



DUTIES OWED BY DIRECTORS OF BVI COMPANIES IN LIQUIDATION

In *Greig William Alexander Mitchell & Ors v Sheikh Mohamed Bin Issa Al Jaber & Ors*¹ the English High Court considered whether the duties owed by directors of BVI companies persist after the company is placed in liquidation. This is the first reported decision on this question of BVI law and provides useful guidance to directors, shareholders and liquidators.

“Given the narrow scope of the duty expressed by the English High Court, future litigants may seek to expand the scope of the duty before the BVI Court. How the BVI Court will approach such claims, given the differences between the BVI and English insolvency regimes, remains to be seen.”

Summary

The English High Court (Court) found that directors of BVI companies do not owe any general duties to the company post-liquidation. However, where the director assumed stewardship of company property and retains (or continues to control) that property post-liquidation, they do so in a fiduciary capacity. If, instead of delivering the property to the liquidators, the director deals with the property, without authority, in a manner adverse to the liquidation, they breach their fiduciary duty of stewardship and must account for the property as if they were a constructive trustee.

Background

Proceedings were brought by the liquidators (**Liquidators**) of a BVI company, MBI International & Partners Inc (in liquidation) (**Company**) against the Company's former directors (**Directors**), alleging breach of statutory and fiduciary duty, breach of trust and negligence in relation to certain pre- and post-liquidation transactions, in particular the transfer of shares in the Company's subsidiary (**Shares**) from the Company to another entity.

The claim was tried before the English High Court, pursuant to orders for recognition and assistance obtained by the BVI Liquidators, and the Court heard evidence from the parties' BVI law experts. Of particular significance was the fact that, unlike the position under English law², the

Directors remained in office after the commencement of the liquidation, pursuant to section 175 of the BVI Insolvency Act 2003 (the **Act**).

The statutory position

Section 175(1)(b) of the Act provides that:

“with effect from the commencement of the liquidation of a company... its directors and other officers of the company remain in office, but they cease to have any powers, functions or duties other than those required or permitted under [Part VI of the Act³] or authorised by the liquidator”.

The Court noted that the duties “required or permitted” under Part VI of the Act were limited to:

- (i) duties applicable in the context of an execution process; and
- (ii) the duty to prepare and submit a statement of affairs;

(neither of which were relevant in this case) and that a liquidator's power to require a director to provide documents and attend for questions arises under Part XI of the Act (specifically, section 282).

The Liquidators' case: Directors' duties persist during liquidation

Notwithstanding the terms of the Act, the Liquidators contended that after the commencement of the liquidation the Directors continued to owe duties to the company, in their

capacity as directors, on the following basis:

1. the general duties of directors under BVI law survive post-liquidation, relying on the recent English decision in *Re Systems Building Services Group Ltd (in Liquidation)*⁴, in which ICC Judge Barber held that, in circumstances where a company had entered administration and the effect of the Insolvency Act 1986 was such that the commencement of the administration did not in and of itself operate to remove directors from office, the general duties of directors under sections 170-177 of the English Companies Act 2006 survive (the **Re Systems Building Services Argument**);
2. the Directors owed a fiduciary duty to the Company, alternatively each was a constructive trustee liable to account to the Company after the commencement of the Liquidation in respect of any property of the Company that remained in their hands or under their control, or under the control of a corporate entity that the director in question exercised control – the **“Fiduciary Duty/Constructive Trust Argument”**); and
3. the Directors owed a duty to account to the Company for (i) their stewardship of the Company and its assets prior

² Under English law, a director's appointment is automatically terminated upon compulsory liquidation (this does not apply to a creditor's voluntary liquidation – as explained in our article. <https://www.hfw.com/High-Court-gives-guidance-on-duties-owed-by-Directors-Feb-20>)

³ (Part VI of the Act deals with 'Liquidation').

⁴ [2020] All ER (Comm) 565 (**Re Systems Building Services**).

to the commencement of the Liquidation; and (ii) their stewardship of any assets that remained in their hands or otherwise under their custody or control (the “**Duty to Account Argument**”).

Decision of the English High Court

1. The Re Systems Building Services Argument

Having regard to the evidence of the parties’ BVI law experts on the proper interpretation of section 175 of the Act, the Court held that the powers and duties of the directors of a BVI company cease upon the commencement of the company’s liquidation, unless a director holds company property (see below).

Accordingly, the Court did not discuss the English law position at length, albeit Smith J. observed that the Court’s reasoning in *Re Systems Building Services* included factors which would not apply to any analysis of the Act, given that the BVI and English insolvency regimes differ on this point.

2. The Fiduciary Duty/Constructive Trust Argument

The Court commented that it was very hard to see how a director’s fiduciary duties could, ordinarily, persist during liquidation given that, pursuant to section 175 of the Act, BVI directors are automatically divested of their powers and duties upon the commencement of the liquidation.

However, the Court accepted that, where a director assumes stewardship of company’s property and retains (or continues to control) that property post-liquidation, they do so in a fiduciary capacity. If the director then deals with the property, without authority, in a manner adverse to the liquidation, they breach their fiduciary duty of stewardship and must account for the property, as if they were a constructive trustee.

The Court considered two further strands of English authority which support this analysis: the English courts have held that fiduciary duties were owed to companies by *de facto* directors:

- (i) a shadow director who dealt with the assets of a company, acting as if he were a director⁵; and
- (ii) a retired director who, after his retirement, exploits a business opportunity belonging to the company⁶;

The Court commented that it was difficult to see why, if *de facto* directors owe such duties, a *de jure* director who deals adversely with company property after liquidation would not, similarly, owe a fiduciary duty to the company in relation to their dealings with its property.

The scope of this duty is limited, and the Court clarified that whether such a duty will arise will depend on the facts and circumstances of each case and, in particular, “*whether the directors were in possession or control of the property and whether the directors set up any beneficial rights to the property that were adverse to those of the [c]ompany*”⁷.

Having found that one of the Directors owed a duty to account to the Company as constructive trustee of the Shares and that he had breached that duty by misappropriating the Shares, the Court ordered the Director to pay approximately €67million to the Company in equitable compensation.

3. The Duty to Account Argument

The Court rejected the Liquidators’ arguments that there was: (i) any duty on a director under BVI law to disclose his own wrongdoing after commencement of the liquidation; and/or (ii) any wider, more general, duty of disclosure on a director post-liquidation.

Conclusion

The BVI is an overseas territory of the United Kingdom, its legal system is a common law system based on English law and practice and English authorities are persuasive before the BVI Court. It is therefore likely that this decision would be persuasive before the BVI Court (if it remains good law - see below).

Given the narrow scope of the duty expressed by the English High Court,

future litigants may seek to expand the scope of the duty before the BVI Court. How the BVI Court will approach such claims, given the differences between the BVI and English insolvency regimes, remains to be seen.

We understand that the English Court of Appeal has granted permission to appeal and await the outcome of the appeal with great interest.

Should you need further guidance please get in touch with the authors of this briefing below, our wider BVI team overleaf or your usual HFW contact.



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⁵ (see *Vivendi SA v Richards* [2013] BCC 711.)

⁶ (see *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704.)

⁷ Paragraph 397.

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