

Director duties post-liquidation in the BVI

Georgina Squire considers a recent BVI case on the extent of duties owed



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IN BRIEF

► The status of director duties in a company in liquidation registered in the British Virgin Islands (BVI) has been undecided, until a recent decision of the English High Court which was required to consider what duties, if any, directors of BVI companies owe after the company has been placed into liquidation.

The status of director duties in a company in liquidation registered in the British Virgin Islands (BVI), has been undecided until the recent decision of the English High Court in *Greig William Alexander Mitchell & Ors v Sheikh Mohamed Bin Issa Al Jaber & Ors* [2023] EWHC 364 (Ch). The High Court (Mrs Justice Smith) was required to consider what duties, if any, directors of BVI companies owe after the company has been placed into liquidation, in light of s 175(1)(b) of the BVI Insolvency Act 2003 (IA 2003), which states that from the commencement of the liquidation, ‘the 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 this Part’.

Background

The claimants were the liquidators of MBI International & Partners Inc, a company registered in the BVI, (MBI), who brought proceedings against various individuals, including Sheikh Mohamed Bin Issa Al Jaber (SM) and his daughter, Mashaal Mohamed Al Jaber (MJ), both directors who remained in post after MBI’s liquidation.

The claim arose out of a series of alleged transactions and acts which took place between late-2008 and 2016 (pre- and post-MBI’s liquidation), which it was argued by the claimants gave rise to claims inter alia of breach of statutory and fiduciary duty, breach of trust and negligence against the directors of MBI. Of particular interest was an alleged disposition of shares by SM which took place in March 2016 (the shares) transferring the company’s shares in its subsidiary to another entity. The claimants argued the directors continued to owe the company a duty of care and had acted in a way which resulted in breaches of, among

other things, statutory and fiduciary duty, breach of trust and negligence.

BVI duties

The duties owed by the director of a BVI company before liquidation are set out in ss 120–125 of the BVI Business Companies Act 2004 (BCA 2004) and, inter alia, include: (i) acting honestly and in good faith and in the best interests of a company; (ii) exercising his/her powers for a proper purpose and not acting in a manner that contravenes the BCA 2004 or the memorandum or articles of the company; and (iii) exercising the care, diligence and skill that a reasonable director would exercise in the same circumstances. These duties are derived from English common law and so the court in this case interpreted them by reference to the common law and fiduciary responsibility.

Directors’ duties after a company has gone into liquidation are set out in s 175(1)(b) of the IA 2003 which provides that directors and other officers of the company remain in office when liquidation commences, though they cease to have any powers, functions or duties other than those required or permitted under Part VI of the IA 2003, which states that ‘required or permitted’ duties are limited to: (i) duties applicable in the context of an execution process; and (ii) the duty to prepare and submit a statement of affairs. Once a company is placed in liquidation, the liquidator takes custody and control of the assets of the company.

Interestingly, neither party sought to argue that BVI law was different to English law on these points.

The court’s decision

Overall, the court considered several arguments regarding potential duties of a director under BVI law raised in the case. Of significance to the points discussed, the court rejected the claimants’ arguments that a director’s general duties continue to apply after a company has gone into liquidation, which appeared to her ‘to push the boundaries of a director’s duties following liquidation far beyond those identified in the statute’. Instead, Smith J found in favour of SM and MJ agreeing that a director’s general duties only apply

when they are exercising their powers or performing their duties.

The court also rejected the claimants’ argument that: (i) a director owes a duty to the company, post-liquidation, to disclose his/her own wrongdoing after the date of liquidation of the company; and (ii) there was any wider, more general, duty of disclosure on a BVI director. However, the court did accept that it was possible, in the right circumstances, for the directors under BVI law to continue to owe a duty of fiduciary stewardship post liquidation, in relation to property in their possession or control, but emphasised that duty was of ‘extremely limited compass’, did not involve a continuing duty of co-operation or ‘delivery up’ of shares and was only an obligation not to deal adversely with the company’s assets.

Ultimately, the court rejected SM’s defence that he had not exercised control over the shares because he had ceased to have any powers as a director of the company after it had gone into liquidation. The judge held SM had ‘taken control’ of the shares by holding himself out as having authority and power to sign the shares transfer forms on behalf of the company, which enabled SM to register the transfer of the shares.

Finally, the court considered that making an award of c €67m would provide appropriate equitable compensation for the misappropriation of the shares, thus making the award against both SM and the entity that had received the shares.

The judgment clarifies an area of law previously untested and so is useful to assist practitioners in determining the possible scope of duties and any liabilities for BVI company directors, post-liquidation of a company. This is undoubtedly an area that will be the subject of further litigation, but for the present, it is helpful guidance to those involved in claims for breach of directors’ duties, particularly of an insolvent offshore entity.

While the case is under appeal, it will be interesting to see how the decision will be applied in future similar situations. **NLJ**

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