

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2013/0001

BETWEEN:

CIBAN MANAGEMENT CORPORATION

Appellant

and

[1] CITCO (BVI) LIMITED

[2] TORTOLA CORPORATION COMPANY LIMITED

Respondents

Before:

The Hon. Mde. Louise Esther Blenman

Justice of Appeal

The Hon. Mde. Gertel Thom

Justice of Appeal

The Hon. Mde. E. Ann Henry

Justice of Appeal [Ag.]

Appearances:

Mr. Ben Hubble, QC with him, Mr. Andrew Chissick for the Appellant.

Mr. Steven Thompson, QC with him, Mr. Richard Brown for the Respondents.

2018: November 1;

2019: February 13.

Civil appeal — Breach of duty of care — Whether learned judge erred in finding that there was no duty of care owed as director — Whether learned judge erred in finding that there was no breach of tortious duties — Applicability of principle of ostensible authority — Breach of statutory duty

The appellant, Ciban Management Corporation (“Ciban”) is the survivor company of a merger between Ciban and Spectacular Holdings Inc. (“Spectacular”), the latter of which was incorporated in the British Virgin Islands. The respondents, Citco (BVI) Limited (“Citco”) and Tortola Corporation Company Limited (“TCCL”) were Spectacular’s registered agent and its sole director, respectively. Mr. Alberto Jackson Byington Neto (“Mr. Byington”) was Spectacular’s ultimate beneficial owner. Through Gravacoas Electricas S.A. (“GEL”), a music and recording company, Mr. Byington sold artistes’ contracts and royalty rights for US\$3 million. The bulk of the sum was to be paid to GEL’s creditors. Mr. Byington lent GEL US\$3 million to keep the business afloat. The business was failing and Mr. Byington was concerned about his US\$3 million. He then sought to

acquire two companies, Waterloo Capital Corp (“Waterloo”) and Spectacular, the latter was incorporated with the help of Mr. Henrique de Moura Costa (“Mr. Costa”). The two companies would be used in a scheme under which GEL’s share capital would be ‘sold’ to Mr. Costa, who would appear to hold it through Waterloo, although in reality, the sale was a sham. As part of the scheme, Mr. Byington sued GEL for his US\$3 million and obtained a judicial sale. By public auction, Spectacular purchased five parcels of the land from which GEL carried on business (the “property”).

Mr. Costa remained involved in Spectacular and took instructions from Mr. Byington. Mr. Byington’s financial situation worsened and Mr. Costa informed him that certain fees were due for Waterloo and Spectacular. He then emailed Mr. Byington advising him that unless Citco’s fees were paid they would cease to act, which would affect Spectacular’s ownership of the property. He asked Mr. Byington to attempt to remedy the financial difficulties. However, the fees remained outstanding. Subsequently, Mr. Costa, without telling Mr. Byington, sent Citco a power of attorney (the “fifth power of attorney”), which he asked TCCL to grant, enabling Spectacular’s property to be sold. Mr. Byington had utilised Mr. Costa to procure three previous powers of attorney. TCCL passed a director’s resolution providing for the issue of the power required. Citco did not consult Mr. Byington about these transactions, nor was Mr. Byington aware of the instruction. Thereafter, the fifth power of attorney was effected and a contract of sale was entered into by Spectacular and Mr. Thomas Law. Mr. Costa then wrote to Mr. Byington telling him, for the first time, what had happened in relation to the sale of the property.

Spectacular sued Citco and TCCL for breach of duty of care and statutory duty in relation to the procurement of the fifth power of attorney. It also complained that Citco and TCCL failed to ensure compliance with section 80 of the International Business Companies Act (the “IBC Act”). Citco and TCCL denied that they breached any duties. They said that the relationship between Mr. Byington, Citco, and Spectacular was governed by a contract to be implied between Mr. Byington, Citco and TCCL to act on Mr. Byington’s instructions. Further, that Mr. Costa had the ostensible authority of Mr. Byington to give instructions for procuring the fifth power of attorney.

The learned judge dismissed Ciban’s claim against Citco BVI and TCCL. The judge found that Citco owed Spectacular no duties, contractual or tortious, to make inquiries about the issuance of the fifth power of attorney or to perform due diligence, or any duties in the capacity of a de facto director. The judge held that Spectacular’s claim against TCCL for breach of duty of care was unsustainable, as TCCL’s responsibilities were limited to ensuring that Spectacular’s acts were lawful and valid. The judge also held that the principle of ostensible authority was inapplicable and section 80 of the IBC Act was not engaged.

Ciban, being dissatisfied with the judge’s decision, appealed. Citco and TCCL counter appealed. The issues for this Court’s determination are: (i) whether the judge erred in holding that Citco did not owe Spectacular a duty of care, as director, in relation to the issuance of the fifth power of attorney; (ii) whether the judge erred in holding that Citco did not breach any tortious duties to Spectacular; (iii) whether the judge erred as a matter of law in failing to conclude that the principle of ostensible authority was applicable to the

relationship between Mr. Byington and Mr. Costa viz-a-viz Citco and TCCL; and (iv) whether the judge erred in concluding that TCCL did not breach any of its duties, in tort.

Held: dismissing the appeal; allowing the counter appeal; awarding costs in the court below and two-thirds of those costs on the appeal and the counter appeal to the respondents to be assessed, if not agreed within 21 days of this judgment, that:

1. 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. The learned judge, having heard and seen Mr. Byington, made critical findings about him and his “scheme”. In view of the totality of the circumstances, the learned judge correctly concluded that Citco was not a de facto director of Spectacular as there is no basis upon which Citco could be said to be a part of the governing structure of Spectacular.

Revenue and Customs Commissioners v Holland and Another; In re Pay Check Services 3 Ltd. and Others [2010] 1 WLR 2793 applied.

2. There is no basis for the contention that the learned judge ignored the relevant principles of directors’ duties in relation to TCCL. The case at bar had very little to do with the general duties of directors. Accordingly, the judge correctly concluded that TCCL had breached no duty of care to Spectacular.

Re Barings Plc and others (No.5), Secretary of State for Trade v Baker & Others (No.5) [1999] 1 BCLC 433; **Re Westmid Packing Services Ltd, Secretary of State for Trade and Industry v Griffiths and Others** [1998] 2 BCLC 646; **Weaver Macro Fixed Income Fund Limited (In Liquidation) v Peterson and Ekstrom** Cause No. FSD 113 of 2010; and **Weaver Capital (UK) Ltd. (In Liquidation) v Peterson and Others** [2012] EWHC 1480 (Ch) distinguished.

3. Since Mr. Byington had utilised Mr. Costa to communicate instructions for three previous powers of attorney prior to the relevant one, the learned judge correctly found that there was no duty of care imposed on Citco, as registered agent, to make enquires about the fifth power of attorney. Accordingly, the judge’s finding that Citco had not been negligent in providing the fifth power of attorney to Mr. Costa, given the system which Mr. Byington had set up, cannot be fairly criticised.

Beacon Insurance Company Limited v Maharaj Bookstore Limited [2014] UKPC 21 applied; **Yates Associates Construction Company Limited v Blue Sand Investments Limited** BVIHCVAP2012/0028 (delivered 20th April 2016, unreported) followed.

4. Where a principal, by words or conduct, represents that an agent is authorised to act on his behalf, he is bound by the acts of the agent, notwithstanding the termination of authority, to the same extent as he would have been if the authority

had not been terminated, when it was reasonable for the third party to deal with the agent, on the faith of any such representation, without notice of such termination. The present case clearly evidences the ostensible authority of Mr. Byington upon which Citco and TCCL could have relied in taking instructions from his agent, Mr. Costa. The learned judge ought to have upheld Citco and TCCL's defence of ostensible authority and insofar as he failed to do, he erred as a matter of principle. This Court should uphold the decision of the judge on the additional basis that Mr. Costa's instructions were ostensibly authorised and provided by Mr. Byington.

Newcastle International Airport Ltd. v Eversheds LLP [2014] 1 WLR 3073 applied.

JUDGMENT

Introduction

- [1] **BLENNAN JA:** This is an appeal by Ciban Management Corporation ("Ciban") against the decision of the learned Justice Bannister in which he dismissed Ciban's claim for breach of duty of care against Tortola Corporation Company Ltd. ("TCCL") together with its claim against Citco BVI and TCCL for a breach of statutory duty for allegedly failing to comply with section 80 of the **International Business Companies Act**¹ (the "IBC Act"). Ciban says that the learned judge made a number of errors of fact and law in arriving at his conclusion and seeks to have the judgment set aside.
- [2] There is also a counter notice, filed by Citco BVI and TCCL, which seeks to have this Court uphold the orders of the learned judge for the reasons given and on additional grounds which will be dealt with in detail shortly. Of importance, is the fact that Citco BVI and TCCL assert that the judge's finding and decisions were correct, and they have put forward additional bases to support the decision.
- [3] In order to give a proper context of this appeal, it is necessary to provide the background in some detail.²

¹ Cap. 291, Revised Laws of the Virgin Islands 1991.

² Most of the factual background is extracted from the detailed factual background that Bannister J provided in his written judgment.

Background

- [4] Ciban is the survivor company of a merger between Ciban and Spectacular Holdings Inc. (“Spectacular”), the latter of which was incorporated in the British Virgin Islands. Spectacular owned a large industrial premises in Sao Paulo, Brazil. Mr. Alberto Jackson Byington Neto (“Mr. Byington”) was the ultimate beneficial owner of Spectacular. Citco (BVI) was Spectacular’s registered agent and TCCL was appointed sole director of Spectacular. It is noteworthy that TCCL was subsequently replaced by Mr. Byington as director of Spectacular. This happened many years after the relevant complaints that were at the heart of the claim in the court below.
- [5] Through a company called Gravacoes Electricas S.A. (“GEL”), Mr. Byington had carried on a music and recording business in Sao Paulo since the 1950s and 1960s. He sold the artistes’ contracts and royalty rights to Warner Bros for a considerable sum of US\$3 million. Part of this sum of money was paid to Mr. Byington personally in return for a non-compete contract. The bulk of the money was to be paid to GEL’s creditors and Mr. Byington lent US\$3 million to GEL in order to keep what remained of the business afloat. The remainder of the business was failing and Mr. Byington was concerned about his US\$3 million. In an attempt to salvage the business, he wanted to acquire two companies namely, Waterloo Capital Corp (“Waterloo”) and Spectacular.³
- [6] With the help of Citco Services Inc (“Citco NY”) and the support of Mr. Henrique de Moura Costa (“Mr. Costa”), Spectacular was incorporated and retained by Citco BVI as a shelf company available for purchase. Mr. Costa was given two copies of a management agreement, proposed to be entered into between Mr. Byington as beneficial owner and Citco BVI and TCCL, which already bore signatures for the two entities, and asked Mr. Costa to obtain Mr. Byington’s signature to it. Mr. Byington apparently refused to sign the document on the grounds that he did not wish for his signature to appear on Citco BVI’s files.

³ For the purposes of this appeal, Waterloo is irrelevant.

- [7] The purpose of the acquisition was that the two companies could be used in a scheme under which GEL's share capital would be 'sold' to Mr. Costa, who would appear to hold it through Waterloo, although in reality the sale was a sham. GEL remained in the beneficial ownership of Mr. Byington, unbeknownst to its creditors. As part of the scheme, Mr. Byington sued GEL for his US\$3 million and obtained a judicial sale. A public auction was held and Spectacular, which was always beneficially owned by Mr. Byington, purchased five of the six parcels of the premises from which GEL carried on business.
- [8] Mr. Costa remained involved in Spectacular and took instructions from Mr. Byington. Mr. Byington, having fallen on hard times, borrowed \$85,000 from Mr. Costa, who was then managing another of Mr. Byington's firms. Mr. Costa eventually resigned but indicated to Mr. Byington his availability "to transfer the subjects that he was taking care of". In addition, Mr. Byington owed Mr. Costa arrears of salary and Mr. Costa was unhappy about the state of affairs. Mr. Byington's financial situation appeared to have worsened and Mr. Costa wrote to him to inform him that the agents and registry fees are due for Waterloo and Spectacular. Mr. Costa continued to email Mr. Byington advising him that unless Citco BVI's fees were paid they would cease to act, which would cause problems with Spectacular's ownership of the property. He asked Mr. Byington to see what he could have done to remedy the financial difficulties. Mr. Costa, in June 2001, complained to Mr. Byington that two monthly payments had been missed and that he had no alternative but to sell his wife's car. He told Mr. Byington that he was sure that there were other sources "over there" from which Mr. Byington could have paid him and complained about the non-payment of the loan and outstanding money.
- [9] Subsequently, Mr. Costa, without telling Mr. Byington, sent Citco BVI the text of a power of attorney which he asked TCCL to grant and which would enable a Sao Paulo lawyer, Mr. Delollo, to sell Spectacular's property. On the following day, TCCL passed a director's resolution providing for the issue of the power required.

This was the fifth power of attorney. Citco BVI, on the same day, sent Mr. Costa a reminder about its fees and the Government licence fee. Mr. Costa caused this invoice to be settled by means of a wire transfer from his son's bank account in Oxford, England.

- [10] Mr. Costa, shortly thereafter, emailed Citco BVI and asked for further documents to be provided for the purposes of the proposed sale. Citco BVI did not consult Mr. Byington about any of these transactions nor was Mr. Byington aware of the instruction that Mr. Costa had provided. A few weeks thereafter, on 14th December 2001, the fifth power of attorney was effected and a contract of sale was entered into by Spectacular as seller, and Mr. Thomas Law ("Mr. Law") as buyer. On the same day, Mr. Costa wrote to Mr. Byington telling him for the first time what had happened. He also gave a breakdown of Mr. Byington's indebtedness to him and indicated the expenses of Spectacular in relation to the sale of the property. The property was apparently sold at an under value. A number of events followed that communication but they are not relevant, except that Spectacular had to negotiate and settle a claim and repurchase its property from Mr. Law. It was clear that Mr. Byington had not specifically authorised the sale of the property. However, there was cogent evidence that Mr. Costa was integrally involved in providing instructions for the creation of three previous powers of attorney on behalf of Mr. Byington.

High Court Proceedings

- [11] Six years after the sale of its property, Spectacular sued Citco BVI as its registered agent on the basis that it owed tortious and/or fiduciary duties to Spectacular to conduct itself with reasonable skill and care, to act honestly and in good faith with a view to exercise the care, with diligence and skill that a reasonable and prudent person would in comparable circumstances, so as to ensure that Mr. Costa had the authority to procure the grant of the fifth power of attorney. Spectacular sued TCCL for breach of duty of care and its statutory duties. It also complained that Citco BVI and TCCL failed to act in good faith in the best interest of Spectacular

and also failed to ensure that there was compliance with section 80 of the IBC Act.

- [12] In their defence, Citco BVI and TCCL denied that they had breached any duties whatsoever. They said that the relationship between Mr. Byington as ultimate beneficial owner, Citco BVI as registered agent, and Spectacular was governed by a contract to be implied between Mr. Byington, Citco and TCCL to act on Mr. Byington's instructions. They also contended that Mr. Costa had the ostensible authority of Mr. Byington to give instructions for procuring the fifth power of attorney. Accordingly, there was no breach of duty by either of them.

Judgment Below

- [13] Faced with the countervailing positions, the learned judge dismissed Ciban's claim against Citco BVI and TCCL, and in so doing made a number of comments and findings on the evidence. He came to the conclusion that Ciban's claim against Citco BVI and TCCL was unsustainable. It is helpful to recite some of the relevant paragraphs of the judgment since they lie at the heart of this appeal.

- [14] In relation to Citco BVI at paragraph 47 - 49 of the judgment, the learned judge said:

"47...Citco BVI clearly contracted with Spectacular to act as its registered agent and to perform the duties which that involved with reasonable skill and care, but there is no suggestion that it failed in that task. There was no other contract between Citco and Spectacular. All contractual obligations regarding the taking of instructions and the execution of instructions in respect of acts required to be performed by Spectacular would, as the draft management agreement sent for signing to Mr. Byington correctly identified, be obligations arising between Citco BVI and Mr. Byington as ultimate beneficial owner. As we know, no such contract was ever agreed in writing between them, but it is obvious that in acting as the provider of a company to Mr. Byington as the conduit through which his instructions were to be transmitted to TCCL, Citco BVI owed him contractual duties to exercise on his behalf the reasonable skill and care to be expected of a person providing such services. It will, no doubt, have owed him parallel duties in tort. None of this is to the point, since Mr. Byington is not the claimant in these proceedings.

48. Certainly, Citco BVI owed no duties, contractual or tortious, to Spectacular to make the inquiries about the issue of the 15 August 2001 power of attorney which are pleaded in paragraph 3.6 of the statement of claim or to perform the due diligence about the underlying transaction there mentioned. Nor can it be said that Citco BVI owed Spectacular any duties in the capacity of a de facto director, for the reason that it never purported to act as a director of Spectacular. Its only position in the loop was as the transmitter, to Spectacular's sole director, of instructions given to it by its sole beneficial owner and shareholder. That task it carried out, as I have said, on behalf of Mr. Byington alone.

49. That is sufficient to dispose of Spectacular's claims against Citco BVI for breach of duty, but I ought to comment on the various breaches pleaded."

[15] At paragraph 51 of the judgment the judge stated as follows:

"In my judgment, even were he the claimant in place of Spectacular, he would have no grounds for doing so. He has set up a system, upon which he clearly expected the professionals to rely, under which he remained in the shadows while Mr. Costa communicated his instructions and was the point of contact. He never told any of the professionals that the system had ceased to operate or had changed – until too late."

[16] The judge stated at paragraph 57:

"My conclusion on the case against Citco BVI is that it owed none of the pleaded duties to Spectacular and that, even if Mr. Byington had been the claimant and had made the same claims against Citco BVI, he would have failed on the facts.

[17] At paragraph 58 the judge stated:

"I should add, however, that there was much discussion at trial about whether CITCO BVI or TCCL could rely upon the principle of ostensible authority and I was referred to a formidable body of learning on the topic. I hope that I will not be thought discourteous when I say that it seems to me that that principle has nothing to do with the case. It would have been in play were Citco BVI or TCCL attempting to assert that Mr. Byington was bound by a contract entered into by a person without his actual authority to do so. That is not this case. The only question in this case, so far as Citco BVI is concerned, is whether it was negligent in procuring the execution of the fifth power of attorney and the November 2001 documents – not whether it can prove that it relied upon holding out of Mr. Costa by Mr. Byington as a person entitled to give instructions upon his behalf."

TCCL

[18] In relation to TCCL, at paragraphs 59-60 of the judgment the judge said:

“59. The statement of claim pleads that, as sole de jure director of Spectacular, TCCL owed to Spectacular duties to conduct itself with reasonable skill and care in the performance of its duties, to act honestly and in good faith; and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, specifically by making the inquiries etc., set out in paragraph 3.6A of the statement of claim and ensuring that instructions regarding the disposal of the property were properly given, undertaking proper due diligence with regard to the proposed sale of the property; raising and querying the proposed sale with Mr. Byington; and ensuring that the grant of the power of attorney of 15 August 2001 was subject to all appropriate legislation, including section 80 of the IBC and all prevailing companies legislation.

60. There is no doubt that as director of Spectacular TCCL was subject to all BVI legislation, whether that was legislation relating to companies or not, and was bound to comply with it and to act honestly and in good faith. With the exception of a question in relation to section 80 of the IBC, which I will come on to later, nobody suggests that it did otherwise. But to attribute to TCCL the sort of duties which affect directors charged with responsibility for the overall management of the affairs of a company whose members expect the board to bring to the table their own skill and to manage its affairs by applying those skills independently of day to day intervention and participation on the part of the members is unrealistic.”

[19] And at paragraphs 62 and 63 of the judgment the judge stated as follows:

“62. In determining the nature and extend of the duties of a director of a BVI registered company it will always be necessary to pay the most particular attention, not only to its corporate documents, but to the whole circumstances of the case. The ‘circumstances’, in the present case, include the fact that the sole beneficial owner of Spectacular wished the executive organ of the company not to act otherwise than upon his instructions. That forms the foundation of the present claim. Spectacular cannot have had any greater expectation about the scope of the duties of its sole director than had Mr. Byington. Provided that Mr. Byington’s instructions did not involve dishonesty or illegality, therefore, TCCL could safely act upon them without more. It was implicit in the relationship between Mr. Byington (who was the only person interested in the matter) and TCCL that TCCL was not required to and indeed was not expected to exercise any independent executive functions or discretion. Its role was execution only. Mr. Byington would have been appalled had TCCL set about challenging the commercial wisdom of any of the instructions which it received from him via Citco BVI or if it had refused to carry them out on

the grounds that to do so would not be in the best interests of Spectacular, or if it had valuations carried out in Brazil in order to check whether the sale was proceeding at a proper price – and then sent him their invoices for the costs incurred.

63. In the circumstances of this case TCCL was intended to be (and engaged to be) nothing more than the instrument through which Mr. Byington's will in relation to Spectacular could be given legal effect. As he was entitled to do, Spectacular's beneficial owner qualified the duties owed to Spectacular by TCCL to the point where they had become almost invisible. Its responsibilities were limited to ensuring that Spectacular's acts were valid and lawful."

[20] The judge further stated at paragraph 65 of the judgment as follows:

"The suggestion that in the circumstances TCCL should have conducted a due diligence on the proposed sale or challenged its instructions or do any of the other things mentioned and that Spectacular has a claim against it for breach of duty arising out of the fact that it did none of these things is consequently unsustainable."

[21] At the conclusion of the judgment, the judge stated at paragraph 70, that:

"This claim therefore fails. That makes it unnecessary for me to consider whether Citco BVI or TCCL would have been entitled to the indemnity contained in Article 26 or whether either of them would be entitled to succeed on the ancillary claim against Mr. Byington."

Grounds of Appeal

[22] As indicated earlier, Ciban is aggrieved by the learned judge's decision and has filed twenty-three grounds of appeal together with sub-grounds of appeal. Those have helpfully been crystallised into six grounds by learned Queen's Counsel, Mr. Hubble. With no disrespect intended, it is not proposed to repeat the crystallised grounds. In addition, Citco BVI and TCCL have filed several grounds in support of their counter notice of appeal and there is no need to recite them for reasons which will become apparent shortly. In these circumstances, this Court felt it necessary to distill the issues that arise for its determination. It is of note that all of the issues that arise for this Court's resolution revolve around the fifth power of attorney which was used to effect the sale of Spectacular's property.

Issues on Appeal

[23] From the grounds of appeal and the grounds in the counter-notice, the following four issues arise for this Court's determination:

- (a) Whether the learned judge erred in holding that Citco BVI did not owe Spectacular any duty of care, as director, in relation to the issuance of the 15th August 2001 power of attorney (the fifth power of attorney);
- (b) Whether the learned judge erred in holding that Citco BVI did not breach any tortious duties to Spectacular;
- (c) Whether the learned judge erred as a matter of law in failing to conclude that the principle of ostensible authority was applicable to the relationship between Mr. Byington and Mr. Costa viz-a-viz Citco BVI and TCCL; and
- (d) Whether the learned judge erred in concluding that TCCL did not breach any of its duties, in tort.

Appellant's Submissions

[24] Learned Queen's Counsel, Mr. Hubble, said that the judge fell into error when he misanalysed the duties owed by registered agents. He stated that the judge was wrong to consider that registered agents' duties, when acting on requests from the ultimate beneficial owner ("UBO"), were only owed to the UBO, and were not owed to the company. He said that Citco BVI necessarily entered into an agreement with Spectacular to provide registered agent, and director's services as apparent from the fact of the invoices rendered by Citco BVI to Spectacular. Those duties will also have extended to due diligence duties performed (or which should have been performed) in their capacity as registered agents. This would apply, in particular, in relation to the suite of documents in respect of "the sale of [Spectacular's] assets".

[25] Mr. Hubble, QC said that the learned judge was wrong to reject Ciban's contention

that Citco BVI was a de facto director of Spectacular on the basis that it never purported to act as director of Spectacular. He said that Citco BVI was plainly a de facto director of Spectacular in light of a number of matters which he sought to draw to the Court's attention. He said that the judge's conclusions were fundamentally at odds with the legal authorities on the role and duties of directors, including for example that stated in **Central Bank of Ecuador and Others v Conticorp v Conticorp SA and Others**.⁴

[26] Mr. Hubble, QC reminded this Court that the learned judge concluded that ostensible authority had nothing to do with the case, as ostensible authority would only apply if Citco BVI or TCCL was attempting to assert that Mr. Byington was bound by a contract entered into by a person without his actual authority to do so, and that the only question was whether Citco BVI was negligent in procuring the fifth power of attorney and the November 2001 documents. Mr. Hubble, QC stated that this was again a misanalysis and an error of law. He said that neither Citco BVI nor TCCL should have been considering, let alone acting on, Mr. Costa's requests unless Mr. Costa had the authority to make such requests on behalf of Mr. Byington. He accepted that, as a matter of law, the principles of ostensible authority apply in relation to instructions from or requests made by an agent on behalf of a principal to professionals whether or not a contract is the result. He referred this Court to **Newcastle International Airport Ltd v Eversheds LLP**⁵ in support of his contention.

[27] Mr. Hubble, QC stated that the learned judge should have found that Mr. Costa did not have the actual authority of Mr. Byington in 2001 as the judge's own findings were that: (i) Mr. Byington had never authorised the grant of the fifth power of attorney; and (ii) until 14th December 2001, Mr. Byington "had not the slightest inkling about the sale which it had been used to effect". He said that the judge should also have found that Mr. Costa did not have any ostensible authority of Mr. Byington in 2001 as the judge's own findings were that: (i) there was no

⁴ [2016] 1 BCLC 26.

⁵ [2014] 1 WLR 3073 at p. 74.

document to suggest that Mr. Byington had told any of the professionals with whom Mr. Costa dealt on his behalf that they could safely rely upon his instructions; and (ii) on the documents none of the professionals had ever asked Mr. Byington for confirmation of any of Mr. Costa's instructions. Mr. Hubble, QC next stated that, for the avoidance of doubt and in light of Citco BVI and TCCL's counter-notice, there is no course of dealing or holding out by Mr. Byington as principal such as could establish ostensible authority.

[28] Alternatively, Mr. Hubble, QC said that even if (contrary to the above), the question was one of negligence as the learned judge posed, then it was negligent of Citco BVI and TCCL to rely on instructions from Mr. Costa because: (i) he was a stranger – not being either the UBO or Citco BVI; and (ii) neither Citco BVI nor TCCL ever undertook any due diligence at all in 2001 to establish whether Mr. Costa was entitled to request the issue of the fifth power of attorney and associated documents.

[29] Mr. Hubble, QC said that the learned judge's finding that TCCL's duties, which were execution only, had been qualified to the point where they had become almost invisible and were limited only to ensuring that Spectacular's acts were valid and lawful is wrong in law and fundamentally at odds with the provisions of section 54(1) of the IBC Act and with long established common law principles as to director's duties. Mr. Hubble, QC said that the judge was referred to the well-known principles, which had recently been summarised by the Grand Court of the Cayman Islands in **Weaving Macro Fixed Income Fund Limited (In Liquidation) v Peterson and Ekstrom**⁶ and by Proudman J in **Weaving Capital (UK) Ltd (In Liquidation) v Peterson and Others**.⁷ Mr. Hubble, QC said the judge was wrong to ignore such fundamental principles.

[30] Mr. Hubble, QC said that the learned judge's approach was wrong in law because

⁶ Cause No. FSD 113 of 2010 at paras. 7 and 10.

⁷ [2012] EWCH 1480 (Ch) at para. 161.

he applied the wrong test as to (i) the duties owed by Citco BVI as registered agent (or de facto director) and (ii) the duties owed by TCCL as director. If the learned judge had applied the correct test, he would have had to then find that Citco BVI and TCCL acted in breach of the duties which they owed. This was because: (i) no due diligence of any sort was undertaken; (ii) there was no evidence that TCCL or Citco BVI brought its mind to bear or exercised any discretion in respect of the proposed transaction and associated documents and what was in the best interests of Spectacular (“[i]ts role was execution only”); and (iii) there were, in any event individually and collectively, a number of unusual features of the requests from Mr. Costa in August 2001 and November 2001, which should have placed any competent registered agent or director on alert that all was not as it appeared.

[31] In short, Mr. Hubble, QC said absent the learned judge’s erroneous approach to the duties owed by the directors and registered agents, the learned judge would (or certainly should) have found that TCCL and Citco BVI should not have acted on Mr. Costa’s requests in August and November 2001 without taking proper and meaningful steps to establish: (i) that the requests were indeed made on behalf of Mr. Byington; and (ii) the nature of and rationale for the proposed transaction. He said that, had such steps been taken, the sale of the property to Mr. Law would never have happened.

[32] Turning next to the breach of statutory duty, Mr. Hubble, QC pointed out that, in relation to the complaint of breach of statutory duty, the learned judge held that section 80 of the IBC Act was not engaged. He said that the judge erred in so concluding. Mr. Hubble, QC therefore urged this Court to allow the appeal and set aside the judgment in the court below.

Respondents’ Submissions

[33] Learned Queen’s Counsel, Mr. Thompson, highlighted that the learned judge disposed of the Ciban’s claims against Citco BVI on the bases that: (i) Citco BVI

had done nothing negligent in its duties qua registered agent; and (ii) Citco BVI was not a de facto director. As Citco BVI owed no relevant duties as a director, the judge noted that these findings would dispose of the claims for breach of its duty of care. However, for completeness, the judge went on to evaluate and make findings on the alleged breaches, as matters of fact. The judge described the way in which Mr. Byington had arranged his affairs so that he “remained in the shadows while Mr. Costa communicated his instructions and was the point of contact”. From the inception of the relationship in October 1997 until the events in question in August 2001, Mr. Byington had, knowingly and intentionally, passed all his demands through Mr. Costa. At trial, Mr. Byington said that Mr. Costa had resigned in late 2000 but as the judge noted, Mr. Byington “never told any of the professionals that the system had ceased to operate or had changed – until too late”.

[34] Mr. Thompson, QC reminded this Court that the judge found that Mr. Byington had no valid complaint that Citco BVI had been negligent in providing the fifth power of attorney to Mr. Costa, given the system which Mr. Byington had set up and expected Citco BVI to follow. He said that, a fortiori, Citco BVI could not have been negligent, even if it did owe duties of care to Spectacular. He said that it is unreasonable now for Ciban to suggest that Mr. Costa was a “stranger” given the fact that Mr. Byington interposed him, on every occasion prior to the events in question, as his messenger and trusted contact.

[35] Mr. Thompson, QC said to the extent that it is now contended, contrary to the judge’s analysis, that this case is concerned with the law of agency, Mr. Costa was indubitably an agent for Spectacular and Mr. Byington, at least for the purposes of passing on Mr. Byington’s decisions and instructions (and indeed for settling his bills) from October 1997 until the last preceding communications in September 1999, when the fourth power of attorney was drawn up as per Mr. Byington’s wishes and in April 2000, when Mr. Byington was trying to confirm that Citco BVI’s invoice had been settled. The course of conduct had continued from the inception

of Spectacular until the last transaction before the August 2001 power of attorney – i.e. for everything (including all three earlier powers of attorney) done by Spectacular before the events in question. In those circumstances, it is entirely unsurprising that the judge concluded, as he was entitled to do on the facts, that Mr. Byington had intentionally set up a system in which he remained in the shadows whilst directing Mr. Costa, amongst others, to effect his will in relation to any matters that needed to be done in the Virgin Islands. He said that, whilst he might regret it today, Mr. Byington never told the respondents that he wished to end that system and so it remained in place up to and including the time of the events in question.

[36] Mr. Thompson, QC said that using the language of agency, Mr. Byington, expressly and by his course of conduct from 1997–1999, authorised Mr. Costa to deal with Citco BVI and TCCL in all matters to do with Spectacular – indeed that was common ground, as recorded by the judge. It is not necessary, as Ciban seems to believe, that there is some direct communication from a principal to a third party in order to bestow an agent with authority. If it be the case that this authority was terminated, Citco BVI and TCCL were never given notice of that fact and so, as far as third parties are concerned, the agency continued.

[37] Next, Mr. Thompson, QC reminded this Court that the claims against TCCL, the sole director of Spectacular, were limited to claims in tort and under section 80 of the IBC Act. He said that Ciban makes much of the judge's findings about the role and duties of directors. In particular, it says that the judge's findings that TCCL's duties had been qualified so as to become almost invisible, is wrong in law. He stated that the mistake Ciban makes is to read too much into the judge's comments here which were patently only intended to address the actual facts of this case, rather than being a commentary on the law.

[38] Mr. Thompson, QC also reminded this Court that subject only to the question of ultra vires, the shareholders of a solvent company can direct the board of a

company to act in any way which they, the shareholders, desire; in such direction, the shareholders are not bound by any fiduciary or other duty – they can act purely in their own selfish interest. This, they can effect through general meeting or, if unanimous, informally and in which case they might approve in advance or ratify subsequently any act of the board. The only limits to this broad power are that: (i) the acts must be lawful and intra vires; and (ii) the company must be solvent, as much after as before the transaction in question. Of course, those controlling companies which are insolvent or at risk of insolvency have duties imposed upon them to the creditors but that is not this case.

[39] Mr. Thompson, QC said that Mr. Byington was entirely at liberty to control Spectacular according to his own whims. He acknowledged that a director might be cautious about slavishly following the directions of a sole owner of a company, but only insofar as the instructions might be ultra vires, illegal or if the company might be at risk of insolvency. Otherwise the board, or sole director, can rely upon any shareholder resolution or, which is the same, any informal instructions from the sole member. In the case of Spectacular, as the judge said, that was surely Mr. Byington's intention. Mr. Thompson, QC said the well-known cases cited by Ciban, on the duties falling on directors to apply their own minds to transactions which they are asked to carry out, are nothing to the point. None of those cases are concerned with the relationship between the shareholders and the board, but rather on the gullibility, laziness and (occasionally) complicity of certain directors who just toed the line set down by their (often fraudulent co-director/s). He said that conversely nothing said by Bannister J in the instant case cuts across the principles set down in those cases about lazy directors. He pointed out that, whilst generally a director is under an obligation to inform herself about the affairs of the company in order to carry out her duties, she is at no risk of liability to a sole member who directs her to do so as she is told, so long as the instructions are lawful and the company is not left insolvent.

[40] Mr. Thompson, QC said that based on the facts it is entirely unsurprising that the

judge found that the reality was that Mr. Byington had intended and arranged his affairs so as to ensure that TCCL was merely an instrument to give legal effect to his will. He said that that is not only lawful (in circumstances such as this), but also factually accurate. This aspect of the case is not susceptible to appeal on the law or the facts.

- [41] Turning next to the issue of breach of section 80 of the IBC Act, Mr. Thompson, QC said that it is hard to see what this claim adds to the complaint. If Ciban is right in its claim in negligence, then section 80 adds nothing to its recoverable losses. Conversely, if Citco BVI and TCCL are right that Mr. Byington, the sole shareholder, is bound by the grant of the fifth power of attorney, then Spectacular cannot point to a breach of section 80 at all, or more fundamentally whether a breach of this section is actionable by a company, and if so, for what relief, if any. He said furthermore that, no sale or disposition of property was made by TCCL at all; any such thing was done by Mr. Delollo, the lawyer, by powers granted to him under the fifth power of attorney, no doubt under instructions. TCCL had merely granted him a power which enabled him to do that as a matter of company law. On its plain wording, section 80 does not catch an act of simply granting a power of attorney, as that is not a disposition of property. Mr. Thompson, QC therefore urged this Court to dismiss Ciban's appeal and affirm the judgment of the learned judge.

Discussion

- [42] It is evident that at the heart of this appeal is the issuance of the fifth power of attorney that was utilised to effect the sale of the property which belonged to Spectacular. It was quite helpful that Ciban did not seek to pursue the twenty-three grounds of appeal together with the sub-grounds outlined in its notice of appeal, since many of the grounds related to comments or "throw away" lines that the judge had made while rendering judgment. It would be rather interesting if a litigant were to be permitted to appeal against every statement that a judge makes, even in passing, while rendering his judgment.

[43] It was quite helpful for Mr. Hubble, QC who appeared at the appeal on behalf of Ciban to have accepted the Court's invitation to crystallise the twenty-three grounds of appeal bearing in mind that each ground of appeal was accompanied by an average of three paragraphs, and for this the Court is grateful. I now turn to address the issues that were distilled from the crystallised grounds of appeal and the counter notice. It is convenient to treat with the first three issues together.

Issues 1, 2 and 3

[44] It is noteworthy that the learned judge having conducted a full trial, on liability only, and in so doing having had the benefit of hearing and seeing Mr. Byington, who was the only witness who testified, and having reviewed the documentary evidence made some very important findings of fact and applied the law thereto in dismissing Ciban's claim. The case required more than a determination of what are the duties of directors and registered agents and whether those duties were in any way breached either by Citco BVI and/or TCCL. In fact, it required the judge to properly assess the evidence and determine what was the true nature of the relationship between Citco BVI, Spectacular and TCCL and thereafter to ascertain whether there were any breaches of duties owed to Spectacular in those circumstances. The factual findings of the judge cannot be properly challenged in the circumstances of this appeal. This much would become apparent shortly. For now, it is enough to say that the essential facts as found by the judge as they relate to the relationship between Mr. Byington and Mr. Costa on the one hand, and Mr. Costa transmitting instructions to Citco NY for transmission to Citco BVI and ultimately to TCCL on the other, were clearly open to the judge to so conclude.

[45] A close reading of the judgment indicates the care and fairness with which the learned judge went about assessing and evaluating the evidence in arriving at his conclusions. This is contrary to what Ciban would have this Court believe. It was simply not a case about the application of the pristine principles of director's duties or the duties of the registered agent. In contradistinction, it required the careful

interrogation of the evidence in order to ascertain the real and factual relationships that existed between Mr. Byington, Mr. Costa, Citco BVI and TCCL all in relation to Spectacular. This required the judge to review the course of dealings between the relevant parties over a period of years. The comments that were made by the judge clearly indicated that he was very familiar and knowledgeable of the applicable law in relation to the duties of directors of companies and those registered agents. It was because the judge was well knowledgeable of the applicable principles that he could have confidently said that they did not arise for consideration based on the facts as he found them.

[46] Most importantly is the fact that the learned Justice Bannister is a very experienced commercial judge and, in my view, his findings of fact were very carefully and well-reasoned. He was clearly able to cut through what was initially put forward to the court as a sophisticated commercial law case and saw the case for what it was. There is no need to repeat most of his findings of fact so as not to unnecessarily lengthen this judgment. However, it is noteworthy that his findings of fact are very helpfully set out in his written judgment. The legal principles that are applicable to an appeal against findings of fact are well known and need no in-depth recitation. Suffice it to say that, Ciban has an uphill and impossible task in challenging the judge's findings of facts.

[47] I turn briefly to examine the role of an appellate court in reviewing the findings of fact of a trial judge. There is a strong stream of jurisprudence which has been consistently applied by this Court in our treatment of the review jurisdiction of the appellate court of findings of fact.⁸ The headnote of the decision in **Yates Associates Construction Company Limited v Blue Sand Investments Limited**⁹ states as follows:

“1. An appellate court reviewing the findings of a trial judge on the printed evidence in relation to a question of fact tried by the judge without a jury and where there is no question of the judge misdirecting himself, should

⁸ See: *Beacon Insurance Company Limited v Maharaj Bookstore Limited* [2014] UKPC 21.

⁹ BVIHCVAP2012/0028 (delivered 20th April 2016, unreported).

not interfere with the trial judge's decision unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the judge's conclusion. In the circumstances, the appellate court may consider that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. However, either because the reasons given by the trial judge are unsatisfactory, or because it is clearly appears so from the evidence, an appellate court may be satisfied that the trial judge has not taken proper advantage of his having seen and heard the witnesses and the matter will then become at large for the appellate court.

...

2. Appellate court restraint against interfering with findings of fact, unless compelled to do so, applies not only to findings of primary fact, but also to the evaluation of those facts and inferences to be drawn from them. Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses who have given oral evidence, and of the weight to be attached to their evidence, an appellate court has to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole. It is only in exceptional circumstances that an appeal court is entitled to take a different view on credibility from that of the judge who has seen the witness, particularly when the judge has referred favourable to the demeanour of the witness concerned.

...

3. Where the trial judge fails to make proper use of the advantage, he or she possesses in analyzing and carrying out an evaluation of the evidence, the judge's decision cannot stand if the decision does not comport with the evidence that was adduced. The critical question before an appellate court is whether there was evidence before the trial judge from which the judge could properly have reached the conclusions that he or she did or whether, on the evidence, the reliability of which it was for the judge to assess, that the judge was plainly wrong.

...

[48] Applying the above principles to the case at bar, I have no doubt that Ciban has not met the threshold to persuade this Court to interfere with the learned judge's findings of facts.

[49] In any event, I have no doubt that the learned judge was aware and very knowledgeable of company law in particular the duties of directors vis-a-vis the company. However, the judge was equally alive to the fact that, in the case at bar, he was not dealing with those principles simpliciter. Indeed, as the learned judge

correctly recognised, what had to be determined was Citco BVI and TCCL's liability to Ciban, if any, in circumstances where Mr. Byington had utilised Mr. Costa, as his right-hand man to give instructions to Citco NY for onward transmission to Citco BVI. The judge was therefore faced with the situation of determining the effect of the relationship which Mr. Byington had with Citco BVI on the one hand and TCCL on the other hand, insofar as Spectacular was concerned, bearing in mind that Mr. Costa was the conduit through whom Mr. Byington acted.

- [50] The case at bar is very fact sensitive and extends beyond the traditional evaluation of the duties of directors and/or registered agents. In my view, the learned judge having heard and seen Mr. Byington made some critical findings about him and his "scheme". Nothing would be gained from repeating them in detail, but it suffices to say that he did not "paint a good picture". The judge seemed to have obtained a good grasp of Mr. Byington's measure. It is noteworthy that it was common ground between the parties that Mr. Byington had utilised Mr. Costa to procure three previous powers of attorney on his behalf. The judge's assessment of Mr. Byington was impressive and cannot be assailed. As stated earlier, the judgment was closely reasoned and based on the evidence, the learned judge was quite correct in concluding that Citco BVI was not a de facto director of Spectacular. There is no basis upon which Citco BVI could be said to be a part of the governing structure of Spectacular. 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**,¹⁰ 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* [1998] 1 BCLC 333, 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* [1999] 2 BCLC 351, 423 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

¹⁰ [2010] 1 WLR 2793, at p. 2810.

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* [1994] 2 BCLC 180, 182, 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.”

[51] Applying the principle above to the case at bar, I am fortified in my view that the learned judge cannot properly be faulted for his conclusion that Citco BVI was not a de facto director of Spectacular. In fact, contrary to Ciban’s argument, on the facts, the judge quite properly rejected the position that Citco BVI had assumed the duties of directors. The judge’s findings that Mr. Byington had no valid complaint that Citco BVI had been negligent in providing the fifth power of attorney to Mr. Costa in August 2010 given the system which Mr. Byington had set up and expected Citco BVI to follow cannot be fairly criticised.

[52] I fail to see how, on the facts, the judge can be criticised for concluding that the duties of Citco BVI as registered agent that were owed to Spectacular were contractual, and that no action by Citco BVI as registered agent was actionable by Spectacular since there was no breach of duty in that regard. The judge came to the right conclusion that there was no duty imposed on Citco BVI as registered agent to make enquiries about the fifth power of attorney; and that it had done nothing negligent as registered agent cannot be faulted.

[53] In addition, and as argued before this Court and as Citco BVI had asserted in its defence to Ciban’s case on agency in the court below, there is good basis upon which ostensible authority could have been properly utilised as a shield to Ciban’s case. Mr. Byington had previously expressed, and by his conduct, authorised Mr. Costa to deal with all matters in relation to Citco BVI and TCCL. I am in full agreement with Mr. Thompson, QC that the case at bar clearly evidences the ostensible authority of Mr. Byington upon which Citco BVI and TCCL could have

relied in taking instructions from Mr. Costa, who was the agent. It is common ground that Mr. Byington had a history of using powers of attorney utilising Mr. Costa to communicate instructions for three powers of attorney prior to the contentious one. The judge cannot be properly criticised for his assessment of the evidence and concluding that Mr. Costa was integrally involved in the conduct of Mr. Byington's business. It is clear that Mr. Costa remained involved in Mr. Byington's business even though he had "resigned" from his position with that company. In those circumstances, it was clearly open to the judge to reject Ciban's claim against Citco BVI and TCCL for breach of duties.

- [54] Accordingly, the decision of the learned judge should stand on the additional basis that Citco BVI and by extension TCCL were entitled to conclude that Mr. Costa had Mr. Byington's ostensible authority to procure the fifth power of attorney. On the principle of ostensible authority, the learned editors of **Bowstead on Agency**¹¹ stated that:

"Where a principal, by words or conduct, represents or permits it to be represented that an agent is authorised to act on his behalf, he is bound by the acts of the agent, notwithstanding the termination of authority (unless perhaps by the death or insolvency of the principal), to the same extent as he would have been if the authority had not been terminated, when it was reasonable for the third party to deal with the agent on the faith of any such representation, without notice of the termination of his authority."

- [55] Moving along, the judge was quite right to characterise Mr. Costa's relationship with Mr. Byington as "one in which he remained in the shadows while Mr. Costa communicated his instructions and was his point of contact". There were four powers of attorney before the contentious one. I remind myself that, in relation to three of the powers of attorney, it was Mr. Costa who passed on the requests on behalf of Mr. Byington and obtained them from Citco BVI and TCCL. The power was granted to Mr. Delollo, a Brazilian lawyer, but neither Citco nor TCCL was ever given any reason for the need for these powers. In view of the totality of the circumstances, the judge's decision is invulnerable. I am fortified in the above

¹¹ Bowstead and Reynolds on Agency, 21st Edn., (Sweet & Maxwell, 2018), at para.10-030.

view even when I examine the number of matters which Ciban said are “red flags” which ought to have put Citco BVI and TCCL on notice that something was amiss and to which the judge did not pay enough attention. Without descending into the details, the judge was quite right not to attach much weight to any of the “red flags” individually or collectively since they were far from “red flags” and are more in the nature of attempts by “Ciban to clutch at straws”, with no disrespect intended. In my view, the judge was careful to review the submission in relation to the “red flags” and properly assessed them in the greater scheme of things. It may well have been sufficient to state them with the sole purpose of rejecting them. In this vein, the judge cannot properly nor fairly be criticised.

[56] For the sake of completeness, it is worth placing on the record that the certificate that Ciban sought to rely on to bolster its case could not assist it in the High Court nor on appeal. It is impossible to see how a certificate which is described as a director’s certificate that is produced after the sale of the property and some four months after the fifth power of attorney could be of any assistance to Ciban. The learned judge quite properly rejected it as proof that either Citco BVI or TCCL had no business acting on requests from Mr. Costa.

[57] For all of the above reasons, in my view, there is no basis for this Court concluding that the judge committed an error of principle or law in concluding that Ciban had failed to establish that Citco BVI had committed any breach of duty of care. Therefore, Ciban’s appeal against the judge’s dismissal of its claim against Citco BVI fails.

[58] Turning now to the appeal in relation to TCCL, it would be shocking, to say the least, if such an experienced commercial judge as Justice Bannister was not au fait with the usual and basic duties that directors owe to companies. The case at bar certainly does not portray any such lack of knowledge in the judge. To the contrary, it is clear that the judge was alive to the relevant principles when the judgment is read in its entirety. What the judge was indicating is that the factual

matrix of the case before him in which the sole shareholder or ultimate beneficial owner was 'calling the shots' meant that TCCL's duties were "execution only" and their duties as directors, "had been qualified to the point where they had become almost invisible and limited only to ensuring that Spectacular's acts were valid and lawful". He cannot be faulted for any misapprehension of law. The judge was merely describing, as he was entitled to do, the factual circumstances in existence as distinct from making any legal pronouncement as to the general and usual duties of directors. I agree with the judge that the case had very little, if anything, to do with the general duties of directors of companies.

[59] It is therefore an unfair criticism to say that the learned judge committed an error of law or fact. It definitely cannot be said that the judge ignored the relevant principles of directors' duties as stated in cases such as **Re Barings Plc and Others (No.5)**, **Secretary of State for Trade and Industry v Baker & Others (No. 5)**¹² and **Re Westmid Packing Services Ltd, Secretary of State for Trade and Industry v Griffiths and Others**¹³ and recently summarised in **Weaving Macro Fixed Income Fund Limited (In Liquidation)** and **Weaving Capital (UK) Ltd. (In Liquidation)**, namely that:

- (a) Directors have a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them to properly discharge their duties as directors;
- (b) Each individual director owes duties to the company to inform himself about its affairs.
- (c) A person who accepts the office of a director of a particular company undertakes the responsibility of ensuring that he or she understands the nature of the duty a director is called upon to perform, that duty will vary according to the size of the company and the experience or

¹² [1999] 1 BCLC 433, at p. 489.

¹³ [1998] 2 BCLC 646 at 653, at paras. b-c.

skills that the director held himself out to have, the duty from upon the natural expectations and reliance placed by shareholders on the experience and still of a particular director.

[60] The common thread throughout the judgment indicates that the learned judge was clear that Mr. Byington was the moving spirit between the ventures and controlled and directed the show. On the facts, it was a fair characterisation by the judge to state that he had qualified the director's duties to the point of virtual invisibility. The judge's comment reflected his assessment of the facts and was never intended to be a statement of law. It could not be reasonably said that the judge misapprehended the role or duties of directors. He was merely describing the factual circumstances as he found them and should not be criticised for doing so. The judge was correct in recognising that it is settled law that subject to ultra vires, shareholders of a solvent company can direct the board of a company to act in any way which they, the shareholders desire. They can act purely in their own selfish interest. This they can effect through general meeting or, if unanimous, informally under the principle known as the rule in **Re Duomatic Ltd.**¹⁴ and in advance or ratify subsequently any act of the breach.

[61] However, the distinguishing feature of the case at bar in comparison to the usual cases of directors' duties to the company lies in the unique factual circumstances as found by the judge and which are unchallengeable, namely that TCCL provided its professional services as directors on a nominee basis. It was the provision of the services by TCCL as "paper directors" for a fee. To require the judge to have applied the usual legal principles that are applicable to directors would have necessitated him ignoring the factual reality which was clearly impermissible, given the way in which Mr. Byington, the sole shareholder or UBO, organised his affairs.

[62] I agree with Mr. Thompson, QC that it was open to the judge to conclude that

¹⁴ [1969] 1 All ER 161.

Mr. Byington wished simultaneously to control Spectacular's affairs and to remain in the shadows. It was a finding on the evidence and, in any event, is not open to appeal. Equally, I accept Mr. Thompson, QC's argument that, taken together, it is entirely unsurprising that the learned judge found that the reality was that Mr. Byington had intended and arranged his affairs so as to ensure that TCCL was merely an instrument to give effect to his will. This is what actually obtained based on the evidence and is in no way unlawful, in my view. Accordingly, there is no basis to criticise the learned judge's impeccable assessment of the relationship between TCCL, Mr. Byington, Mr. Costa, Citco BVI, and Spectacular and by extension to impugn the learned judge's decision.

[63] It is equally unfair to criticise the judge for correctly observing that based on factual circumstances, TCCL's responsibilities were limited "to ensuring that Spectacular's acts were lawful and valid". I am fortified in this view when one reads the judgment which has as the main thread running through it the fact that Mr. Byington, who was the sole owner of the company or the UBO at all times, had directed what was to happen with Spectacular and how it was to be done. Critically, even after Mr. Costa had "resigned", Mr. Byington continued to utilise Mr. Costa as the main conduit through which instructions were passed to TCCL. I agree with the judge that there is nothing unlawful with the relationship that Mr. Byington had in that capacity with the director of Spectacular. This in no way undercuts general principles of company law nor derogates from the responsibilities of directors generally. As indicated, the appeal at bar is fact sensitive and the case turned on its own facts. In light of this, I have no hesitation in accepting that the judge correctly concluded that, in the totality of circumstances, TCCL had breached no duty of care to Spectacular.

[64] For what it is worth, I have no doubt that if needed TCCL could also have properly relied upon the principle of ostensible authority to successfully defend Ciban's claim against it. TCCL had a previous course of dealing in which Mr. Costa was the person who had communicated the instructions on behalf of Mr. Byington to

prepare three of the four earlier powers of attorney. I do not propose to recite those well-known principles which are found in **Bowstead on Agency** and which were referred to earlier. It is clear therefore that this Court could properly uphold the decision of the learned judge on the additional basis that since Mr. Byington had arranged his affairs so as to lead TCCL reasonably to believe that Mr. Costa was authorised to act on Mr. Byington's behalf at all material times, then TCCL was justified in concluding that the instructions were ostensibly authorised and provided to it on behalf of the sole member or owner of Spectacular and were in its best interest.

[65] I have no hesitation in concluding that the learned judge's decision to dismiss Ciban's claim against TCCL cannot be impugned. Ciban's appeal against the judgment of the learned judge, in relation to TCCL, has no merit and is therefore dismissed.

[66] Out of deference to Queen's Counsel, I will now look at TCCL's alleged breach of statutory duty.

[67] The relevant statutory provision is section 80 of the IBC Act, which states as follows:

"... any sale, transfer ... or other disposition ... of more than 50 percent of the assets of a company incorporated under this Act ... if not made in the usual or regular course of business carried on by the company, shall be made as follows –

(a) The proposed sale, transfer, lease or other disposition must be approved by the directors;

(b) Upon approval of the proposed sale, transfer, lease, exchange or other disposition, the directors must submit the proposal to the members for it to be authorized by a resolution of members."

[68] For reasons which will become apparent shortly, in my view, this is a very short point. It is noteworthy that, in his judgment, the judge made a number of comments but for what it is worth at paragraphs 68 and 69 of the judgment,

Bannister J said this:

“68. In my judgment, section 80 did not apply to this transaction. If it did, then the only person who would be entitled to complain of its breach would be Mr. Byington, for whose benefit as a member of the company section 80 was enacted. Even if he were the claimant in this action, I consider, for the reasons given above, that he would be in no position to complain that the section had not been complied with.

69. For these reasons, in my judgment, Spectacular had no claim against its sole director, TCCL.”

- [69] In view of the conclusions arrived at in relation to the previous issues, it has become unnecessary to address the third issue of whether or not the learned judge erred in concluding that there was no breach of section 80 of the IBC Act. It should be said that it is noteworthy that section 80 of the IBC Act does not catch an act of simply granting a power of attorney, as that is not a disposition of property. At its highest, what TCCL did amounted to no more than procuring the power of attorney and it was authorised to do so based on the directions of Mr. Costa who was the ostensible agent of the sole member of Spectacular or the UBO, Mr. Byington. By extension, Mr. Byington in his capacity as the sole member must be taken to have approved the sale. Therefore, it could not reasonably be suggested that the learned judge erred in concluding that section 80 of the IBC Act was not engaged. The appeal fails on this ground also.

Costs

- [70] Citco BVI and TCCL, having succeeded in defending this appeal and on their counter appeal, shall have their costs in the court below which are to be assessed, by the master or registrar, if not agreed within 21 days of this judgment. They shall also have in their appeal and on the counter appeal two-thirds of the costs of the court below to be assessed, by the master or the registrar, if not agreed within 21 days of this judgment.

Conclusion

- [71] For the above reasons, I would make the following orders:
- (a) Ciban’s appeal against the judgment of Bannister J is dismissed and the

judgment is affirmed.

- (b) Citco BVI and TCCL's counter appeal is allowed.
- (c) Citco BVI and TCCL shall have their costs in the High Court assessed by either the master or the registrar, if not agreed within 21 days of the date of this judgment; and
- (d) Citco BVI and TCCL shall have in the appeal and the counter-appeal two-thirds of the costs in the court below to be assessed by either the master or the registrar, if not agreed within 21 days of the date of this judgment.

[72] I gratefully acknowledge the assistance of all learned counsel.

I concur.
Gertel Thom
Justice of Appeal

I concur.
E. Ann Henry
Justice of Appeal [Ag.]

By the Court

Chief Registrar