

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS
BVIHCV 2011/0305**

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

AND IN THE MATTER OF HALE STONES LIMITED (“THE COMPANY”)

**AND IN THE MATTER OF AN APPLICATION BY SHAIKHA LULWA BINT MOHAMED
ABDULLA AL KAHLIFA
(by her attorney SHAIKH RASHID BIN SALMAN AL KHALIFA)**

**FOR AN ORDER THAT THE COMPANY BE RESTORED TO THE COMPANIES
REGISTER**

BETWEEN:

**SHAIKHA LULWA BINT MOHAMED ABDULLA AL KHALIFA
(by her attorney SHAIKH RASHID BIN SALMAN AL KHALIFA)**

Applicant

AND

FINANCIAL SERVICES COMMISSION

Respondent

**Appearances: Ms Rhonda Brown and Ms Nadine Whyte for the Applicant;
Ms Lynette Ramoutar for the Respondent**

JUDGMENT

[2012: 12, 19 July]

(Application to restore company by lawful attorney of sole member and sole director – construction of Power of Attorney)

[1] **Wallbank J [Ag]:** This is an application to restore a company, Hale Stones Limited (**“the Company”**), to the Register of International Business Companies of the Virgin Islands. The application raises an issue as to the circumstances where a Power of Attorney granted in favour of a lawful attorney of a company’s sole member can be invoked by that lawful attorney to restore a company to the companies register. The application raises questions concerning the principles of construction of a Power of Attorney in these circumstances, and the construction of the particular Power of Attorney in this case.

[2] The Respondent, through Learned Counsel, has indicated that its sole interest in contesting this application is to ensure that if the Company is to be restored, it should so be done in accordance with the law. The Respondent queries, to put it at its lowest, whether the Power of Attorney in question is sufficiently specific to empower Shaikh Rashid to restore the Company on his mother’s behalf.

[3] The application is nominally being made by Shaikha Lulwa Bint Mohamed Abdulla Al Kahlifa, who I shall refer to as Shaikha Lulwa, the sole member and director of the Company during its existence. The application is however brought on her behalf by her son, Shaikh Rashid Bin Salman Al Khalifa, who was appointed as her attorney by virtue of a power of attorney dated January 25, 2007 (**“the Power of Attorney”**). I shall refer to him as Shaikh Rashid.

[4] The Power of Attorney is in Arabic, but a certified English translation has been laid before the Court. Both sides proceed on the basis that the English translation is materially accurate. The Power of Attorney appears, from the face of the translation, to have been prepared and executed in a jurisdiction outside the Virgin Islands.

[5] Shaikha Lulwa last paid the Company’s annual licensing fees on March 23, 1999. The Company was struck off the Register pursuant to the International Business Companies Act on 31 October 2000, but was deemed to be dissolved ten years later, on 31 October 2010. As the Defendant submits, and the Applicant accepts, it must

therefore be restored under paragraph 57 of Schedule 2 of the Business Companies Act.

[6] The Company is said to be (now, strictly speaking, to have been) the registered owner of real property outside the jurisdiction which is used as a residential dwelling for Shaikha Lulwa and her family, and which, it would appear, would from time to time also be sublet.

[7] In 2006 Shaikha Lulwa was diagnosed with a medical condition. Prior to this diagnosis, her family was apparently not involved in her corporate affairs. After the diagnosis Shaikha Lulwa conferred a Power of Attorney upon her son, Shaikh Rashid, to handle certain of her affairs.

[8] In June 2011 as part of a subletting transaction in relation to the residential dwelling in question, it came to light that the Company had been allowed to lapse and to have been dissolved. Shaikh Rashid, in his capacity as Shaikha Lulwa's attorney, purported to take steps to have the Company restored. The Defendant is concerned that the Power of Attorney does not authorize Shaikha Lulwa's agent to bring the application to restore under section 57 of schedule 2 of the Business Companies Act.

[9] The Defendant's opposition is based on two grounds:

- i. That the Power of Attorney was, the Defendant submits, granted by Shaikha Lulwa in her personal capacity and not in her capacity as a sole director or sole member of the Company; and
- ii. That the Power of Attorney itself does not give Shaikha Lulwa's agent the authority to restore the Company.

[10] Under section 57(3) of Schedule 2 to the Business Companies Act, an application may be made to the Court for an order declaring the dissolution of a CapCo or an IBC, to which subparagraph (2) applies, to be void. The practical effect is that a company to which this Act applies is thereupon restored to the register. Sub-paragraph 2 reads:

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

- (a) in the case of a CapCo
 - (i) the company was struck off the CapCo register and dissolved under section 202 of the Companies Act prior to the re-registration date, or
 - (ii) the company is deemed to be dissolved under paragraph 54; or
- (b) in the case of an IBC
 - (i) the company was dissolved under the provisions of the International Business Companies Act prior to the re-registration date, or
 - (ii) is deemed to be dissolved under paragraph 54.
- (3) An application under subparagraph (1)
 - (a) may be made by the company or a creditor, **member** or liquidator of the company (*emphasis added*);

[11] In the present case therefore, Sheikh Rashid purports to apply for the restoration of the Company as the Lawful Attorney of the Company's "member".

[12] As Learned Counsel for the Applicant submitted, the approach to be adopted when construing powers of attorney was stated by Lord MacNaghten in ***Bryant, Powis and Bryant Ltd v La Banque Du Peuple***¹:

"...powers of attorney are to be construed strictly – that is to say, that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred under the power, it is necessary to shew that on a fair construction of the whole instrument the authority in question is found to be within the four corners of the instrument, either in express terms or by necessary implication."

[13] In short, as Learned Counsel for the Applicant submits, a power of attorney is construed strictly, and authority for any act must be derived from the instrument itself either by express words or by necessary implication.

¹[1893] A.C. 170 at page 177

[14] The present Power of Attorney materially provides that, in relation to the Applicant's companies, the attorney is empowered to, *inter alia*, "establish companies, to liquidate them, to buy shares and bonds, to sell them and receive their proceeds." The Power of Attorney does not use the word "restore".

[15] Learned Counsel for the Applicant argues that "establishing" a company includes a power to restore by necessary implication. However this Court does not need to consider whether that is the case for the purposes of ruling upon this application.

[16] The Power of Attorney further provides, towards the end of the document, that "*In general, he [that is, Shaikh Rashid] shall handle all her [that is, Shaikha Lulwa's] private business affairs.*"

[17] Learned Counsel for the Applicant submitted that it is an accepted rule of interpretation that where general words are used to confer power and these follow special powers, the general words are to be limited to the special powers conferred; however, that incidental powers necessary for carrying out the authority will be implied.

[18] Learned Counsel for the Applicant submitted that in ***Bryant, Powis and Bryant Ltd v La Banque du Peuple*** the court held that the general power "to do execute and perform any other act matter or thing whatsoever which ought to be done executed or performed or which in the opinion of the said agent or attorney ought to have been done or executed or performed in or about the business affairs of the company", read in light of the more specific powers which preceded the clause, authorized the agent only to enter into contracts or engagements for those specified purposes or other acts of those kinds.

[19] Learned Counsel for the Applicant further relies upon ***In Re Wallace***², where, Learned Counsel for the Applicant explains, the court found that a power of attorney authorizing the agent (inter alia) "to commence and carry on, or to defend, at law or in equity, all actions suits, or other proceedings touching anything in which I or my ships or other personal estate may be in anywise concerned" authorized the attorney to sign a

² 1884 14 QBD 22

bankruptcy petition against a debtor of the principal, even though bankruptcy petitions were not expressly mentioned in the Power of Attorney.

[20] Learned Counsel for the Applicant submits that the act of restoring the Applicant's company is incidental to and is an act in the same nature as the kinds specified in the Power of Attorney.

[21] The Defendant, through Learned Counsel, submitted that ***In re Dowson's and Jenkins's Contract*** [1904] 2 Ch 219 is authority for a proposition that the Court must look closely whether in fact, on its proper construction, a Power of Attorney confers a particular power, and that a liberal approach is inappropriate.

[22] In that case, Learned Counsel of the Defendant points out, a vendor Mr. C.K. Dowson, resided in Canada, but was in England and instructed his solicitors to put up a mortgaged property for auction. He had to return to Canada prior to the date fixed for sale. He prepared a power of attorney to one Eliza Jenkins, which contained the power, *inter alia*, "*to sell any real or personal property now or hereafter belonging to me by public auction or by private contract, and subject to any conditions as to title or otherwise*", and the power to invest the proceeds of sale in certain securities. The power of attorney contained no reference to the impending sale, and no special authority for realizing property held by the vendor as mortgagee.

[23] The Court of Appeal (Vaughan Williams LJ) held³ that the words of the power of attorney "*do not extend to everybody who has that power merely as agent, but is intended to apply only to those persons who are either mortgagees or have vested in them the property of the mortgagees, such as the executors... I find no passage in the deed which supplies the deficiency in these words – the absence, that is, of any reference to the exercise of the power of sale which is exercisable by the principal by virtue of the statutory authority in the Act of 1881.*"

³ At page 4 of the Lexis report.

[24] Cozens-Hardy LJ also stated⁴: *“But I cannot find on the face of this power of attorney anything which authorized the attorney to exercise the power of sale conferred on his principal by s. 19 of the Conveyancing Act, 1881.”*

[25] Learned Counsel for the Defendant explained that the issue in that case was not the ability of an attorney to exercise a power conferred on the principal by a statute, rather, it was the question whether the power of attorney, as drafted, was sufficient to confer that statutory power on the attorney. Learned Counsel for the Defendant submitted that the Court of Appeal held that the power of attorney was insufficient, but implicitly accepted that, had it been properly drafted, the attorney would have been able to exercise the power under section 19 of the Conveyancing Act, 1881.

[26] Learned Counsel for the Defendant conceded that it is arguable that the Power of Attorney in the present case could by implication be construed as including a power to restore companies in certain circumstances.

[27] However, the Defendant raised an apparently more powerful possible objection, which was, as its Learned Counsel submitted, that the Power of Attorney was granted by Shaikha Lulwa in her personal capacity (for herself), in certain other capacities specified in the Power of Attorney to deal with another company in another jurisdiction and on behalf of the heirs of a certain deceased person, but not in her capacity as the sole member or the sole director of the Company. Learned Counsel for the Defendant submits that this is similar to the situation in the **Dowson** case, where the power of attorney did not expressly confer the right to exercise the powers under section 19 of the Conveyancing Act, 1881.

⁴ At page 5 of the Lexis report.

[28] Learned Counsel for both the Applicant and the Defendant raised other arguments which either were, in my respectful view, of no moment or do not require to be addressed in order to determine this matter.

[29] Construing the Power of Attorney in this case as a whole it is clear to me that the purpose was to confer upon Shaikh Rashid a wide authority to deal with Shaikha Lulwa's private and business affairs and that it was intended to be inclusive, rather than exclusive, even upon a strict and narrow construction. It is also clear to me that being prepared overseas, without specific reference to any corporate affairs in this jurisdiction, or real property elsewhere that might be owned by a company originally established in this jurisdiction, does not detract from that wide authority.

[30] The provision in the Power of Attorney that "*In general, he shall handle all her private business affairs*" is in my view particularly instructive and indeed crucial in the present case. It is a catch-all provision, which is designed to supplement specifically mentioned general powers, in circumstances where the document is clear that the grantor of the Power did not intend to restrict the grantee merely to those powers. I have no doubt that Shaikh Rashid was intended to have the same powers as his mother to handle all her private business affairs, and that this must include restoring a company of which Shaikha Lulwa was a sole member and director.

[31] **Dowson** can be distinguished, to the extent that it may be necessary to do so (and I do not think it is necessary), in that there the distinction between powers conferred and powers withheld was referable to the type of title interest the grantor held in certain property, and specifically, that a mortgagee sale would include also sale of the mortgagor's equity of redemption, whereas a sale of unmortgaged property would not so interfere with the rights of third parties. In the present case, there appears no reason on the face of the Power of Attorney why Shaikh Rashid should have power to liquidate and establish companies, but

not to restore them, or, more generally, why the provision “*In general, he shall handle all her private business affairs*” should be deprived of its natural meaning. There is nothing in the Power of Attorney which even remotely causes an objective reader to suppose that Shaikha Lulwa would not want Shaikh Rashid to restore a company which was struck off for non payment of fees and which ostensibly continued to own the family’s home. There is also nothing in the Power of Attorney that would allow an objective reader to suppose that Shaikha Lulwa wished that family home to become bona vacantia and thereby devolve to a foreign state. Rather, the whole scheme of the Power of Attorney is predicated upon Shaikh Rashid being given the Power to continue his mother’s private business affairs for the benefit of his mother and her family. The powers accorded to him to dispose of companies and shares refers to a sale, in other words, a disposal for consideration or other benefit to his mother. Allowing a residential real estate family home property to slip out of his mother’s grasp for no return by way of the legal doctrine of bona vacantia runs directly contrary to this scheme.

[32] Furthermore, the residential real property said to be (or now, strictly speaking, to have been) owned by the Company was private, in the sense that it was apparently a private family home of Shaikha Lulwa and/or her family, and at the same time it was owned by a business vehicle, namely a Virgin Islands corporation. From time to time that property would be sublet.

[33] As Shaikha Lulwa was the sole member and sole director of the Company, this company was to all appearance one of her private business affairs. In my view Shaikh Rashid’s purported handling of this private business affair by seeking the restoration of the Company falls squarely within the four corners of this provision and hence the powers conferred upon him by his mother.

[34] For the reasons given the Court therefore grants the following relief:

- (i) a declaration that the dissolution of the Company is void and that it be deemed to have continued in existence as if its name had not been removed from the Register of International Business Companies; and
- (ii) an order that the Company's name be restored to the Register of Corporate Affairs.
- (iii) the declaration and order stated above to take effect upon satisfaction by the Claimant of any and all other statutory and/or legal prerequisite conditions for such restoration.

[35] In relation to costs, whilst the Applicant's claim has been successful, the view of the Court is that although allowances should be made for Shaikha Lulwa's medical condition, this claim arises out of a situation which in more ways than one is of Shaikha Lulwa's, or of her advisers' own making, and which could have been avoided either by their taking steps to maintain the Company or by wording the Power of Attorney to address this Company specifically. Also, the Court considers that the Defendant exercised commendable caution in preferring to allow the Court to give guidance in what is not only a relatively unusual circumstance but also a situation where a Power of Attorney prepared overseas in particular underlying circumstances reasonably required to be construed. Such caution is commendable where, otherwise, perceived informal precedents might be seen to arise, creating or dampening expectations which might not in all cases be desirable or compatible with a well regulated off-shore commercial industry. In the present case therefore the Court makes no order as to costs.

[36] I should say further that only such information as is reasonably required to lay out the circumstances of this matter have been included in this ruling, which may be of some general legal interest, in order to respect the privacy of the

Applicant. Consequently I have avoided mentioning specific details on a number of factual aspects which were presented to the Court by Learned Counsel for the Applicant.

[37] Finally I thank both parties' Learned Counsel for their lucid, candid and dispassionate submissions and their assistance to the Court.



Gerhard Wallbank
High Court Judge (Acting)

19 July 2012