidbetter and Allen had been directors of Montobacco; Meade and Lidbetter (and also a local distinguished lawyer named Khari Markham) of Emerald; and Lidbetter was sole director of 888. Of relevance, Fagen and Lidbetter have been in a relationship of 13 years living as a family together, while Meade worked for Fagen at Montobacco and left him to conclude Emerald deals.
- 6 Complaint to the Registrar in early 2018 about Montobacco arose from Meade, who believed Fagen had duped him out of money, and from Canadian brothers Fotis and Panagiotis Andrianakos ('Frank' and 'Peter') who believed inter alia Montobacco had fiddled its share register to deny them shares following their investment in Montobacco of about US\$1m.
- 7 The parties having studied the Krys report, the Registrar applied to have the companies wound up. On 16.07.18, Krys gave evidence at length as to his report and under cross-examination. The Krys report runs to 58 pages as a narrative, and is supported by 10 appendices lettered A-J, in combination running to 189 pages. It is well written, with suitable caution in places, thoughtful, not given to exaggeration, and made the wholly persuasive case the three companies were run abysmally.

² Being respectively more formally Montobacco Limited (incorporated 11.05.12), 888 International Limited (incorporated 10.05.13), Emerald Metal Company Limited (incorporated 13.05.13).

8 As part of the winding up order of 31.07.18, contents in his report were explicitly referenced and adopted, noting in particular (quoting the order):

- 1 The Inspector visited the premises of Montobacco on 12-13 April and 4-6 June 2018 (there being no premises associated with 888 or Emerald);
- 2 At para 2.7 his tasks;
- 3 At para 3.6, a lack of cooperation by Fagen, Lidbetter and Allen;
- 4 At para 3.11, Montobacco accounts were wholly inadequate, grossly misrepresenting the position of the company;
- 5 At para 3.12, the absence of financial records for 888 and Emerald;
- 6 At para 3.16, written documentation regarding investments/loans made by the original investors and Andrianakos brothers into Montobacco is somewhat lacking in detail and as to intention;
- 7 At para 4.2, conclusions that the business of Montobacco, and the other companies, was carried out with an intent to defraud, Montobacco is likely insolvent, meaning 888 is likely insolvent too, and Emerald may be insolvent;
- 8 At para 5.1, the financial records of Montobacco and the other companies are in a 'dire state';
- 9 At para 5.4.2, the Montobacco cigarette business is unprofitable;
- 10 At para 6.14, the assessed beneficial owners as investors into Montobacco do not include Fagen, Lidbetter, or Allen;
- 11 Within para 6, observations concerning likely manipulation of documents presented to the Inspector by Fagen, non-payment of rent by Montobacco to 888 (which acts merely as a holding company for the lease of Montobacco's premises), and irregularities in convening and recording meetings;
- 12 At para 6.36, irregularity in the position of Allen acting as a director and unqualified in-house counsel;
- 13
- 14 At para 7.3, documentation is 'scant with no coherent accounting records' for any of the companies, which are 'intertwined'; and
- 15 At para 8.22, Montobacco is likely to have negative equity.

9 All four respondents have represented themselves. During the winding up litigation, Allen purported to represent Montobacco, where, though not legally qualified, to her credit she

attempted diligently and with great attention to detail a robust defence with a rudimentary analysis of legislation and some case law, filing copious materials, repeated during the lead-up to the hearing on disqualification. At every turn, she has sought to challenge the Krys report, invoking his lack of qualification on Montserrat and attacking the admissibility of his opinions and features of hearsay in his analysis as justifying the report's exclusion.

- 10 Allen has been unsuccessful in unseating the Krys report, in light of the UK case, of relevance on Montserrat, of **S'State BERR v Aaron et al 2008 EWCA civ 1146**. In that case there was consideration of the admissibility of an investigation report in disqualification proceedings, where Thomas LJ (as he then was) observed in paras 29-31:

29. ...it is clearly established that in disqualification proceedings...there is an implied exception to the strict rules of evidence on hearsay evidence, [and] opinion evidence... This was developed from the scheme of the Companies Acts... There was no real disadvantage to a director. It was no more than prima facie evidence and the director was entitled to adduce evidence to contradict the findings and conclusions in the report. The court would reach its own conclusions.

30. ...The primary objective of the implied exception is to put before the court material obtained under the statutory scheme on which the Secretary of State relied in making his decision and which forms the basis of the case against the defendant. It enables the defendant to know the case made against him and to put in the materials on which he relies in response.

31. ...To abrogate the exception would be to render of no value a careful investigation, to put the public through the Secretary of State to considerable and unnecessary expense and to cause significant delay. Save by making the task of the Secretary of State more difficult, slower and expensive (with the consequent advantage that would provide to such defendant directors), it cannot sensibly be argued that the admission of such evidence causes any disadvantage to the defendant directors. It is plainly relevant evidence which a judge can and should take into account with all the other evidence in the case, giving it such weight as it deserves in the context of all the other evidence adduced.

- 11 Reflecting 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.

- 12 The only persons from whom I have heard evidence in an attempt to contradict the report are Allen and Meade, on 03.04.19; Fagen and Lidbetter have given none, though have addressed me from the Bar, and though there have been various affidavits filed, untested by cross-examination, the report has only otherwise been attacked by submissions. Furthermore, concerning the evidence from Allen and Meade, on close questioning sadly for both neither denied it.
- 13 There is much material to review, running to 100s of pages, with accounts, emails, minutes, share certificates, schedules, contracts and chronologies, so that a reader could easily be drawn into squabbling over myriad small points of detail, like a fly drawn into a spider's web ever trapped by threads of minor and indistinct information. However, some features emerge of much clarity pertaining to each respondent.
- a. Concerning Fagen and Lidbetter, note para 6.34(2)(i). 888, with no assets, was granted an attractive 25 year lease on 31.10.14 from the Governor on Montserrat to pay EC\$3100pm, the low rent being no doubt to stimulate business. However, 888 then rented the premises to Montobacco for US\$5100pm (EC\$13770), which is an uplift of 340%. There is no credible explanation why Montobacco did not negotiate this lease. Note that Fagen unfortunately has convictions overseas for dishonesty, and was the Chairman of Montobacco, living with Lidbetter as the sole director of 888. It seems irresistible the structure of the lease was to syphon money out of Montobacco to 888, dressed up as rent, from investors in the cigarette business to Fagen's domestic partner. I am quite satisfied the arrangement was probably fraudulent.
 - b. Concerning Allen, note para 6.2, 6.9, 6.28, and 6.30. It is clear Frank with Peter invested over US\$1m and as at 25.09.17 were listed at the Registry as having 2500 and 500 shares each in Montobacco. On an investment basis, in theory they could claim entitlement to 44% of the shares in Montobacco, namely 4480 shares. Bizarrely, when unease began in the relationship between Montobacco and the brothers, at the hand of Allen acting as Montobacco company secretary, in early 2018 they were stripped of their shares by her

simply re-filing at the Registry an adjusted list of shareholders, excising them, on the illogical, perhaps bad-minded, and possibly fraudulent basis the shares had been 'allocated' but not 'issued', and could therefore be rescinded at whim, notwithstanding share certificates were granted in their names, with tear-off sections should they sell them on. In evidence on 03.04.19, it is with regret I observe Allen was wholly unpersuasive her actions concerning the brothers' shares was in keeping with the probity expected of a director.

- c. Concerning Meade, note para 6.63, and in particular (iii) pointing out there are no books or records available for Emerald. In evidence on 03.04.19, Meade was frank in describing how he did not keep proper accounts, wrongly thinking he could rely instead on Khari Markham, who resigned on 19.05.17 as a director. Representing himself, Meade called Markham, unaware he may not be able to help, and who tried his best to speak well of Meade, but under questioning from me had to concede bluntly he had resigned to protect his reputation as he felt Meade, who was working with Fagen at Montobacco, was not acting properly, saying (per my note):

'The cause of concern was Emerald was exporting and I had no knowledge, I was not notified of these activities. It was being run as if a person was running it, not the company... I was being kept out of the loop, by Reuben and Fagen. I was worried, I was a director, a lawyer... Meade was not performing as a director properly, in retrospect.'

- 14 Reflecting on the submissions of the parties, which have been voluminous, I find Crown Counsel Morgan has accurately summarized much of the concern:

- a. Fagen has been convicted of minor fraud overseas; he appears to have altered his employment contract to justify monies he claimed to Krys to be owing to him; he mixed funds owing to Emerald with Montobacco; he appears to have fabricated expenses and arranged irregular liens; he has not reflected investors as shareholders leaving the nature of investment uncertain as to whether loans, but about which, if so, there are no terms; and as Chairman he presided over record keeping described by Krys as 'abysmal', and despite significant investment from abroad of over US\$2.3m reduced Montobacco to insolvency.

- b. Lidbetter has probably been an instrument of fraud for Fagen in the leasing structure between the Governor, 888 and Montobacco; rent has not been paid; 888 records are parlous; and on inquiry from Kryz showed a lack of understanding of fiduciary duty and what constitutes investment as distinct from legal expense.
- c. Allen worked closely with Fagen and Lidbetter, perhaps too closely; she has acted as in-house counsel, though is unqualified, and this has been in conflict with in parallel being company secretary; she has sought remuneration by share issue for legal work she has not been qualified to do; and she improperly rescinded the brothers' shares.
- d. Meade quite simply did not know what being a director involved, thinking Emerald a device for navigating export regulations, keeping no records, and under the influence of Fagen in part receiving money for himself which ought to have gone to Emerald.

15 Each respondent is an engaging personality.

- a. Fagen has had a positive career in retail concerning liquidated office furniture for a time in California, later he was in Montreal, where he met Lidbetter, he has made good money, and has strong business references from Glenn Feldman in Montreal and Harold Mintz in Florida. He and Lidbetter came to live on Montserrat in 2012. Though not formally qualified, I have no doubt he is good at making deals, and that he is a risk-taker, which may explain how he has strayed from the formalities of running companies on Montserrat where he may have thought the regulations might be lax.
- b. Lidbetter has also had a company background, in retail concerning plastic, and is reportedly particularly devoted to her child.
- c. Allen is a former staff sergeant in the US military, where she has seen combat experience in Operation Desert Storm in 1991 and worked for a time in Korea, and within the chambers of military judges.
- d. Meade is a former police inspector, having been in the police for 37 years, now a bus driver, and also still involved with scrap metal. His relations with Fagen have broken down whom he suspects kept money he should have received from scarp metal sales finalized by Fagen. His cousin, of the same name, is a former distinguished Premier on Montserrat, and I sense

this connection may have been the bedrock of Fagen's interest in Meade, who is a less sophisticated man, and who I sense Fagen may have thought might be useful to his business interests.

- 16 Having heard from them in court, in submissions or evidence, I consider Fagen to be the leader, Lidbetter his assistant, Allen his loyal follower led astray by him, and Meade he kept not fully informed. In light of the Krys report, I consider all are unfit to be directors, though to differing degrees. I stress, as I did at the hearing, disqualification is not a conviction and does not brand any respondent a criminal, but is instead a civil remedy to protect the public, ensuring companies are run efficiently, transparently, and by the book.
- 17 Reflecting on **Amron v Lubrani 1998** BCC 264, a decision of Neuberger J (as he then was) I must be satisfied there is a need for disqualification to protect the public: I am and there is.
- 18 Reflecting on **SS Trade and Industry v Swan et al 2005** EWHC603, Etherton J noted, when considering disqualification periods, there is a difference between incompetence and dishonesty.
- 19 Reflecting on **Re Sevenoaks Retail 1991** 3AER578, in the UK disqualification can be for up to ten years, (unlike Montserrat where the maximum is five). In that case, the Court of Appeal opined that more than half the maximum and upwards would apply where conduct was 'relatively serious', which I assess means 'probably dishonest'.
- 20 Weighing matters, I am of the view there was something dishonest in the structuring of the lease between Montobacco and 888, so that Fagen and Lidbetter go into the higher bracket, Fagen being more serious as he has relevant previous convictions. As to Meade, I assess his failing was merely lack of competence. 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.

- 21 In consequence, I will order disqualification as follows:
- a. Steven Fagen is disqualified on Montserrat as a director of any company 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. Marie Carole Lidbetter is likewise disqualified for three years;
 - c. Karen Allen is likewise disqualified for one year; and
 - d. Reuben Meade is likewise disqualified for one year.
- 22 Noting the winding up of the three companies will likely have caused financial loss to each respondent, further noting none have been able to afford lawyers, and reflecting on how bringing these actions is precisely the function of the Registrar, there shall be no order as to costs.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

7 May 2019