

**THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHCV 2007/301

BETWEEN:

CIBAN MANAGEMENT CORPORATION

Claimant

And

- 1. CITCO (BVI) LIMITED**
- 2. TORTOLA CORPORATION COMPANY LIMITED**

Defendants

ALBERTO JACKSON BYINGTON NETO

Defendant to the Counterclaim

Appearances: Mr Ben Hubble QC and Mr Ben Mays for the Claimant and Defendant to the Counterclaim
Mr Steven Thompson and Mr Jeremy Child for the Defendants

2012: 14-16, 27 November

JUDGMENT

(Shelf company and sole director supplied to sole beneficial owner by first defendant fiduciary services provider – sole beneficial owner failing to execute management agreement with first defendant and second defendant director – sole beneficial owner using associate as channel of communications and provider of instructions to first defendant for transmission to second defendant – defendants acting upon instructions given by associate without the knowledge or approval of sole beneficial owner thereby enabling associate to effect the sale of company's only asset – sole beneficial owner causing company to bring claims against first defendant for breaches of duty in accepting and acting upon associate's instructions and in failing to carry out due diligence on the proposed transaction – whether fiduciary service provider owing any such duties to company supplied – whether principle of ostensible authority in play –

company bringing claims against second defendant director to breach of duty - nature and extent of duties of sole director of shelf company supplied to sole beneficial owner considered – section 54(1) of International Business Companies Ordinance, 1984 ('IBC') considered – whether sale of sole asset engaged IBC section 80 – IBC section 80 considered – whether supplied company had any cause of action against board of directors if section 80 IBC not complied with)

- [1] **Bannister J [Ag]:** The moving spirit behind these proceedings is an eighty year old Brazilian gentleman called Alberto Jackson Byington Neto ('Mr Byington'). Through a company called Gravacões Eletricas S/A ('GEL') he had carried on a music and recording business in Sao Paulo since the 1950's or 1960's. In 1993 he sold the artists' contracts and royalty rights to Warner Bros for some US\$18 million. US\$3 million, part of this sum, was paid to Mr Byington personally in return for a non-compete covenant. It seems that the bulk of the consideration was paid to GEL's creditors and Mr Byington lent his US\$3 million to GEL to help to keep what remained of the business afloat. That business (apparently a graphic design business connected with the design and production of record sleeves) continued to be carried on in part of GEL's premises at Avenida do Estado in Sao Paulo.
- [2] By 1997 the remainder of the business was failing and Mr Byington was concerned about his US\$3 million. In an effort to salvage what he could he persuaded a long standing friend and associate of his called Henrique de Moura Costa ('Mr Costa') to acquire two¹ BVI shelf companies, one called Waterloo Capital Corp ('Waterloo') and the other Spectacular Holdings Inc ('Spectacular').² I shall have to describe this process in more detail later, but these acquisitions were made, through the intermediary of Citco Services Inc ('Citco NY') from Citco (BVI) Ltd ('Citco BVI'), the first defendant in these proceedings. The acquisitions took place with effect from 27 October 1997. Citco BVI appointed the second defendant, Tortola Corporation Company Limited ('TCCL') as Spectacular's sole director.
- [3] The purpose of the acquisitions was so 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 the reality was that the sale was a

¹ in fact, Mr Costa acquired four others, but they do not figure prominently in the story and can be ignored for present purposes

² on 7 June 2012 Spectacular was merged with the presently named Claimant, which now pursues the claim, but it is convenient to refer to Spectacular, since that is the name used in all of the documents and witness statements

sham. In fact, GEL remained in the beneficial ownership of Mr Byington - although its creditors would know nothing of this.

- [4] As the next step in the scheme, Mr Byington sued GEL for his US\$3 million and obtained an order for a judicial sale. At the resulting public auction Spectacular, which has always been beneficially owned by Mr Byington, obtained five of the six parcels making up the premises from which GEL carried on business (I shall refer to the acquired parcels as 'the property') for R\$2.75 million.³ So Mr Byington had succeeded in extracting the property from the arms of GEL's creditors without anyone (other than Mr Costa) knowing that he was the real purchaser. He had also obtained a valuable asset without anyone other than Mr Costa (including the Brazilian tax authorities, with whom Mr Byington admitted to having a rather fraught relationship) being any the wiser. As Mr Costa was to put it in a later email to Mr Byington, he (Mr Costa) had 'assumed GEL to protect [Mr Byington's] assets from tax creditors.'
- [5] This scheme is not mentioned in Mr Byington's witness statement. It was revealed only in cross examination, although to be fair to Mr Byington he volunteered the information as sought frankly and with no attempt to evade questions.
- [6] In early 2000 Mr Byington appears to have fallen on financial hard times and he persuaded Mr Costa, who was then helping to run another Byington enterprise, Guias Latinas, which had the Yellow Pages concession in Paraguay, to lend him US\$85,000 with interest at 8%. In November 2000 Mr Costa resigned from 'the organisation', while agreeing to remain available to transfer 'the subjects I am taking care of, or, at any time, to co-operate as necessary.'
- [7] By February 2001 Mr Byington had not repaid Mr Costa's loan. Mr Costa (who did not give evidence in the proceedings) also appears to have been owed arrears of salary⁴ for the year 2000. The parties agreed a settlement under which Mr Byington would pay, or arrange the payment of these debts by 31 December 2001. It was a term of the arrangement that Mr Byington should pay Mr Costa a minimum of US\$2,000⁵ a month in respect of the salary arrears, to be set off against the total salary debt.
- [8] On 21 March 2001 Mr Costa emailed Mr Byington to say that a sum of US\$2040 was due for agents and registry fees in respect of Waterloo and Spectacular and that although he would try to obtain funds to pay them from Mr Ansano Baccelli,

³ there was no evidence of conversion rates in 1997 but at today's rates that would be around US\$1.3 million

⁴ about US\$23,000 at now current conversion rates, less a small amount to take account of personal phone calls

⁵ at present exchange rates

(Mr Baccelli), who was managing what was left of GEL's business in Sao Paulo, money there was tight. So he asked Mr Byington to see what he could get 'over there'. 'Over there' was a reference to Paraguay, where Mr Byington spent the bulk of the year 2001 in trying to salvage the Yellow Pages business following a period of what he regarded as mismanagement on the part of Mr Costa.

- [9] On 11 May 2001 Mr Costa emailed Mr Byington to tell 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. On 24 June 2001 he complained to Mr Byington that the last two of his monthly payments under the agreement of February had been missed and that he had had to sell his wife's motor car to pay bills. He ended that email by saying that he 'had no more alternatives.' On 27 July 2001 Mr Costa complained that his name had been entered in the (bad) books of a credit bureau. He referred to Mr Byington's unfulfilled promises to pay him from the Paraguayan company, said he was sure there were other sources from which the money could be found, and complained about the general sense of uncertainty under which he was laboring.
- [10] On 14 August 2001 and without telling Mr Byington, Mr Costa sent Citco BVI the text of a power of attorney which he asked Spectacular to grant. The power would enable a Sao Paulo lawyer, Mr Delollo, to sell the property. On the following day TCCL passed a director resolution providing for the issue of the power as asked and executed it. On the same day the executed power was sent to London for consularisation at the Brazilian consulate, as Mr Costa had asked, with a request that it be forwarded afterwards to Mr Costa at the address of the property.
- [11] Also on 14 August 2001, Citco BVI sent Mr Costa a reminder about its fees for 2001 and the US\$300 Government licence fee, including a request for the US\$150 late fee. Mr Costa caused this invoice to be settled on 23 August 2001 by means of a wire transfer from his son's bank account in Oxford, England.
- [12] On 20 and 21 November 2001 Mr Costa emailed Citco BVI and asked for further documents to be produced. It was made plain that they were required for the purposes of the proposed sale. The email asked that the documents be sent to Mr Costa's home address, rather than to the property. Citco BVI did not consult Mr Byington about any of these transactions nor did it inform him of them subsequently.
- [13] On 14 December 2001 a contract for the sale of the property in the sum of R\$1.15 million was entered into by Spectacular as seller and one Thomas Law as buyer. The purchase price was to be paid in two instalments of R\$575 thousand, the second to be paid on delivery up of vacant possession.

[14] On the same day Mr Costa wrote to Mr Byington telling him, for the first time, what had happened. He included a sort of completion statement showing receipt of the first R\$575 thousand, from which had been paid: tax of just under R\$200 thousand; Mr DeIollo's fees; and R\$316 thousand, being the amount which Mr Costa claimed was due to him under the agreement reached between him and Mr Byington earlier that year (despite the fact that payment of the loan and ultimate salary balances was not supposed, under those arrangements, to be due until 31 December 2001). That left a final balance in hand of R\$1,930.

[15] Mr Byington's reply came immediately. It is worth setting out in full:

Henrique, you must be joking and it's very bad joke. See how you can undo this because even a child can see that this is a phenomenal loss. When did you say that it would be sold? Your wages are paid up from what I know, and by the end of December everything indicates that you, with great sacrifice from me, will receive yours from another source which is not this craziness that you are talking about.

It is plain that Mr Byington had never authorized the grant of the 15 August 2001 power of attorney and until that date had had not the slightest inkling about the sale which it had been used to effect.

[16] Acting through Mr John Greene, of the Florida law firm which he had used in order to acquire Spectacular in 1997 and with which he had had a longstanding relationship ('Stollman'), Mr Byington immediately caused the power of attorney granted on 15 August 2001 (together with four earlier powers granted by Spectacular during the period within which Mr Costa gave instructions on behalf of Mr Byington) to be revoked by TCCL. Steps were taken in the Brazilian Courts to stop registration of Mr Law's title to the property. Although that process was ultimately abandoned, terms were subsequently reached with Mr Law under which Spectacular retained the property in return for a payment to Mr Law of some R\$1.6 million. Spectacular also incurred legal costs of some R\$400 thousand. It also claims that it has lost rents from the property which it would have earned in the period while it was unable to let out the property until the question of title was settled.

[17] On 14 December 2007, the sixth anniversary of the execution of the contract for the sale of the property, Spectacular issued the present proceedings. Since that was more than six years after Citco BVI's and TCCL's alleged breach of contract in issuing the 15 August 2001 power of attorney and the November 2001 documents which had enabled the property to be sold, Spectacular is reduced to

claims in tort. These claims are, in short, for negligence in failing to check that Mr Costa had My Byington's authority to procure the grant of the 15 August 2001 power of attorney and for failing to carry out due diligence and thus to discover that the transaction was at a significant undervalue. There is a further claim against TCCL for breach of statutory duty in failing to comply with section 80 of the IBC.

- [18] Citco BVI and TCCL have put in defences to these claims and each has counterclaimed for an indemnity for any sums they may be ordered to pay to Spectacular in these proceedings under Article 26 of Spectacular's Articles of Association ('Article 26'). On 6 October 2008 they brought an ancillary claim against Mr Byington himself. The present hearing has been for determination of the question of liability only.
- [19] These claims and the counterclaim will be better understood if I first take a more detailed look at the dealings between Citco BVI, TCCL, Mr Byington and Mr Costa between October 1997 and Mr Costa's bombshell of 14 December 2000. Before I do so I should make clear that the only witness called to give evidence about these events was Mr Byington. I heard no evidence from Mr Costa, nor from Mr van Aalst or Mr Stollman and no one from Citco BVI or TCCL with actual knowledge of the events in question was called to give evidence upon their behalf.

Spectacular and its affairs

- [20] Spectacular was incorporated on 21 March 1996 under the then International Business Companies Ordinance of 1984 ('the IBC') and retained by Citco BVI as a shelf company available for purchase. Its registered agent was (and, remarkably given the complaints which Mr Byington now levels at it, until 13 December 2007 remained) Citco BVI.
- [21] Mr Byington says that when in late 1997 he was looking for an offshore company to acquire the property he made inquiries of one of his bankers, Citibank, which suggested that it made sense to acquire a BVI registered company for the purpose. Mr Byington told Mr Costa to instruct Mr Marc Stollman, of Stollman, to pursue the matter on his behalf. Mr Stollman got in touch with Citco NY, of which it appears that he was an established client, and on 15 October 1997 Mr van Aalst of that office faxed him with a list of five available BVI companies, which included Waterloo, but not Spectacular, together with some guidance notes on BVI companies. Mr Stollman passed this information on to Mr Costa, who must have telephoned Mr van Aalst, because in response to that call Mr van Aalst on 24 October 2007 sent Mr Costa a list of three further available companies, which included Spectacular.

- [22] On 27 October 1997 Mr Costa faxed Mr van Aalst and asked him to 'incorporate' Spectacular and to appoint 'Citco' as its director. Nothing turns on the fact that Mr Costa's instruction was to incorporate, rather than acquire Spectacular. On the same day Mr van Aalst faxed to Mr Leue, of Citco BVI, a completed document described as a 'BVI Shelf Request.' It identified Spectacular as the entity in point and gave as its proposed share capital 5,000 bearer shares. The sole director was to be TCCL and the secretary was to be a company referred to as 'BCCL', which plays no part in the story. The Request specified that the 'initial documents' and invoice were to be sent to Citco NY and that all subsequent correspondence was to be sent to Mr Stollman in Florida. Mr van Aalst asked Citco BVI to include Citco NY's fee of US\$2,000 in the invoice. The purpose of the acquisition was stated to be real estate holding and the nationality/residence of 'the shareholder' was stated to be Brazilian. Citco BVI was further asked to prepare a management agreement with Mr Byington, whose full name and address were included in the Request, and to issue a power of attorney in the terms of an attached draft. Finally, Citco BVI was instructed to release 'all other shelves' which had been reserved for Citco NY.
- [23] On 28 October 1997 Mr van Aalst faxed Mr Costa to tell him that the necessary documentation would be prepared. He requested a reference letter and passport details for Mr Byington (but without referring to him by name) and asked to be told his specific business occupation and business address. Mr Costa supplied that information on or before 29 October 1997 and asked for the matter to be treated as one of urgency.
- [24] By documents dated 27 October 1997, Citco BVI appointed TCCL as first director of Spectacular and caused five thousand bearer shares to be issued. Citco BVI was appointed registered agent. The power of attorney requested by Mr van Aalst was issued. It granted one Ricardo Valente, a Sao Paulo lawyer, power to represent Spectacular in any judicial proceedings for the specific purpose of taking legal proceedings against GEL. So far, therefore, the evidence shows that Citco BVI was taking its instructions from Citco NY. Citco NY, on the other hand, was obtaining its instructions from Mr Costa.
- [25] On 30 October 1997 Mr van Aalst sent Mr Costa a copy of the power of attorney, together with Citco NY's invoice (incorporating Citco's fees to end 1998). He told Mr Costa that once the invoice was paid, the documents (legalized by the Brazilian consulate) would be sent to Mr Stollman.
- [26] In fact, it appears that payment was not effected until 23 December 1997, when Citco BVI's invoice was settled internally by Citco NY. Mr van Aalst nevertheless sent copies of the documents to Mr Costa on 3 November 1997. He also sent Mr

Costa two copies of a management agreement, proposed to be entered into between Mr Byington as beneficial owner and Citco and TCCL, which already bore signatures for the latter two entities, and asked Mr Costa to obtain Mr Byington's signature to it.

- [27] Mr Byington objected to signing this document on the grounds that he did not wish his name to appear anywhere on Citco BVI's files. There was an attempt to get round this difficulty by redrafting so that Mr Stollman was to execute the agreement on behalf of Mr Byington, but that got nowhere (a) because Mr Byington still objected to having his name on the document and (b) Mr Stollman sensibly took the view that he had no business signing the document, since he was a stranger to the transaction. The documents show that a further suggestion was that Mr Stollman should sign as 'US attorney for the Beneficial Owner' but that was not acted upon and the management agreement remains unexecuted by Mr Byington to this day.
- [28] Had it been signed, Mr Byington would have bound himself to indemnify Tortola against claims made against it in the proper performance of its duties; TCCL would have bound itself to carry out its duties as director in the best interests of Mr Byington; and the agreement would have had incorporated into it Citco BVI's standard terms and conditions. Those standard terms would have bound Citco BVI to ensure, so far as it could, that Spectacular complied with all its obligations under the IBC and any other applicable BVI legislation. They would also have entitled Citco BVI to send all relevant correspondence to Mr Byington's last known address unless he provided it with an alternative correspondent. Finally, by clause 8.1, they would have provided that all instructions, etc, sent to Citco BVI were to be sent to it by Mr Byington directly and in writing.
- [29] Mr Byington told me that he had noticed that the management agreement contained an indemnity and that that was a further reason why he did not sign it. I reject that evidence. Had that been so, there would have been some trace of the objection somewhere in the remarkably complete contemporaneous documentation. I find that Mr Byington refused to sign because he did not want anyone to find out, or even to have the possibility of finding out, that he owned Spectacular.
- [30] The upshot is that no such management agreement ever came into force between Mr Byington, Citco BVI and Tortola. Nor was the relationship between the parties ever governed by Citco BVI's standard terms and conditions.
- [31] On 5 November 1997 Citco BVI sent the bearer shares to Mr Stollman and the consularised certificate of incorporation, memorandum and articles of association

together with a copy of the signed sole director's resolution direct to Mr Costa. This appears to have been the first communication between Citco BVI and Mr Costa.

- [32] Two days later Citco BVI sent Mr Stollman an invoice for the abortive amendment to the draft management agreement. Mr Stollman forwarded it to Mr Costa, asking him to confirm that he would handle the payment of it. He did not do so, because on 9 March 1998 Citco BVI chased Mr Stollman for payment. He settled the bill with his firm's cheque dated 2 April 1998.
- [33] On 10 November 1997 Citco BVI received the completed KYCP checklist from Citco NY. It had been completed by Mr van Aalst and showed the 'name feeder' as Mr Stollman, described as an existing Citco client. Mr Byington was described as the beneficial owner and the company's activities were described simply as 'real estate.' Citco BVI was still receiving its instructions from Citco NY.
- [34] On 30 April 1998 Mr Costa sent Mr van Aalst the text of a new power of attorney for Spectacular which he asked Mr van Aalst to provide. There is no evidence that that instruction was questioned. The power was executed by TCCL on 14 May 1998. The donee of the power was Mr Delollo. It enabled him to represent Spectacular generally in Brazil and to appear for it before all agencies of the Brazilian Government. The power was sent back for consularisation to Mr van Aalst, who forwarded it to Mr Costa on 8 June 1998 once that had been done. The charge for the power of attorney was US\$320. It was settled by one of Mr Byington's other companies, Ciban Corporation, with its cheque which Mr Byington signed personally.
- [35] Meanwhile, on 12 May 1998 Mr Costa had asked Citco NY that all correspondence related to, among others, Spectacular, be sent to him at the property in Sao Paulo. It is evident from the route taken by the 14 May 1998 power of attorney that that instruction had been overlooked and the instruction was repeated, this time to Citco BVI itself, on 13 June 1998.
- [36] On 30 June 1998 Citco BVI sent an invoice direct to Mr Costa.
- [37] On 9 October 1998 Mr Costa asked Mr van Aalst to procure the grant of a further power of attorney by Spectacular. The power was executed on the same day. It was in similar terms to that granted on 14 May 1998, but it contained an additional power to open a bank account on behalf of Spectacular. That element of the power was never in fact used. At this point, it appears that Citco BVI was still receiving its instructions from Citco NY.

- [38] By 21 April 1999 Mr Leue had left Citco BVI's employment. Citco BVI wrote to Mr Costa to inform him of this news. On 2 September 1999 Mr Costa asked Citco BVI directly to arrange for Spectacular to execute a fourth power of attorney. The text submitted by Mr Costa, unlike the previous powers of attorney, but like the disputed power of attorney of 15 August 2001, had dual English and Portuguese texts. The donee of the power was, once again, Mr DeIollo and it empowered him to represent Spectacular in the matter of the incorporation of a new company in Brazil. The instruction was once more followed without question and the power was granted on 6 September 1999. It was never used, as the project was subsequently abandoned.
- [39] On 25 April 2000 Mr Costa informed Citco BVI that their invoice in respect of Spectacular was being settled via Citibank in New York.
- [40] It was on 21 March 2001, as I have said earlier, that Mr Costa complained to Mr Byington that he was having trouble persuading Mr Baccelli to put him in funds to settle an outstanding Citco BVI invoice of US\$2,040 for fees due from Spectacular and Waterloo. By 7 May 2001 the invoices had still not been settled. Mr Costa wrote to Mr Byington again, describing Waterloo and Spectacular as his (Mr Costa's) responsibility and reminding Mr Byington that Waterloo held GEL and that Spectacular held the property.
- [41] I have already mentioned Mr Costa's request to Citco BVI, on 14 August 2001, for the power of attorney which was subsequently used in the sale of the property to be issued and sent to him at the address of the property. The instruction was followed without question and the power of attorney, issued by Spectacular on 15 August 2001, was sent on the same day by Citco BVI to lawyers in London, with instructions to forward it to Mr Costa at the property once that had been done. Also on 14 August 2001 Mr Costa told Citco BVI that the outstanding invoice would be settled immediately and he further asked that all further invoices be sent to Mr DeIollo.
- [42] On 16 August 2001 Mr Costa told Citco BVI that the invoice would be settled by the Oxford branch of the Natwest Bank. That happened on 23 August 2001 and on the same day Mr Costa emailed Citco BVI, telling it that the office in Sao Paulo would be closed for fifteen days and asking for the power of attorney to be sent direct to Mr DeIollo. It is not known whether Citco BVI's instructions to the London law firm were amended to provide for this to be done or whether, as they had been instructed, they sent the power of attorney to Mr Costa at the property.
- [43] As already mentioned, on 20 and 21 November Mr Costa asked Citco BVI to generate various documents, such as a certificate of good standing and a copy of

the resolution authorizing the issue of the power of attorney, in order, as he told it, 'to execute the sales deed.' In making these requests, Mr Costa used a new fax number and he also asked that the documents, when consularised, be sent to what was in fact his home address (although there is nothing to suggest that Citco BVI would have had any reason to know that). Mr Costa's instruction was followed without question. On 22 November 2001 Citco BVI (using the new fax number) faxed copies of the documents which he had requested and told him that the originals had been sent to the Brazilian consulate for consularisation. The documents were prepared and reached Mr Costa in due course.

- [44] That was the last dealing between Mr Costa and Citco BVI before Mr Costa's bombshell of 14 December 2001. I should, however, mention one more matter. As I have said, after learning, on 14 December 2001, of the sale Mr Byington, through Mr Greene, had caused all the previous powers of attorney to be revoked. It appears that Mr Greene had also asked Citco to provide what was described as a 'Directors' Certificate.' This document was sent by Citco to Mr Greene on 19 December 2001. It was in the following terms:

We, Tortola Corporation Company Limited, of Citco Building, PO Box 662, Road Town, Tortola, British Virgin Islands, as Director of **SPECTACULAR HOLDINGS INC.**, an International Business Company organized and existing under the laws of the British Virgin Islands ("the Company"), **HEREBY CERTIFY** according to our files and to the best of our knowledge and belief that Mr. Albert Jackson Neto is the sole Beneficial Owner of the Company and as such he is the sole person authorized to provide Tortola Corporation Company Limited, as Director, with instructions on behalf of the Company.

- [45] It is common ground that Mr Byington had given his approval, either specifically or generally, for all the corporate acts carried out on Spectacular's behalf down to and including the issue of the fourth power of attorney on 2 September 1999. There is, however, no document in evidence to suggest that Mr Byington told any of the professionals with whom Mr Costa dealt on his behalf that they could safely rely upon his instructions. Yet Mr Stollman clearly treated Mr Costa as having the authority to give instructions to Mr van Aalst at Citco NY in October 1997 and Mr van Aalst treated Mr Costa as having authority to give him instructions on behalf of Mr Byington right down to October 1998. Citco BVI, for its part, was comfortable receiving instructions ultimately from Mr van Aalst in relation to Spectacular matters down to October 1998 and to accept them directly from Mr Costa thereafter. So far as the available documents go, none of these professionals ever asked Mr Byington for confirmation of any of these instructions.

[46] With that brief factual introduction I turn to consider Spectacular's pleaded causes of action.

Spectacular's causes of action

(a) Citco BVI

[47] By its third amended statement of claim ('the statement of claim') Spectacular pleads, first, that there existed a 'contract of agency and of professional services' between Citco BVI and Spectacular, concluded at the time when Citco BVI agreed to form Spectacular and to provide ongoing company administration and fiduciary services (such as the provision of directors). 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 and 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 for breach of duty, but I ought to comment on the various breaches pleaded.

[50] The first clutch of alleged breaches are different ways of saying that Citco BVI should not have acted on Mr Costa's instructions in relation to the fifth power of attorney and the documents which he requested in November of 2001. Even if the

claimant in these proceedings had been Mr Byington, in my judgment he would have had no claim against Citco BVI in these respects. As the facts set out in paragraphs [2] to [45] above demonstrate, Mr Byington had so arranged matters that those engaged on his behalf on the affairs of Spectacular were expected to act on the instructions of Mr Costa. Mr Byington attempted to dismiss Mr Costa as a mere amenuensis, but the correspondence between the two men in, particularly, 2001 shows quite clearly that he was more than that. He had been entrusted by Mr Byington with the oversight of Guias Latinas. Mr Byington said he made a bad job of it, but one does not give a mere secretary a task of that sort. Perhaps more to the point, you do not borrow US\$85 thousand from a mere secretary, either. The tone of Mr Costa's resignation letter of 27 November 2000 is consistent with there having been a relationship of collaboration between the two men, rather than one of employer/employee. So the conclusion must be drawn that Mr Costa had Mr Byington's trust. Mr Byington could have executed the management agreement proffered to him by Citco, in which case he would have had the protection of clause 8.1 of Citco's standard terms and conditions, providing, in effect, that Citco BVI would act only upon Mr Byington's written instructions. Mr Byington did not go down that route and instead must be taken to have accepted the risk that Mr Costa might one day betray him. By the present proceedings he attempts to transfer that risk to Citco BVI.

- [51] In my judgment, even were he the claimant in place of Spectacular, he would have no grounds for doing so. He had 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.
- [52] Various 'red flags' are relied upon: for example, that Mr Costa asked that the fifth power of attorney and invoice be sent to him. But Mr Costa had asked in October 1998 that all correspondence be sent to him and the second, third and fourth powers of attorney had all been sent, after consularisation, to Mr Costa at the property. Then it is said that Mr Costa asked for Citco BVI's invoices for the work on the fifth power of attorney to be sent to him rather than to Citco NY or to Mr Stollman. But Mr Costa had asked for that procedure to operate as early as May/June 1998 and the instruction had been complied with, without protest from Mr Byington, over the following three years. It is pointed out that Mr Costa's email requesting the execution of the fifth power of attorney was from his personal email address and referred to his home telephone number instead of that at the property. That is so, but I cannot see why that should have excited any suspicion, especially since Mr Costa in the same email asked that the executed and

consularised document be sent to him, as previously, at the property. It was only subsequently that he asked, whether successfully or not is not known, that the power of attorney be sent to Mr DeIollo. Next, it is said that the terms of the fifth power of attorney were in unusually wide and general terms. I do not understand this point, or why it should have excited the suspicions of Citco BVI. It is a power enabling the sale of a property. Citco BVI would have had no idea until then that Spectacular had ever acquired the property, let alone any reason to ponder why Mr Byington might wish to dispose of it.

[53] Next it is said that Citco BVI failed to carry out any due diligence in respect of the proposed sale. I deal with this point later in respect of the claims against TCCL, but I say at once that it seems to me to be fanciful that a service provider offering services of the sort which Mr Byington was purchasing from it should be under any duty whatsoever to monitor the health of the businesses (if any) conducted by the shell companies which it had provided. The statement of claim goes so far as to allege that Citco BVI was negligent in allowing all of Spectacular's assets to be sold at a significant and obvious undervalue. I do not see how it can be suggested that Citco BVI would know that the property was Spectacular's only asset or that it was being sold at any particular value – let alone that the price was at an alleged undervalue. It is said that Citco BVI should have been alerted by Mr Costa's telling it that the office was to be closed for 15 days from 27 August 2001. I do not see why Citco BVI needed to be the slightest interested in the business practices of Mr Byington's companies or that it should have felt nervous at the receipt of this intelligence. It is also said that payment of the Invoice from the Natwest Oxford account should have caused it concern. I disagree. Its invoices had previously been settled by, variously, Citco NY, Citibank in New York, Mr Stollman and Mr Byington's company Cibac Corporation. Why the identification of yet another source of funds should have put them on notice that there was something amiss quite escapes me.

[54] Other breaches of duty are alleged, but they are peripheral and I do not need to lengthen this judgment by setting them out or commenting upon them.

[55] In relation to Spectacular's claim against Citco BVI, the only further point which I need to mention is the reliance placed by Mr Hubble QC, who appeared for Spectacular at trial, upon the document set out under paragraph [44] above and which for convenience is repeated here:

We, Tortola Corporation Company Limited, of Citco Building, PO Box 662, Road Town, Tortola, British Virgin Islands, as Director of **SPECTACULAR HOLDINGS INC.**, an International Business Company organized and existing under the laws of the British

Virgin Islands ("the Company"), **HEREBY CERTIFY** according to our files and to the best of our knowledge and belief that Mr. Albert Jackson Neto is the sole Beneficial Owner of the Company and as such he is the sole person authorized to provide Tortola Corporation Company Limited, as Director, with instructions on behalf of the Company.

- [56] Mr Hubble QC says that that is the end of Citco's case. He appears to rely upon it as some sort of conclusive admission that Spectacular was in breach of duty in accepting instruction from Mr Costa (or, for that matter, from Mr van Aalst). I cannot accept that submission. The document correctly identifies Mr Byington as Spectacular's sole beneficial owner and says that he is the only person entitled to provide TCCL with instructions on behalf of Spectacular. While one might quibble with the words 'instructions *on behalf of* [Spectacular]', the statement is true. No other person had an *entitlement* to give instruction to Citco BVI in relation to Spectacular. How Mr Byington communicated those instructions was a matter for him, but that he alone was entitled to give them cannot be in doubt. The document does not prove that on its own admission Citco BVI was negligent in acting upon instructions passed to it *via* Mr Costa, nor that it was negligent when it acted upon Mr Costa's instructions of 14 August 2001 and 20/21 November 2001.
- [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.
- [58] 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 a holding out of Mr Costa by Mr Byington as a person entitled to give instructions upon his behalf.

(b) TCCL

- [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.
- [61] Company law derives its principles from a mixture of statute and contract. In deciding the extent and scope of the duties of its directors, one starts with its articles of association and, of course, the relevant company legislation. The articles of association of Spectacular are silent on the point, but section 54(1) of the IBC, to which I was referred by Mr Hubble QC, provides that directors of companies incorporated under the IBC must act honestly and in good faith with a view to the best interests of the company and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. Those words are incorporated in paragraph 3.6A of the statement of claim. The critical words are 'that a reasonably prudent person would exercise in comparable circumstances.'
- [62] In determining the nature and extent 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 discretions. 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 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.

[64] There is nothing contrary to general principles of company law, or to section 54(1) of the IBC in any of this. It is a perfectly lawful arrangement between the sole owner of a company and its board for the division of responsibilities between them. It is irrelevant that it has not been incorporated into Spectacular's articles of association. The company itself has no separate right, in these circumstances, to claim that the board owed it separate stand alone duties. Indeed, if this sort of relaxation on the part of ultimate beneficial owners of the duties which would otherwise be owed by directors to the companies which they own were not permissible, the provision by fiduciary service providers of companies like Spectacular and directors like TCCL for the purposes for which they are provided, at the rates at which they are provided, would have to stop. If directors of such companies were to be expected to have a continuing duty to monitor the decisions of ultimate beneficial owners and liable to claims for breach of duty if they failed properly to carry out such duties, they would need to have the right, first, to compel beneficial owners to provide them with complete details about every transaction which the beneficial owner required them to execute, to be placed in funds in order to be able to engage lawyers, accountants, valuers and other specialists in order to satisfy themselves that what they were being asked to do was, commercially speaking, in the best interests of the company and to be provided with funds to enable them to do so. They must, finally, have the right to refuse to carry out the instructions of beneficial owners if not satisfied that what they wish to happen is in the best interests of the companies of which they are the sole owners. Finally, they must be remunerated at rates which compensate them for all of these additional responsibilities. These requirements have only to be listed for it to be

seen that the attribution to directors in the position of TCCL of the duties relied upon in the statement of claim is fanciful.

- [65] 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.

Section 80 of the IBC

- [66] Section 80 of the IBC ('section 80') provides, so far as material, 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"

- [67] In order for section 80 to apply the underlying transaction must be one not made in the usual or regular course of a company's business. Its purpose is to ensure that directors do not use their powers in order to dispose of assets of a company on ventures to which its members have not signed up. I cannot see how it can be said that a sale of the property was not in the usual or regular course of Spectacular's business. Spectacular's business was that of a property holding company. In the nature of things, property holding companies dispose of, as well as acquire, property. Mr Byington had caused Spectacular (and thus TCCL) to be told that Spectacular's business was 'property holding' (BVI Shelf Request of 27 October 1997) and/or 'real estate' (KYCP checklist of 10 November 1997). TCCL had never been told what were the assets held by Spectacular, so that until 14 August 2001 it had no means of knowing that Spectacular even owned the property, let alone whether it accounted for more than 50% of those assets. Finally, Mr Byington had set up the system of giving instructions which had enabled it to be represented to TCCL that he had already approved the sale of the property.

- [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 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 has no claim against its sole director, TCCL.

Conclusion

[70] 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.

A handwritten signature in black ink, appearing to read 'Alvin Sun', written in a cursive style.

Commercial Court Judge
27 November 2012