**THE EASTERN CARIBBEAN SUPREME COURT**
**BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE**
**(COMMERCIAL DIVISION)**

**Claim No: BVIHC (COM) 231 OF 2018**

**IN THE MATTER OF KOSHIGI LTD (IN LIQUIDATION)**

**BETWEEN:**

**PAUL PRETLOVE**
**(in his capacity as sole liquidator)**

Applicant

**and**

[1] **KOSHIGI LTD**
[2] **DMITRY KOSTYGIN**

Respondents

**CONYERS, DILL & PEARMAN**

Respondent to the costs application

**Appearances:**

Mr. Michael Fay QC and Mr. Shane Quinn of Agon Litigation for Mr. Pretlove, the BVI liquidator of Koshigi Ltd
Ms. Tameka Davis and Ms. Jane Fedotova of Conyers, Dill & Pearman for Conyers, Dill & Pearman

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2019: November 27 and 29;
December 5.

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**JUDGMENT ON THE COSTS CLAIM AGAINST CONYERS, DILL & PEARMAN**

[1] **JACK, J [Ag.]**: This matter came before me on 27th November 2019, when I was hearing an application issued on Mr. Pretlove's behalf, in his capacity as liquidator of Koshigi Ltd ("Koshigi"), a BVI company. At the same time my attention was drawn to an application issued by Conyers, Dill & Pearman ("Conyers") on 19th November 2019.

[2] This latter application was issued on behalf of Mr. Dmitry Kostygin, the second respondent, and, also purportedly on behalf of Koshigi itself. Conyers did not have Mr. Pretlove's authority to act on behalf of Koshigi. I dismissed the application of 19th November 2019 on substantive grounds. At the conclusion of that hearing, however, Mr. Fay QC appearing for the liquidator, sought the costs of the 19th November application against Conyers personally, on the ground that they acted without the authority of a client for whom they purported to act, namely Koshigi. That application took Ms. Davis of Conyers by surprise, so I adjourned consideration of the costs application against Conyers personally to Friday 29th November.

[3] On 29th November, I had the benefit of skeleton arguments from both Mr. Fay and Ms. Davis. After hearing oral arguments, I indicated to the parties that I found that Conyers had acted in breach of an implied warrantee of authority, but that no costs had been caused by that breach. I therefore held that Conyers were liable to Mr. Pretlove for nominal costs (or damages), which I assessed at $100. I indicated that I would give written reasons for my decision. These are those reasons.

[4] I then heard argument on the costs of the costs application. I considered that Conyers should pay the costs of Mr. Pretlove's application against them. Although often the Court will not award costs in favour of a party who has recovered only nominal damages, this is by no means a universal rule. Bringing proceedings in the name of a client for whom a firm of legal practitioners has no authority to act is extremely serious. A costs award was in my judgment necessary to show the Court's disapproval of what occurred. I summarily assessed the costs of the

application in the sum of $3,500. The total payable by Conyers to Mr. Pretlove was therefore $3,600.

[5] The background to this matter is set out in my written judgment on 29th November 2019. The judgment was given in respect of the current case of Koshigi, and a related case **Re Svoboda Corp; Pretlove v Svoboda Corp**[1]. So far as material to the current application, the relevant facts are that on 1st May 2019 Adderley J appointed Mr. Pretlove as the liquidator of Koshigi. On 3rd May 2019, he made a further order which permitted Mr. Kostygin, as the sole shareholder and director of Koshigi, to prosecute an appeal in Koshigi's name against the order of 1st May 2019. That order did not permit Mr. Kostygin to act in the company's name for any other purpose. Accordingly, Conyers did not have authority to act on Koshigi's behalf in making the 19th November application.

[6] The law in relation to legal practitioners who act without authority is set out in **Yonge v Toynbee**.[2] It is a harsh decision. In August 1908, Toynbee retained Wontner & Sons as his solicitor to act in the defence of an action which was expected to be brought against him. Unbeknownst to them, Toynbee subsequently suffered a nervous breakdown and was certified as a lunatic. They nonetheless proceeded to defend the proceedings brought against Toynbee.

[7] Buckley LJ held that a solicitor's personal liability for costs arises:

> "(a) if he has been fraudulent, (b) if he has without fraud untruly represented that he had authority when he had not, and (c) also where he innocently misrepresents that he authority where the fact is either (1) that he never had authority or (2) that his original authority has ceased by reason of facts of which he has not knowledge or means of knowledge. Such last-mentioned liability arises from the fact that by professing to act as agent he impliedly contracts that he has authority, and it is immaterial whether he knew of the defect of his authority or not."

[1] BVIHC (COM) 230 OF 2019
[2] [1910] 1 KB 215

[8] Ms. Davis sought to distinguish the facts there from the current case on the basis that Mr. Pretlove and his advisors knew full well that Mr. Kostygin had no authority to act for Koshigi. Therefore, she argues, there can have been no detrimental reliance on any implied representation that Conyers were entitled to act for Koshigi.

[9] I do not find that an attractive argument. Whatever the other side's knowledge of the want of authority of the solicitor, that other side cannot simply ignore procedural steps taken by a legal practitioner who acts without authority. On the contrary, they will do what the liquidator has done here, namely draw the legal practitioner's and the Court's attention to the want of authority. Costs will inevitably be incurred in doing so. Buckley LJ speaks of an implied contract. It is this implied contract which gives rise to liability for breach of warrantee of authority. An actionable misrepresentation is not required. As the English Court of Appeal said in **S E B Trygg Liv AB v Manches**[3]: "As with any warranty, liability is strict."

[10] It may be that there are cases where there may be genuine doubts as to whether a client has (or can) give instructions to a legal practitioner[4], so that the Court can exercise some discretion. Even if that is right, however, (and I make no determination to that effect), this is not the case here. The order of 3rd May 2019 is perfectly clear. Conyers should have known that they had no authority to act for Koshigi in making the 19th November application.

[11] Accordingly, liability on the part of Conyers is in my judgment made out.

[12] This leaves the question of quantum. It is common ground that Conyers' liability is limited to the costs thrown away by their acting without authority. In other words there must be causation.

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[3] [2005] EWCA Civ 1237, [2006] 1 WLR 2276 at para [60]

[4] See the analogous issues which arose in Carl Zeiss Stiftung v Herbert Smith & Co (No 1) [1969] 1 Ch 93 and Carl Zeiss Stiftung v Herbert Smith & Co (No 2) [1969] 2 Ch 276; cf Bronze Monkey LLC v Simmons & Simmons LLP [2017] EWHC 3097 (Comm), [2018] PNLR 14

[13] Ms. Davis submits that, in the current case, Mr. Kostygin would have brought the application of 19th November anyway. No further costs have been incurred by the liquidator in opposing the 19th November application than he would have incurred anyway.

[14] Mr. Fay QC argues that the 19th November application was brought jointly by Mr. Kostygin and the company, so that it is impossible to distinguish between costs attributable to the one applicant and to the other. Conyers should therefore be liable to the whole of the costs. He relied on **Re Microsulis Ltd; Warner et al v Masefield et al**[5]. In that case, the solicitors, Merriman White, had acted for a Mr. Warner and purportedly for a trustee company, SMP Trustees Ltd, in an unfair prejudice petition. Warner was a beneficiary under the trust and purportedly instructed Merriman White on behalf of the trustee. Only the trustee had the cause of action, but the trust company never instructed Merriman White to act on its behalf. The Court ordered Merriman White to pay all the costs, not merely a proportion.

[15] In my judgment, issues of causation always turn on the facts. In that case, Warner had no cause of action. If he had issued proceedings in his sole name, they would have been speedily struck out. It was the adding of the trustee as a party which incurred the costs. In the current case, Mr. Kostygin was entitled to bring the 19th November application in his own name. It failed on substantive grounds, not on his wrongly being a party to it. The same costs would have been incurred by the liquidator if Conyers had refused to act for the company in making the application.

[16] Accordingly in my judgment the liquidator has suffered no loss by Conyers' falsely acting for the company. Since breach of warrantee of authority is a breach of contract, damage is not necessary to give rise to the cause of action. The liquidator is therefore entitled to nominal damages, but only nominal damages.

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[5] [2008] EWHC 1129 (Ch)

[17] As to the amount to be fixed for nominal damages, there is some confusion in the case law. Some of the cases fail to distinguish between contemptuous damages (traditionally a farthing, or whatever the smallest coin in the jurisdiction might be, but sometime one pound) on the one hand and nominal damages on the other. Historically nominal damages were forty shillings or two pounds sterling, in mediaeval times the minimum amount which a plaintiff had to claim in order to take his claim outside the jurisdictional limits of most local courts in England and into the courts at Westminster. Before the First World War this was a significant sum. Many working men supported a family on twenty shillings a week, albeit in conditions of poverty.[6] In **Douglas v Hallo! Ltd (No 8)**[7] in 2003 Lindsay J awarded £50 as nominal damages. Converted into dollars and adjusting for inflation and local conditions, this gives about $100, which is the sum I fixed as the nominal figure for the costs which Conyers shall pay.

**Adrian Jack (Ag.)**
Commercial Court

**By the Court**

**Registrar**

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[6] Maud Pember Reeves, Around about a Pound a Week (Fabian Society Women's Group, 1913)

[7] [2003] EWHC 2629 (Ch), [2004] EMLR 2. In R (Checkprice (UK) Ltd) v HM Commissioners of Customs and Excise [2010] EWHC 682 (Admin), [2010] STC 1153, the Court awarded £500, which it said was nominal damages. It is doubtful if it was (it represented the chance of a Magistrates' Court deciding that goods had had duty paid: see paras [56] and [57]). However, assuming that the sum was genuinely nominal damages, it could be justified on the following basis (albeit not one discussed by the Court). The gold sovereign was pre-1914 worth (by definition) one pound. A sovereign is currently worth about £274.50 (https://www.bullionbypost.co.uk/gold-coins/full-sovereign-gold-coin/ accessed 2nd December 2019). Two sovereigns are thus worth £549. The difficulty is that, since the abandonment of last vestiges of the gold standard by the United States in 1971, gold has become an extremely volatile commodity. Although gold can be a useful measure to estimate real prices over centuries and millennia, it is not generally thought to be appropriate over shorter periods. In my judgment Checkprice cannot be relied upon to assess nominal damages.