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OFFSHORE CASES

NOVEMBER 2012

BRITISH VIRGIN ISLANDS

HIGH COURT (COMMERCIAL DIVISION)

Ciban Management Corporation -v- Citco (BVI) Limited and Tortola Corporation Company Limited Claim No. BVIHCV 2007 of 301

INTERNATIONAL BUSINESS COMPANIES ORDINANCE - NATURE AND EXTENT OF DUTIES OWED BY PROFESSIONAL DIRECTOR APPOINTED BY FIDUCIARY SERVICE PROVIDER - SECTION 54(1) AND 80 OF THE INTERNATIONAL BUSINESS COMPANIES ORDINANCE

This case is noteworthy for the Commercial Judge's treatment of the nature of duties owed to a Company by a professional director, Tortola Corporation Company Limited ("TCCL"). TCCL was appointed by Citco (BVI) Limited, a fiduciary service provider ("Citco") as director of Spectacular Holdings Inc ("Spectacular") (which merged with the Claimant). Spectacular was bought off the shelf from Citco by the sole beneficial owner. The sole beneficial owner wanted TCCL not to act otherwise than on his instructions. The Court felt that implicit in the relationship between the sole beneficial owner, TCCL was not required to and, indeed was not expected to, exercise any independent executive functions or discretion. TCCL was intended and engaged to be nothing more than the instrument through which the sole beneficial owner's will could be given legal effect and that this division of responsibility between the sole beneficial owner of a company and its board was a: "*perfectly lawful arrangement*".

The Court said that while there was no doubt that as director of Spectacular, TCCL was subject to BVI legislation and was bound to comply with it and to act honestly and in good faith, it was unrealistic to attribute to TCCL the sort of duties which affect directors charged with responsibility for the overall management of the affairs of a company. In those circumstances, members expect the board to bring to the table their own skill and to manage its affairs by applying those skills independently of the intervention and participation on the part of the members. The Court viewed that in the circumstances, TCCL's duties as a director was limited to ensuring that Spectacular's acts were valid and lawful. The Court said that this conclusion was not contrary to general principles of company law. The Court was of the view that if relaxation of the duties which would otherwise be owed by directors to companies by ultimate beneficial owners was not permissible, the provision by fiduciary service providers of companies and directors would have to stop. Otherwise professional directors would be, amongst other things, under an obligation to compel beneficial owners to provide them with details about every transaction which they are required to execute and to engage professionals to ensure that the transaction was commercially in the best interest of the company. The Judge expressed the view that to attribute duties to directors in the position of TCCL, such as a duty of inquiry (for example, querying the proposed sale of the property to the sole beneficial owner) was fanciful.

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