EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2017/0018

BETWEEN:

DELCO PARTICIPATION BV

Appellant

and

GREEN ELITE LIMITED

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Mr. Matthew Hardwick, QC with him Mr. Simon Hall for the Appellant
Mr. Phillip Jones, QC with him Mr. Nicholas Brookes for the Respondent
Mr. Richard Millett, QC for the interested party, HWH Holdings Ltd.

2018: February 27;
June 15.

Commercial appeal – Insolvency Act, 2003 – BVI Business Companies Act, 2004 – Whether learned judge erred in refusing to wind up company – Whether the learned judge erred in concluding that there was no loss of substratum – Main object or dominant purpose of company – Test for whether a company has lost its substratum

The respondent, Green Elite, was incorporated on 20th January 2010 in the Territory of the Virgin Islands with its registered agent appointing Mr. Fang An Kong ("Mr. Fang") as one of

its first directors on 2nd February 2010. Green Elite's Memorandum of Association does not identify the main or any objects of the company.

On 2nd February 2010 Delco, a company incorporated in the Netherlands, and HWH Holdings Limited ("HWH") were allotted 1 share each in Green Elite. On 8th March 2010 Delco and HWH transferred 4 ordinary shares each in a company called Chiho Tiande Group Limited ("CT") to Green Elite. On 24th June 2010 Delco, Mr. Fang and CT entered into a Shareholders' Loan Assignment and Capitalisation Agreement by which CT agreed to allot a number of shares to each company thereby increasing Green Elite's total shareholding in CT. A few days later CT published a prospectus which identified Delco and HWH as the owners of the CT shares.

On 2nd April 2014 Green Elite sold all the CT shares to Tai Security Holding Limited pursuant to a written sale and purchase agreement for a total consideration of HK$150m. On 4th April 2014 CT formally announced that by reason of the sale, Green Elite ceases to hold any shares in CT.

On 8th March 2017 Delco filed an originating application which sought to appoint liquidators over Green Elite contending that Green Elite's sole purpose and business was to hold shares in CT, which Green Elite sold in April 2014 as such Green Elite had lost its substratum. Green Elite and HWH opposed Delco's application on the basis that Green Elite has the continuing business of dealing with the proceeds of sale of the shares. HWH also contended that Green Elite's commercial purpose was to act as a trustee, and that the trust continues, the trust assets being the proceeds of sale of the CT shares.

Delco's application was dismissed by the trial judge who agreed with Green Elite and HWH to the extent that even though Green Elite had sold all of its shares it still had a continuing ancillary function of dealing with the proceeds of sale of the CT shares, such that the whole of Green Elite's substratum had not failed. On the trustee point, the judge held that the totality of the determination weighs heavily against the existence of a trust and concluded that there was no such trust.

Delco has appealed arguing inter alia that the learned judge erred in concluding that there was no loss of Green Elite's substratum. Green Elite has cross appealed contending that the learned judge erred in making a final determination on the trust point and in holding that there was no trust.

Held: allowing the appeal; dismissing the cross appeal; setting aside the costs order; ordering that Green Elite be wound up; and awarding costs to Delco on the appeal and the cross appeal, such costs to be assessed, if not agreed within 21 days, that:

1. It is just and equitable for a court to order the winding up of a company if that which the company was formed to do can no longer be done or if the company has ceased to carry on its business and the carrying on of the business has become, in a practical sense, impossible. In such a case, the company's substratum has disappeared.

Re Bristol Joint Stock Bank (1890) 44 Ch D 703 applied.

2. In considering whether it has become impossible for the company to achieve the purpose for which it was formed, it is necessary to ascertain the main objects or paramount object or dominant object of the company as expressed in the company's memorandum and articles and to determine whether it has become impossible for the company to attain those objects. Where the company has no objects clause, the nature of its business must be ascertained from other materials.

   Re German Date Coffee Co (1882) 20 Ch D 169 applied; **Citco Global Custody NV v Y2K Finance Inc**, BVIHCV2009/0020A (delivered 25th November 2009, unreported) approved.

3. Applying this test, as Green Elite's Memorandum of Association does not identify the main or any objects of the company, the nature of its business must be ascertained from available materials. Based on the documentation, it is clear that the main object or dominant purpose of Green Elite was to hold the shares. Upon the sale of the shares in 2014, the main object could have no longer have been obtained; Green Elite's CT shares now sold, it serves no further purpose. As a result, Green Elite's substratum had totally failed.

   Re Bristol Joint Stock Bank (1890) 44 Ch D 703 applied; **Re German Date Coffee Co** (1882) 20 Ch D 169 applied; **Citco Global Custody NV v Y2K Finance Inc**, BVIHCV2009/0020A (delivered 25th November 2009, unreported) approved.

4. The learned judge was involved in a trial and the corollary of this is that he was entitled and bound to make findings based on the evidence and/or documentation that was before him. The trust matter, having been raised by HWH and the learned judge having reviewed the evidence and the submissions in relation thereto, it was clearly open to him to determine whether or not a trust existed. The learned judge correctly found that Green Elite was not a trust company. In that connection, the appellate court would not interfere with the judge's finding.

JUDGMENT

Introduction

[1] **BLENMAN JA**: This is an appeal by Delco Participation BV ("Delco") against the judgment of a learned trial judge of the Commercial Court in which he refused Delco's application to wind up Green Elite Limited ("Green Elite") on the basis that Green Elite had lost its substratum. Delco has also appealed against the

alternative ruling of the learned trial judge that even if Green Elite has lost its substratum, Delco was acting unreasonably in not pursuing alternative remedies that are available to it. Green Elite cross appeals against the learned trial judge's finding that there was no relationship of trust in existence between itself and Delco. It has also cross appealed on the basis that the learned trial judge improperly made a final determination on the issue of the trust in circumstances where the shareholders of Green Elite were not named as parties to the originating claim. HWH Holdings Limited ("HWH") who is a fifty percent shareholder in Green Elite has also provided submissions which argue that the learned judge ought to have upheld Green Elite's position on the basis that there was subsisting of trust between Green Elite and Delco and HWH and this militated against the winding up of Green Elite since there was no issue of loss of substratum.

[2] I now turn to the factual matrix.

Background Facts

[3] Green Elite was incorporated on 20th January 2010 in the Territory of the Virgin Islands. On 2nd February 2010, its registered agent appointed Mr. Fang An Kong ("Mr. Fang"), Mr. Gu Liyong, Mr. Fang Anlin and Ms. Ding Li as the first directors. They remain the only directors of Green Elite.

[4] On 2nd February 2010 representatives of Delco, a company incorporated in the Netherlands, and HWH wrote to the Board of Directors of Green Elite applying for 1 share of US$1.00 at par for consideration of US$1. By resolution of the directors dated 2nd February 2010, it was noted that the first registered agent had appointed the said four individuals as the first directors. Delco and HWH were allotted 1 share each in Green Elite.

[5] On 8th March 2010 Delco and HWH transferred 4 ordinary shares of HK$0.01 each in a company called Chiho Tiande Group Limited ("CT") to Green Elite. Subsequently, on 24th June 2010 Delco, Mr. Fang and CT entered into a

Shareholders' Loan Assignment and Capitalisation Agreement by which CT agreed to allot 59,999,992 shares to Green Elite, 344,999,954 shares to HWH and 344,999,954 shares to Delco increasing Green Elite's total shareholding in CT to 60,000,000.

[6] On 28th June 2010 CT published a prospectus detailing the "Hong Kong Public Offering" and the "International Offering" identifying Delco and HWH as the owners of the CT shares and describing a Pre-IPO and a Post-IPO Share Option Scheme. CT was then listed on the main board of the Hong Kong Stock Exchange on 12th July 2010.

[7] On 2nd April 2014 Green Elite sold all the CT shares to Tai Security Holding Limited pursuant to a written sale and purchase agreement for a total consideration of HK$150m. Discussions ensued between the representatives of Delco and Green Elite for the transfer by Green Elite to Delco for its share of the dividends and proceeds of sale of the CT shares.

[8] On 8th March 2017 Delco filed an originating application which sought to appoint liquidators over Green Elite on the basis that it was just and equitable to do so pursuant to section 162(1)(b) of the **Insolvency Act, 2003**.[1]

[9] In the court below, Delco argued that Green Elite had lost its substratum as the object for which it was incorporated could no longer be achieved. Delco contended that Green Elite's sole purpose and business was to hold the shares in CT, which Green Elite sold in April 2014.

[10] Green Elite and its other shareholder, HWH opposed Delco's application on the basis that Green Elite has the continuing business of dealing with the proceeds of sale of the shares. HWH also contended that Green Elite's purpose had been to

[1] No. 5 of 2003, Laws of the Virgin Islands.

hold shares in CT, but that it held those shares upon trust. HWH argued that the object of the trust was to hold the shares in question for the benefit of certain key staff members of CT who had been appointed directors of Green Elite since its inception as an incentive. In short, HWH posited that Green Elite's commercial purpose was to act as a trustee, and that the trust continues, the trust assets being the proceeds of sale of the CT shares.

The Ruling Below

[11] The learned trial judge dismissed Delco's application to wind up Green Elite and held that even though Green Elite had sold all of its shares it still had a continuing ancillary function of dealing with the proceeds of sale of the CT shares, such that the whole of Green Elite's substratum had not failed. On the trust point, the judge held that the totality of the determination weighs heavily against the existence of a trust and concluded that there was no such trust. The learned judge went on to conclude that even if there was a loss of substratum, Delco was acting unreasonably in not pursuing its alternative potential remedies.

[12] As a consequence of the above ruling, Delco has appealed and Green Elite has cross appealed. HWH supports Green Elite.

[13] I turn now to the issues that arise for this Court to resolve.

Issues

[14] The following issues can be distilled from the grounds of appeal and the cross-appeal:

(a) Whether the learned judge erred in concluding that there was no loss of substratum.

(b) Whether the learned judge erred in concluding that even if there was a loss of substratum, Delco was acting unreasonably in seeking to wind up Green Elite instead of utilising alternative remedies.

(c) Whether the learned judge erred in making a final determination on the trust point.

(d) Whether the learned judge erred in holding that there was no trust.

Issue 1 – Whether the learned judge erred in concluding that there was no loss of Substratum

Delco's Submissions

[15] Learned Queen's Counsel Mr. Hardwick said that the learned judge correctly held that the main purpose of Green Elite was to hold the shares, however the judge fell into error when he went on to consider the notion of ancillary purpose. The main thrust of Mr. Hardwick, QC's submissions is that Green Elite was incorporated for the sole purpose of holding certain shares in CT for the potential benefit of certain staff, and as those shares were sold on 2nd April 2014, Green Elite no longer holds any CT shares and no longer serves any purpose. He submitted that in these circumstances there has been a loss of substratum such that it is just and equitable that liquidators be appointed to Green Elite.

[16] Mr. Hardwick, QC further argued that the learned judge's findings disclose several errors, namely the fact that Green Elite had the power to sell the CT shares is altogether inconsistent with the loss of substratum analysis advanced by Delco. That is to say, Green Elite having sold the CT shares, there is nothing left to be done but to wind up its affairs. Mr. Hardwick, QC said that the approach adopted by the learned judge of seeking to ascertain an ancillary purpose is inconsistent with the authorities. Mr. Hardwick, QC criticised the judge for reading into the main purpose of Green Elite an ancillary purpose of distributing the proceeds from the sale of the shares.

[17] Mr. Hardwick, QC also complained that the judge was wrong to deal with a hypothetical situation of proceeds of sale in the absence of any evidence before him that there was any proceeds in existence. He said that despite Delco's

enquiries, Green Elite has failed to indicate to the court below any proceeds from the sale of the shares.

[18] During oral arguments, Mr. Hardwick, QC emphasised that Delco's case is that Green Elite was incorporated for the sole purpose of holding shares in CT for the potential benefit of certain staff. The shares were sold with the result that Green Elite no longer holds any of the shares and no longer serves any purpose.

[19] Mr. Hardwick, QC reminded this Court that what is required is to ascertain the main purpose of the company based on all of the available materials.

[20] Mr. Hardwick, QC said that although the learned judge correctly identified the "main objects" test for determining the purpose for which the company was incorporated, the learned judge failed to apply this test. In particular, there was no suggestion in the evidence that Green Elite was formed for the purpose of holding and distributing the proceeds of sale of the CT shares. Mr. Hardwick, QC submitted that the finding of the court that there was a continuing "ancillary function" of dealing with the proceeds of sale as a practical result of the share sale was irrelevant since the need to distribute the proceeds of sale was not the purpose for which the company was formed, but part of the winding up process now that the purpose of Green Elite has ceased to exist. Mr. Hardwick, QC said that the judge's choice of the word "ancillary" only underlines the error that he made as the distribution of the proceeds of sale could not be considered one of the "main objects" or "the chief object" of Green Elite.

[21] Mr. Hardwick, QC posited further that the judge in fact came close to the right answer when he referred to the need for Green Elite to wind up its affairs. Having acknowledged that need for such a winding up process, the judge took the wrong step of conflating that practical need with the original business purpose of Green Elite. Mr. Hardwick, QC argued that the two are quite different as the original business purpose of Green Elite was to hold the CT shares. There is no

suggestion or evidence that Green Elite purchased any other shares or pursued any other business with the proceeds of sale. As such, the necessity for a winding up, by a court appointed liquidator, is plain.

[22] Finally, Mr. Hardwick, QC said that the learned judge wrongly categorised Delco's originating application as a "complaint" that Green Elite has not fulfilled its function of distributing any of the proceeds of sale to Delco promptly or at all. Further, that in circumstances where Green Elite's only function was to hold CT shares, the learned judge erred in concluding that Delco might have no entitlement to any part of the proceeds of sale such that it was "pointless" and/or "unjust" to appoint a liquidator. He posited that on the evidence the only conclusion that the judge could have properly reached was that there was a total loss of substratum as a consequence of Green Elite's sale of the shares.

Green Elite's Submissions

[23] Learned Queen's Counsel Mr. Jones submitted that there was no loss of substratum by the sale of the shares.[2] He said that it was within the discretion of the directors to deal with the proceeds of sale and that they had an obligation to distribute the proceeds of the sale.

[24] Mr. Jones, QC supported the judge's opinion that Green Elite had the ancillary function of distributing the proceeds of sale of the shares. Mr. Jones, QC further posited that there was another reason the substratum had not disappeared namely, the acceptance, or concession by Delco before the judge that the evidence of Mr. Stephanus Maria van Ooijen should be preferred over the evidence of Mr. Herman Maurits de Leeuw ("Mr. Leeuw") such that the function of Green Elite holding the CT shares was, and continued to be, to benefit the key employees and/or their relatives. He said that since the shares were sold the persons who were the beneficiaries of the shares can properly receive cash distribution.

[2] Learned Queen's Counsel Mr. Millet, counsel for the interested party HWH Holdings Ltd., adopted the arguments that were advanced on behalf of Green Elite.

[25] Learned Queen's Counsel Mr. Jones reminded this Court that in the originating application in the court below, Delco had argued that the object of the company was to hold the CT shares. However, in oral arguments before this Court, Delco conceded that the object of the company was to hold the shares as a pot from which the employees may be rewarded. Mr. Jones, QC stated that it was open to the company to sell the shares and keep the proceeds derived therefrom as a source from which to distribute to the shareholders – this he said was an ancillary purpose. He agreed with the learned judge that in so far as there was this ancillary purpose it could not be said that the substratum had failed. Learned Queen's Counsel therefore urged this Court to dismiss Delco's appeal. Learned Queen's Counsel Mr. Millett adopted Mr. Jones, QC's argument and addressed HWH's position that there was the creation of a trust. However, for reasons which will become apparent and with no disrespect intended to Mr. Millet, QC his submissions will not be elaborated at this stage.

Discussion

[26] This appeal brings into sharp focus the issue of loss of substratum. It requires this Court to interrogate the circumstances of this case in order to ascertain whether there is any merit in Delco's claim that the learned trial judge erred by concluding that there was no loss of substratum even though Green Elite had sold all of its shares in CT.

[27] In **Re Bristol Joint Stock Bank**,[3] Kekewich J stated that it is just and equitable for the court to order the winding up of a company if that which the company was formed to do can no longer be done or if the company has ceased to carry on its business and the carrying on of the business has become, in a practical sense, impossible. In such a case, the company's substratum has disappeared.

[3] (1890) 44 Ch D 703 at p. 712.

[28] Also in **Re Amalgamated Syndicate Ltd**[4] it was held that where a company has fulfilled the objective for which it was created, then it can be said to have lost its substratum.

[29] It is settled law that a loss of stratum can occur in myriad ways. Indeed, the learned authors of **Applications to Wind Up Companies**[5] identified a number of situations where the substratum has gone, namely: (a) there is no reasonable hope of achieving the object of trading at a profit; (b) the company's business is no longer viable; (c) the company was formed to pursue a specific opportunity which has proved to be worthless; (d) the company was formed to pursue a specific opportunity not in fact available to the company; (e) the company was formed to pursue a specific opportunity which has never materialised; (f) the company was formed to carry on a specific business which it then sold; (g) the company was formed to pursue a specific business which has come to an end; and (h) the company's regulatory authority has withdrawn its authorisation.

[30] It is settled law that in considering whether it has become impossible for the company to achieve the purpose for which it was formed, it is necessary to ascertain the main objects or paramount object or dominant object of the company[6] as expressed in the company's memorandum and articles (if they are so expressed) and to determine whether it has become impossible for the company to attain those objects. However, where the company has no objects clause, the nature of its business must be ascertained from other materials.[7]

[31] Green Elite's Memorandum of Association does not identify the main or any objects of the company. Clause 5.1 merely indicates that Green Elite has "full capacity to carry on or undertake any business or activity, do any act or enter into any transaction". The Articles of Association also provide no assistance in

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[4] [1897] at Chancery 600.
[5] Derek French, Oxford University Press, 3rd edn., para. 8.262.
[6] Re German Date Coffee Co (1882) 20 Ch D 169.
[7] Bannister J [Ag.] in Citco Global Custody NV v Y2K Finance Inc, BVIHCV2009/0020A (delivered 25th November 2009, unreported).

ascertaining the purpose of Green Elite. It is therefore necessary to ascertain its purpose from other documentation.

[32] In the affidavit of Mr. Erik Hammerstein ("Mr. Hammerstein")[8] in support of Delco's application, sworn on 6th March 2017, Mr. Hammerstein identified the following documentation which makes the point that Green Elite ceases to hold any CT shares and no longer serves any purpose. The documentation includes the following:

(1) An email dated 2nd February 2010 from Mr. Frank van Lint (an advisor to Mr. de Leeuw) to Ms. Emily Chan (Mr. Fang's personal assistant) asking:

> "*does [the function of Green Elite] relate to the structure that we discussed in which [Delco] and [Mr. Fang] will become 50/50 shareholder [sic] and that [Green Elite] will acquire the 8 shares of CT?...*".

which question received the response from Paul Chow (CT's Chief Financial Officer), "*…your understanding is correct…".*

(2) On 28th September 2011 an email from Ms. Emily Chan to Mr. van Lint indicating that Green Elite is "*…a holding company which holds 6% of CT Group's shares, that's all, there is no other operation or business…*".

(3) A formal announcement by CT on 4th April 2014 which made it clear that by reason of sale, Green Elite ceases to hold any shares in CT.

(4) An email dated 22nd April 2014 sent by Mr. van Lint to Mr. de Leeuw entitled "Green Elite Ltd – Final Settlement" enclosing a draft email (from Mr. de Leeuw and Mr. van Ooijen) seeking the distributions of

[8] Mr. Erik Hammerstein is a director of Delco appointed by the Dutch Enterprise Chamber (a division of the Amsterdam Court of Appeal) on 1st and 2nd February 2016 with a court mandate to pursue claims on Delco's behalf in relation to its investment in a company known as Chiho-Tiande Group Limited ("CT"), including its indirect investment in CT via Green Elite.

the funds and also recommending "…*As Green Elite Ltd does no (sic) longer serve any purpose, we suggest to liquidate this company…*".

[33] Mr. Hammerstein concluded in his affidavit that, based on the documentation identified, it is abundantly clear that Green Elite's CT shares now sold, it serves no further purpose.

[34] The learned judge concluded that Green Elite's main purpose was to hold the CT shares. I agree with the judge's conclusion. There is not a scintilla of evidence that Green Elite was engaged in any other business nor owned any substantial assets apart from the CT shares which it sold 4 years ago. The irresistible conclusion is that Green Elite's main purpose was to hold CT shares for the benefit of employees. The learned judge's finding to this effect was sound in law and cannot therefore be properly criticised. The learned judge's conclusion that it was to hold shares and not to hold the shares on trust as was contended for will be addressed in relation to the trust point. I find the arguments advanced by Mr. Hardwick, QC on this aspect very compelling and for reasons which would be provided shortly, they cannot properly be assailed.

[35] Having established that the purpose of Green Elite was to hold CT shares, it is necessary to determine whether the company's substratum has failed. The principles that were enunciated in **Re German Date Coffee Co**[9] and **Re The Edison Telephone Company of London**[10] are applicable to bar since they all frontally address the issue of loss of substratum.

[36] In **Re German Date Coffee Co**, the company was formed to pursue a specific purpose which had never materialised. The memorandum of association of the company stated that it was formed for working a German patent, but the intended German patent was never granted. The company purchased a Swedish patent

[9] (1882) 20 Ch D 169.
[10](1881) SJ 240.

and established works at Hamburg where they made and sold coffee made from dates without a patent. Many of the shareholders withdrew from the company on ascertaining that the German patent could not be obtained, but the large majority of those who remained desired to continue the company, which was insolvent circumstances. A petition to wind up the company was filed by two shareholders. The court held that the substratum of the company had failed, and it was impossible to carry out the objects for which it was formed and therefore it was just and equitable that the company should be wound up.

[37] Kay J observed as follows:

> "…where on the face of the memorandum you see there is a distinct purpose which is the foundation of the company, then, although the memorandum may contain other general words which include the doing of other objects, those general words must be read as being ancillary to that which the memorandum shews to be the main purpose, and if the main purpose fails and fails altogether, then, … the substratum of the association fails."[11]

[38] In the case of **Re The Edison Telephone Company of London**, the company was formed to carry on a specific business which it then sold. In that case, Jessel MR made an order winding up the company on the ground that the company could not earn any further dividends and there was nothing left to be done but to divide the proceeds of sale among the shareholders.

[39] Further, in **Re Johnson Corporation Ltd**[12] the court found it to be just and equitable to wind up a company which had withdrawn from the business it was formed to pursue where those in control of the company used it for purposes beyond those for which it was incorporated.

[40] I can do no more than apply those very helpful principles that were enunciated in the above cases to the case at bar. This leads to the ineluctable conclusion that on Green Elite's sale of the shares, its substratum failed. The main object of the

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[11] At p. 177.
[12] (1980) 5 ACLR 227.

company was to hold the shares and upon the sale of the shares in 2014, the main object could have no longer have been obtained. This is the most typical case of a loss of substratum.

[41] In my view, the learned judge erred in concluding that Green Elite's substratum had not failed because it had the continuing ancillary function of dealing with the proceeds of sale. The test for whether a company has lost its substratum requires an examination of the dominant object for which the company was formed, or in other words, the main object of the company. The fact that Green Elite had to deal with the proceeds of sale of the CT shares (if any) is irrelevant, as dealing with the proceeds of sale of CT shares was not the main purpose for which the company was formed, but part of the winding up process (which is what Delco is ultimately seeking). I agree with learned Queen's Counsel Mr. Hardwick that the learned trial judge conflated the practical need for Green Elite to be wound up with its business purpose. The test is whether the dominant object or main object can no longer be carried out. The test does not admit of any determination of the ancillary purpose. I emphasise that the main object or dominant purpose of Green Elite was to hold CT shares. Green Elite had sold those CT shares in April 2014; as a result I find that Green Elite's substratum has totally failed. I agree with Mr. Hardwick, QC that the main purpose of Green Elite was not to distribute cash. The judge fell into error by addressing any ancillary purpose. A corollary matter is whether the learned judge ought to have exercised his equitable jurisdiction to wind up Green Elite as a consequence of its loss of substratum.

[42] Having found that the learned judge erred in concluding that Green Elite has not suffered a loss of substratum this brings me now to issue 2: whether there are reasonable alternative remedies available to Delco, even if there was a loss of substratum.

Whether Delco was acting unreasonably in seeking to wind up Green Elite instead of utilising alternative remedies even if there was a loss of substratum

Delco's Submissions

[43] Learned Queen's Counsel Mr. Hardwick advocated that the learned judge ought to have granted Delco the equitable remedy of winding up Green Elite given the circumstances of the case at bar. The crux of Mr. Hardwick, QC's submissions on this point is that all the "alternative potential remedies" which were not specifically identified by the learned trial judge are unsatisfactory in the circumstances and the winding up of Green Elite remains the only viable recourse. He reminded this Court that Delco, in another application, had requisitioned a shareholders' meeting. Learned Queen's Counsel complained that up to time of the hearing of the appeal Delco, despite its efforts, was unaware of the fact of whether there were any proceeds of sale from the sale of CT shares.

[44] Mr. Hardwick, QC submitted that it is entirely unacceptable that Delco who is a 50 percent shareholder in Green Elite has absolutely no knowledge as to what has become of its shares save for the fact that they were sold. Mr. Hardwick, QC posited that a requisition of a shareholders' meeting pursuant to section 86(2) of the **BVI Business Companies Act, 2004**[13] would not be a suitable remedy. Mr. Hardwick, QC indicated that a requisition application which was made had been met with consistent obstruction and delay, such that when a meeting of the members of Green Elite was ordered by the court below, Green Elite appealed the order. He indicated during oral arguments that despite Delco's best efforts Green Elite has refused to provide Delco with any information in relation to the sale of its shares. Mr. Hardwick, QC said that the case at bar is ideally suited for the winding up order and the judge erred by failing to do so. He also criticises the judge for not indicating the alternative remedy that he had in mind. More importantly, learned Queen's Counsel said that it should have been obvious that the equitable jurisdiction ought to have been exercised to wind up Green Elite.

[13] No. 16 of 2004, Laws of The Virgin Islands.

Green Elite's Submissions

[45] Learned Queen's Counsel Mr. Jones on the other hand, said that Delco had more than adequate remedies available to it to remedy what it saw as its legitimate complaints, if this Court were to conclude that there was a loss of substratum.

[46] Learned Queen's Counsel Mr. Jones submitted that, in the circumstances, it was unnecessary and unreasonable for Delco to seek to remedy these matters by the appointment of a liquidator. He stated that the real matters of complaint by Delco are classic matters of complaint that are usually the subject matter of unfair prejudice proceedings or derivative actions, and the appointment of a liquidator will bring no advantages in obtaining such compensation that Delco does not have itself and will only add an unnecessary layer of extra costs. Mr. Jones, QC opined that the nub of Delco's case was that Green Elite had not distributed any of the proceeds of the sale to Delco promptly and this was Green Elite's function.

[47] Mr. Jones, QC said that there is inevitably going to have to be litigation with Mr. Gu, Mr. Fang Anlin and Ms. Ding as to who beneficially owned the CT shares and proceeds. Further, that the issue should be resolved by proceedings between Delco (through unfair prejudice proceedings or derivative actions) and these persons in their individual capacities. A liquidator's appointment does not resolve this issue.

[48] Learned Queen's Counsel Mr. Millett on behalf of HWH strongly supported Green Elite and argued against the winding up order. With no disrespect intended, merely so as not to unnecessarily lengthen the judgment, I will refrain from repeating Mr. Millett's very succinct and helpful submissions, even though I have considered them in their entirety.

Discussion

[49] In my view, Mr. Hardwick, QC has correctly pointed out that there was no reference to the requisition application by the learned trial judge in his conclusion that Delco

was acting unreasonably in not pursuing its alternative potential remedies. However, nothing turns on that. Equally, I agree that there is no suggestion here or elsewhere that the judge considered the requisition application to be a viable alternative remedy in light of the obstruction faced. It is clear that the learned judge having started off from the wrong premise, namely, that Green Elite had a continuing purpose of distributing the proceeds of sale, was influenced by this in his approach to the question of what was an appropriate remedy. As I have already decided that there was a loss of substratum, the appropriate remedy must be determined against that background.

[50] It is also my view that there is no suggestion in the judge's finding on alternative remedies that he had considered that Green Elite, apart from selling the shares of which Delco was a 50 percent shareholder, had refused to advise Delco of the whereabouts of the proceeds of sale, if any. As matter stands, this Court is in no different position. This could not be acceptable in the circumstance where the judge indicated that Delco ought to have pursued some unidentifiable remedy.

[51] I also accept Delco's submissions that it cannot be deemed unreasonable to not pursue the remedy of an unfair prejudice application; even the judge seemed to have reservation about an unfair prejudice claim and stated that it is impractical to adopt expensive shareholder proceedings in relation to a company which has no continuing purpose. I am not of the view that an unfair prejudice application would be an appropriate course to adopt in a loss of substratum case. In fact, the learned trial judge was correct in observing that situations such as fraud, misconduct or oppression in management and the quasi-partnership type case lend themselves more naturally than others to remedies such as an unfair prejudice petition. In my view, the learned trial judge ought to have accepted that since Green Elite is a company with no continuing purpose and having sold its substantial assets, the CT shares, winding up would not be an unreasonable remedy for Delco to seek.

[52] It is very clear to me that having concluded that there was a loss of substratum the factual circumstances of the case at bar required the judge to address the remedy that was just and equitable and not simply leaving it to others to determine what, if any, other remedies were available to Delco as a consequence of Green Elite's loss of substratum.

[53] I am fortified in the above view by the fact that it is difficult to ascertain precisely what the learned trial judge had in his contemplation when he referred to alternative potential remedies, as the learned trial judge seemed to discount the alternative remedies discussed above in favour of an alternative remedy which he did not identify. The learned trial judge further did not identify how in his view Delco acted unreasonably. There is no doubt that any other remedy would be hampered by the time constraints, considerable expense and most significantly, an uncertain outcome. This does not undermine the conclusion to which I have arrived, that given the totality of circumstance the learned judge in the exercise of his equitable discretion should have ordered that Green Elite be wound up. The judge's exercise of discretion is therefore set aside. Evidently, I accept Mr. Hardwick, QC's complaint that the learned trial judge was wrong to find that even if Green Elite's substratum had failed, Delco was acting unreasonably in not pursuing alternative potential remedies.

[54] It now falls to this Court to exercise its discretion afresh. In the exercise of this Court's discretion, for reasons I have articulated above I would order that Green Elite be wound up. And I so do.

[55] The above conclusion effectively disposes of the appeal. However, for completeness, I now turn to the trust issues in the appeal which were raised by Green Elite on the cross-appeal. The two issues are interrelated and would be dealt with together:

(a) Whether the learned judge erred in making a final determination.

(b) Whether the learned trial judge erred in holding that there was no trust.

[56] Learned Queen's Counsel Mr. Jones and learned Queen's Counsel Mr. Millett contend that the learned trial judge erred in concluding that there was no trust in circumstances where the beneficiaries were not joined in the application and in finding that it was for Green Elite to join the beneficiaries. Further, that the learned trial judge was wrong to find that Green Elite's evidence on the trust point was inadequate.

[57] On the other hand, Mr. Hardwick, QC submitted that based on the fact that there was a trial it was open to the learned trial judge to find that the totality of the documentation weighs heavily against the existence of a trust and conclude that there was no such trust. He submitted that the evidence of Green Elite and HWH is plainly insufficient to establish the existence of the alleged Green Elite Trust. The high point of that evidence is an informal letter of commitment produced in respect of one alleged beneficiary. Further, Mr. Hardwick, QC said that all the other contemporaneous documents including formal published documents are inconsistent with the existence of the alleged trust.

[58] Both Mr. Jones, QC and Mr. Millet, QC, on behalf of Green Elite and HWH respectively, complain that the judge was wrong to make a final determination that Green Elite was not a trust company, during a summary procedure.

Discussion

[59] Let me say straight away that I accept without reservation the argument advanced by Mr. Hardwick, QC that it was not a summary hearing. Indeed, the learned judge was involved in a trial on the merits and the corollary of this is that he was entitled and bound to make findings based on the evidence/documentation that was before him. Also, the trust matter, having been raised by HWH, the judge quite properly

resolved it. Having reviewed the evidence and the submissions in relation thereto, it was clearly open to the judge to determine whether or not a trust existed.

[60] HWH's case and by extension the nub of Green Elite's case in the court below was that the substratum of Green Elite had not gone since it was a trust company. It therefore behooved the judge to determine the veracity of that postulation in his resolution of the issue of whether the substratum persisted. It is unfair therefore to criticise the judge for determining the trust point, which was raised by Green Elite and HWH. In fact, at the trial both Green Elite and HWH put forward the argument that Green Elite was a trust company. Much of the debate during the trial centered around the issue of whether or not this was so. Evidence was adduced by the opposing parties in an effort to support their respective positions. The learned judge in a careful and closely reasoned judgment held that Green Elite was not a trust company; rather it was a company that was established for the main purpose of holding shares. This was a clear finding by the learned judge and in my view that conclusion is quite unsurprising based on a review of the evidence. The learned judge clearly rejected the evidence of the deponents Mr. Stuart Alexander Jessup and Mr. Edwin Conrado Gomez who deposed that the company's purpose upon its incorporation was to hold shares in CT on trust for certain members of the senior management. The judge reviewed the evidence and documentation and a close reading of the judgment indicates that the judge held that Green Elite held shares beneficially.

[61] The learned judge quite rightly did not accept the proposal from learned Queen's Counsel Mr. Millett and Mr. Jones to merely assume that there was a bona fide dispute without resolving whether Green Elite was a trust company. It was impossible for him to take that narrow approach if he had hoped to resolve the issue of whether or not Green Elite was a holding company that was established to hold the CT shares and whether its substratum no longer existed.

[62] It is interesting that Green Elite and HWH having taken the position before the judge that Green Elite was a trust company sought on the other hand to say that the judge should not determine the issue of whether it was a trust company even though the issue of whether the substratum had failed was interlinked to the issue of whether or not it was a trust company.

[63] Of great significance is the fact that the judge in his judgment said that Green Elite had the opportunity to join the beneficiaries to the claim and fail to do so. As a consequence, the judge correctly stated that it must be a matter for them if their trust point fails. The learned judge also correctly found as a fact that Green Elite was not a trust company. The law is very settled as to the circumstances in which the appellate court can interfere with the findings of a court below and needs no repetition. I see no reason nor basis for this Court to interfere with the judge's findings.

[64] I fail to see how the judge can now be criticised for having concluded, after his comprehensive review of the evidence, that the documentation weighed heavily against the existence of a trust and therefore there was no trust. I do not accept that the judge erred in his determination of the trust points that were raised by Green Elite and HWH.

[65] It is not open to Green Elite or HWH to now complain that the learned judge ought not to have finally determined the trust point since the shareholders were not parties to the claim. In any event, there is nothing to that point since it is Green Elite and HWH who had raised the trust point , and as I have said therefore cannot now properly complain. In addition, there is very little to that complaint for the additional reason of the relationships between the shareholders, HWH and the Delco directors who are its moving force. The beneficiaries were the same individuals who were the directors of Green Elite.

[66] In any event and in my view, the judge was correct in his findings and there is no basis upon which this Court can properly interfere with the judge's findings. There is the additional complaint that the judge failed to take into account relevant material and attached too much weight to other documentation in concluding that there was no trust. I have reviewed the evidence and the judgment and there is no basis for concluding that the judge failed to take any relevant dates or the events leading up to the alleged trust into account. I have no doubt that there is no merit on this ground of appeal. That addresses the trust point.

[67] Accordingly, the cross appeal fails on both issues.

Costs

[68] Delco having prevailed on its appeal and resisted the counter notice of appeal is entitled to have its costs on both. The costs order that was made by the court below is set aside and Delco shall also have its costs in the court below.

Conclusion

[69] For the above reasons, I would:

(a) allow Delco's appeal against the decision of the learned judge and/ order that Green Elite be wound up pursuant to provisions of the **Insolvency Act, 2003**;

(b) set aside the costs order that was made by the judge against Delco and in favour of Green Elite;

(c) dismiss Green Elite's counter notice of appeal against the decision of the learned judge;

(d) Delco Participation is to have its costs on the appeal and the cross appeal together with its costs in the court below against Green Elite, such costs are to be assessed, if not agreed within 21 days of this order.

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

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar