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# Disputes

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# GUARDING TRUST ASSETS AND CORPORATE CONTROL IN TRUST DISPUTES



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**Given trustees' personal liability to the extent of their wealth for liabilities associated with trust property, trustees have long mitigated their risk through the use of special purpose corporate vehicles. It is commonplace in these circumstances for directors of the trust corporation (trustee) to be directors of underlying companies and for the trust corporation to have a majority interest in the underlying companies. In these circumstances questions of control and accountability should be straightforward to manage.**

However, what happens when the directors of the trust corporation and the underlying companies diverge or when the trust corporation's ability to remove problematic directors in the underlying companies is absent?

In *Spanish Steps Holdings Inc v Point Investments Ltd* [2021] SC (Bda) 90 Comm, the Petitioner (Spanish Steps Ltd) was a company which was wholly owned by the trustee of A. Eugene Brockman Charitable Trust ("the Trust"). The Petitioner, as shareholder, sought to wind up the Respondent on just and equitable grounds to have

joint provisional liquidators ("JPLs") appointed.

The Respondent (Point Investments Ltd) was a corporate investment vehicle for the petitioner and ultimately the Trust, which held assets in Cayman Islands funds worth in the region of \$1.8 billion.

Somewhat unusually, although the Petitioner held the totality of the economic interest in the Respondent and 4.9 common million shares, it held none of the voting power. All of the voting power was held by the single "manager share".



The original trustee of the Trust was St. Johns Trust Company Limited ("SJTC"), one of the directors of which was, until 2018, a Mr Evatt Tamine. The current trustee of the Trust, BCT Limited ("BCT"), and the Petitioner are separately pursuing Mr Tamine

and his associated company, Tangarra Consultants Limited, for the return of US\$28 million, alleged to have been wrongfully removed by Mr Tamine from the Trust when he had control of SJTC. Mr Tamine was also, until 2018, a director of the Respondent.

Mr Tamine used his position as director of SJTC and the Respondent to cause James Watlington and Glenn Ferguson to be appointed as directors of both SJTC and the Respondent. In addition, the holder of the manager share in the Respondent was a Nevis company, Point Investments LLC the shares in which were understood to be controlled by Mr Tamine.

Accordingly the position was that the directors of the Trust's investment vehicle were individuals who owed their position to Mr Tamine and the controlling shareholding interest in the Trust's investment vehicle (by means of ultimate ownership of the manager share) was held by Mr Tamine.

The Petitioner claimed that BCT had asked Mr Tamine to transfer his nominee share in the Respondent to a BCT nominee and he had refused. The Petitioner claimed the Respondent's directors operated under an incurable conflict of interest. It claimed that it had been prevented from withdrawing its investments in the Respondent, that it and BCT had been unable to access billions of dollars of Trust assets, that the Trust had had to reduce its charitable commitments and that the Respondent had failed to meet capital calls on one of its funds.

In the circumstances the Petitioner argued that it was just and equitable the Respondent be wound up and JPLs appointed. As the sole purpose of the Respondent was to act as an investment vehicle for the Petitioner (which was owned by the Trust), and as the Trust and Petitioner wished to terminate the Respondent's role as an investment vehicle for the Trust, it was said that the directors had been acting in breach of their duties and without proper justification.

The Court accepted the Petitioner's submission that in order to hold a trustee accountable as a trustee the Court had to ensure that the trustee was able to gather, control and manage the trust property and considered that it would be *an abdication of this Court's inherent jurisdiction to supervise the administration of trusts to allow a situation to arise and/or continue where the entire corpus of the trust is managed by whom the trustee considers by sworn evidence before the Court not to be fit and proper individuals to be in the position.*

The Respondent sought to oppose the petition on grounds that the US Department of Justice did not wish the liquidation to proceed. The Court indicated its concern that the Respondent had failed to remain neutral (per *Westport Trust v Paragon Trust* [2010] Bda LR 35) and that the directors of the Respondent appears to be unaware of their duties towards the DoJ (per *Government of India v Taylor* [1955] AC 491).

Applying the legal principles with respect to the appointment of JPLs following the presentation of a winding up petition as summarised in *Raswant v Centaur Ventures* [2019] SC (Bda) 55 Com (a contributory's petition)<sup>1</sup> the Chief Justice accepted that the directors should be replaced by JPLs. The Chief Justice also accepted that the relationship between the Respondent and its sole economic shareholder was, in all the circumstances, dysfunctional.

**Absent special circumstances, a shareholder cannot bring a derivative action against directors of a company who cause the company loss<sup>2</sup>.**

However it will usually be open to shareholders to attempt to remove problematic directors by exercise of their voting rights not least when it is felt that trust assets may be under threat. In Spanish Steps this was not possible in light of the absence of voting rights held by the Petitioner. The solution in those circumstances is likely to be the appointment of JPLs on a just and equitable winding up petition where, as the Court here made clear, the relationship between the investment vehicle and its sole economic shareholder was dysfunctional.

*This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.*

<sup>1</sup> Following the guidance given by Sir Robert Megarry in *Re Highfield Commodities Ltd* [1984] 3 All ER 884.

<sup>2</sup> *Prudential Assurance Co v Newman Industries (No.2)* [1982] 1 Ch 204; the leading case is now *Johnson v Gore-Wood* [2002] 2 AC1.

