Professional Director's Duties in BVI Companies

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Professional directorship services are par for the course in the administration of companies incorporated in the British Virgin Islands. As an adjunct to registered office and agent services, fiduciary services providers ("trust companies") frequently offer directorship services. These "directors" are invariably corporate directors permissible under the BVI Business Companies Act (the "Act"). The directors of the corporate directors in turn may be the trust companies or the trust companies' affiliate located in a second offshore jurisdiction.

Rather than opting to use the trust companies' own corporate director the beneficial owner of a BVI company (the "UBO") may instead retain the services of some other professional director. There is considerable flexibility under the Act regarding who may act as a director. Virtually anyone/entity may be appointed a director of a BVI company, so long as they are not under the age of 18, an undischarged bankrupt or disqualified under the Insolvency Act or the memorandum and articles of association of the relevant company. Further, there is no requirement of residency. Professional directors are frequently paid a fee and offer professional directorship services to dozens if not hundreds of other companies. It is a big business.

In the context of either of these arrangements there is typically an agreement between the ultimate beneficial owner and the professional director that the latter may only act on the instructions of the former. The distinct issue arising out of arrangements akin to those described above is to what extent such professionals would owe duties to the company as typically envisaged by the Act.

Under the Act there is a statutory duty imposed on directors of BVI companies to act honestly, in good faith and in what the director believes to be in the best interest of the company. Further the Act requires that directors *must* exercise their powers for a proper purpose and to a standard of care, diligence and skill that a reasonable director would exercise in the circumstances taking into account without limitation the, (a) nature of the company (b) nature of the decision and (c) position of the director and the nature and responsibilities undertaken by him.

A director in the context of the Act includes any person occupying or acting in the position of director by whatever name called. This clearly encompasses *de facto* directors but is also arguably broad enough to include shadow directors. The Insolvency Act offers a somewhat more expansive definition of directors which includes a person in accordance with whose directions or instructions a director or the board of a company may be required or is accustomed to act; and who exercises, or is entitled to exercise, or who controls, or is entitled to control, the exercise of powers which, apart from the memorandum or articles, would fall to be exercised by the board. This more, ostensibly expansive definition of directors means that directors duties are likely to extend to a wider group of persons who purport to act in a position of control *vis-à-vis* the company although the fact of their so doing may be concealed.

The duty to act in the best interest of the company is considered to be the statutory expression of a long held common law rule. It has been strictly applied even in the context of nominee directors appointed to represent the interest of a particular shareholder on the board where it has been held that nominee directors are not absolved from the obligation to exercise independent judgment to act or vote in a manner in the best interest of the company nor can they be absolved from liability from failure to do so by virtue of the fact that their very appointment was at the instance of a particular shareholder.

The difficulty with the application of these duties to professional directors in the BVI however is that often times rightly or wrongly they bring little independent judgment to their directorship because of a separate contractual relationship with the UBO. This was the case in *Ciban Management Corporation v Citco (BVI) Limited* and *Tortola Corporation Company Limited*. There, the UBO of a BVI company brought an action against Tortola Corporation Company Limited (the "corporate director") and Citco (BVI) Limited, the former corporate director and registered agent respectively, for causing the company's sole asset to be sold without having conducted the proper due diligence to determine whether the transaction was commercially in the best interest of the company. It appears that the corporate director was asked by a known associate of the UBO to approve the sale and did so without more. It turns out that the associate in making the request was not, then, acting on the instructions of the UBO and that the sale of the asset was at a significant undervalue.

In examining the nature and the extent of duties owed by the corporate director to the company the Court found that since the UBO made it plain that the director should not act otherwise than on his instructions and at times those instructions came from the said associate, that implicit in the relationship between the UBO and the corporate director was that the director was not expected to exercise any independent executive functions or discretion. The court said that while there was no doubt that as a director the corporate director was subject to the BVI legislation and was bound to comply with it namely to act honestly and in good faith, to attribute to the corporate director 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 the day to day intervention and participation on the part of the members was unrealistic.

This conclusion of apparent unrealism seems to wither way beyond recognition, the functions expected of an ostensible director.

It is arguable that to strictly impose on such persons duties of care comparable to that expected of a non-executive

director of an active going concern would be fictional and unduly harsh. However, it may be countered that there appears to be no reason in principle why professional directors who agree to act as directors of a company with full knowledge of their obligations under the Act, for a fee, are to be held to a different standard. Although in reality the directors in that case were merely the "nominee" of the UBO they were still directors under the Act. The Learned Judge appeared to have been swayed by the fact that this was a one man company and it was that "one man" that sought to sue the very directors he previously advised should not act otherwise on his instructions. No third parties interest was being affected, no harm done. However, it would be an unwelcomed development if the Judge's conclusion in that case were to be read as justification for some lesser standard of care for professional directors or those merely acting as nominees. This would be against the spirit and intent of rules on corporate governance and directors duties irrespective of how strained those rules may seem in the context of companies incorporated in the BVI to act as holding companies. We watch this space further while the inevitable appeal is underway.

The saving grace in all this, is that even if the professional directors are not held accountable to the typical statutory obligations at the very least there is a strong case for saying that those duties should be attributed to UBO's who, while apparently not so, purport to act with a degree of control and in manner inimical to that of a director.

Problems in Paradise – the Changing Nature of Offshore Insolvency

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People often tell me it must be tough acting as a restructuring and insolvency professional in the Caribbean and I usually tell them with a straight face that it is. I won't deny that we do have some tangible benefits in terms of weather and taxation but the day job is more demanding than many industry professionals might imagine. Cayman, being as it is at the cross roads of international finance, is where some very complex work gets done. Our work almost always involves asset recovery and litigation in multiple jurisdictions and it's fascinating to see how many professionals in onshore centres are intimately involved in Cayman work every day.

Cayman's background should by now be very familiar to the insolvency profession. In a nutshell it is the world's headquarters for hedge funds with over 10,000 funds registered here by investment managers who are predominantly sitting in New York and London. Throw in a substantial number of private equity funds and a myriad of international group holding structures, some high value cross-border litigations, asset tracing and exotic derivative based assets and you can see how we keep ourselves busy.

So far keeping busy in my career has never been a problem as there always seems to be plenty of call for palliative care professional services regardless of location. Cayman probably does benefit from the Darwinian nature of alternative investments creating a constant work stream but it isn't immune from the market forces that have rapidly changed the face of insolvency and restructuring in most common law onshore jurisdictions.

Back in the day, in the onshore world, asset laden companies would go under with bankers and creditors caught by surprise, and IPs and attorneys brought in at the last minute charging expensive hourly rates. Then the profession suddenly evolved and matured very quickly. I can vividly remember the shock on the face of my then boss when the bank, instead of pulling the plug and inserting him as administrator, telephoned to inform us matter of fact that they had decided to try a new approach and had sold their debt for 65 pence in pound. I recall the dawn of the 'pre-pack' too. At that moment I realized that standing still was not an option. Fast forwarding several years and relocating to the Caribbean arena, I am reminded of that episode most times a new engagement crosses the threshold.

Offshore liquidators and litigators have, to a large extent, been insulated from the market forces and competition over the years that onshore brethren have had to deal with on a daily basis. A significant reason is the nature of offshore work which is often forensically and litigation based with plaintiffs and defendants arguing over massive sums of money on a routine basis. However, as with IPs in many other jurisdictions, although we have been busy since 2008, we have not been as busy perhaps as we might have imagined.

There are some peculiar reasons for this. Some offshore funds that have collapsed into liquidation have suffered total and catastrophic losses, often with leverage providers in the form of investment banks stepping in and managing the liquidations of the assets themselves, or selling them onto speculative secondary market funds. Other funds have been exposed as shams, with subsequent liquidators searching fruitlessly for litigation funding in order to progress litigation to generate a return for the estate, often ending up providing unexpected liquidation funding through the extension of their own work in progress and ending up as the biggest creditor.

For the most part however, investment funds, when they hit difficulties, stayed in the hands of their investment managers, who acted or continue to act as the de facto liquidator. Many of these have been successfully wound down by their competent managers without any level of contentiousness or investor dissatisfaction.

Many though, particularly those funds that went to market as hedge funds, but invested in illiquid private equity type assets, and who are still gated or suspended, occupy that

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