

JERSEY / JUDGMENT

Itkin v JFSC [2017] JRC 207 (08 December 2017)

[2017] JRC 207

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

judgment

the bailiff: 1. The representor is resident in California, and a former director of Diesel Limited ("Diesel"), incorporated in Jersey on 11 th April, 2005. Its registered office was situated at 43/45 La Motte Street, St Helier, and it was dissolved on 1 st October, 2014, pursuant to Article 205(7) of the Companies (Jersey) Law 1991 ("the Law") as a result of its failure to respond to notices issued by the Registrar of Companies following its failure to file statutory annual returns. 2. The second respondent is a company registered in California. The representor asserts that the second respondent is owned by a Mr Alexander Sabadash, as its sole shareholder, and that the second respondent is the sole shareholder in Diesel. The representor claims that until 3 rd October, 2016, he was President and Director of the second respondent. He was removed from those offices, and is currently engaged in proceedings in California in connection with that removal. 3. The representor asked the Court to declare the dissolution of Diesel void, in accordance with Article 213 of the Law, and direct the first respondent to restore Diesel to the Companies' register. The representor undertakes on behalf of Diesel to settle any outstanding statutory fees that might be due to the first respondent as at the date that Diesel was struck off. The application is resisted not by the first respondent but by the second respondent. It is an unusual stance to take in the sense that as recently as January 2017, the second respondent was urging the first respondent to confirm that it had no objection to the dissolution of Diesel being declared void, as the second respondent was imminently to lodge its own application pursuant to Article 213 of the Law with that object in mind. In Advocate Garrood's letter to the first respondent dated 31 st January, 2017, he also confirmed that the ultimate beneficial owner of the shares in Diesel was Mr Sabadash. We note that the first respondent has not issued a letter of no objection to the reinstatement of Diesel on the grounds, inter alia , that its records do not identify as Mr Sabadash as the beneficial owner. Other than through correspondence, the first respondent has played no part in the current proceedings. The facts 4. We make it plain that on this application we are not able to resolve what the true facts are. We have received an affidavit from the representor, sworn on 4 th May, 2017, and an affidavit from Mr Piotr Szymanski, who asserts that he is a director of the second respondent, sworn on 2 nd August, 2017. Neither deponent has been cross-examined. We have exercised our discretion in relation to this application based upon the affidavit evidence which has been put before us, supported to the extent it is by the documents which have been

exhibited. 5. The first respondent expressed surprise that, having previously applied through Advocate Garrood to reinstate Diesel based on the sworn evidence of the representor, the second respondent, through Advocate Garrood, was now seeking to oppose the application made by the representor. The first respondent also noted that there was no reference in any of the documents before the Royal Court to current arbitration proceedings underway in St Petersburg, Russia. In those proceedings, we are told, it has been represented that as at 1 st March, 2017, Diesel is described as the 100% founder of a Russian company Vsevolzhskaya Promischlennaya Korporatsia ("VPK") which has one hundred and eleven employees. A Declaration of Insolvency appears to have been issued on 24 th March, 2017. 6. The representor seeks to have Diesel reinstated because he asserts that he has a valid claim against that company. If it is right, as the first respondent indicates, that Diesel is the 100% owner of VPK, which has over one hundred employees and appears to make sizeable profits in Russia, there is every reason to treat the representor as having locus standi to make the present application. The objections which the second respondent puts forward are that while it too wants to see Diesel reinstated at some point, it would be wrong to reinstate it now because the representor's claim is a bad one - described as "at best doubtful"

- and that in any event, the Court should not reinstate Diesel in a corporate vacuum - in other words in circumstances where Diesel has no registered office, no directors and there is no corporate governance framework. It was also submitted that the representor does not come to Court in Jersey with clean hands and should therefore not have the benefit of the Court's discretion exercised in his favour. We now examine those various arguments. No credible case theory 7. The representor claims that he was appointed as the President, Director, Chief Executive Officer, Secretary and Chief Financial Officer of the second respondent in May 2003. He was allegedly removed on 3 rd October, 2016, with resolutions reconfirmed at a shareholder meeting on 15 th November, 2016. He disputes the terms of his removal and apparently proceedings are ongoing in the Superior Court of the State of California. 8. The representor also claims to be a former Director of Diesel and exhibits a copy of his Employment Agreement dated 28 th August, 2008. He asserts he is owed £855,000 in unpaid fees due by Diesel and in the light of that debt, he seeks the reinstatement of the company. If it is not reinstated, he is, so he asserts, at risk of not being able to pursue his claim against the underlying assets of Diesel, namely the business of VPK. 9. The second respondent asserts that the alleged employment contract was a sham. It asserts that the contract was signed by the representor when he was the Director of Diesel, and is clearly for his benefit. It is asserted that the representor will never be able to provide a good reason why a controversial decision such as his employment contract should not have been signed by one of the other Directors of the company. It is asserted that there is no Members' Resolution approving the employment contract and, even so, the second respondent would have been the shareholder and the representor was the sole officer of the second respondent anyway. Furthermore, it is said that the second respondent is able to plead a time bar against the claim of the representor under California Law. 10. In our view, it is impossible to assert there is no credible case theory. There may or may not be a good defence which the second

respondent has to the action. We accept the submission of Advocate Preston that it is clear that the representor's claim is disputed, but nonetheless he is a person interested in the reinstatement of the company. The validity of the claim is to be decided later. In our view, even if it is the case that the representor's claim may be the subject of a strike out application or summary judgment application, it would be wrong in principle for him to be deprived even of the ability of bringing the claim in the first instance by our refusing to reinstate Diesel. In drawing this distinction, we certainly do not indicate that the representor's claim is liable to be struck out, or that he is liable to have summary judgment entered against him, because we do not consider we have the facts available to form any opinion on that matter. In particular, we have noted that the proper law of the Employment Contract is said to be that of California, and we have no evidence from a qualified Californian lawyer as to what that law might be. There may well be other facts relevant to the claim which again have not been put before us. In the circumstances we find the argument that there is no credible case theory fails. Prescription 11. It appears from the Employment Contract that a claim by the representor against Diesel would naturally be brought in the courts of California. There is reference to the prescription period under Californian law in the affidavit which has been sworn by Mr Szymanski who exhibits two photocopied documents said to be the Code of Civil Procedure in California which would tend to indicate a prescription period of four years for an action founded upon contract. However, Mr Szymanski is not a lawyer, or at all events he does not say that he is, and we do not think that we should treat his statement as to the law of California as conclusive. If he is right, the proceedings commenced against Diesel if reinstated will quickly be struck out in California for being out of time. It does not seem to us to be a reason not to reinstate the company. It seems clear that the representor is not time barred in Jersey. Clean hands 12. It appears from Mr Szymanski's affidavit that an English company New Albion Property Limited is a subsidiary of a Jersey company Golden Sphinx Limited. It is said that Mr Szymanski was the sole Director of New Albion, and that the representor, purporting to act as a Director of Golden Sphinx notwithstanding that he was later removed, exercised the voting rights of Golden Sphinx so as to terminate the appointment of Mr Szymanski as a Director of New Albion. It is said that the representor by the same document or one executed contemporaneously managed to appoint himself as sole Director of New Albion. Mr Szymanski asserts that he has been advised by English lawyers that the representor's actions were not taken in accordance with English law and that the purported removal is ineffective. Having procured that he be appointed sole Director of New Albion, the representor is also held responsible by Mr Szymanski for approving in that capacity a transfer of the shares in New Albion from Golden Sphinx Limited to himself personally. Thus it is said the representor comes to this Court without clean hands. 13. Mr Szymanski's affidavit was sworn on 2 nd August, 2017. It is unclear when a copy of it was delivered to the representor, who lives in California. We have no evidence directly to gainsay what Mr Szymanski says. In submissions, Advocate Preston advised us that Mr Sabadash is the ultimate beneficial owner of Diesel through the second respondent, which is a different structural holding than that which contains New Albion and Golden Sphinx. He goes on to

submit that it is hard to take this argument seriously. Mr Sabadash, according to the representor, is a fraudster serving time in a Russian prison. That of itself should be sufficient to prevent the Court concluding that it should hold against the representor on clean hands principles. Furthermore it was clear that the representor asserted he was a genuine creditor, and whatever arguments might arise in relation to other conduct, whether justified or not, there was no basis to treat such arguments as relevant to the representor's good faith in relation to the present claim. 14. It was not disputed before us that Mr Sabadash is serving a prison sentence in Russia for fraud but the Court treats this as of relatively little significance. We do however consider the submissions of Advocate Preston in this respect are generally well made and we accept them. Corporate governance 15. Allegations of wrongful corporate governance on both sides have been made. In our view, it is not possible to reach a conclusion on the facts with only this affidavit evidence and a few documents. We have not heard the witnesses. In the circumstances, we are not prepared to rule out the application of the representor on a disputed factual premise. In argument before us, Advocate Garrood submitted that there are governance issues which are of concern which should prevent the Court from reinstating Diesel. 16. Advocate Garrood accepted that where Article 213(1) of the Law provides that a person "appearing to the Court to be interested" may make an application for a company to be reinstated, such an expression includes a person asserted to be a creditor, on the basis that their claim is not merely shadowy. See *In Re Independent Marines Services*

[1996] JLR 294 citing *Hoffman LJ in Stanhope Pension Trust Limited v Registrar of Companies*

(2) [1994] 1 BCLC at 635

- 636. We have dealt with that part of the argument above. 17. Advocate Garrood then goes on to refer to various provisions of the Law and asserts that if the dissolution is declared void, the Court will in effect be requiring the company to commit criminal offences. Declaring the dissolution void should therefore be conditional on further steps if that is to happen at all, and neither the Court nor the representor is in a position to ensure those steps are taken. This argument relies on the propositions that there is no plan for Diesel to be provided with directors, a registered office, a register of members and officers or the filing of annual returns in circumstances where:- (i) Article 41(3) of the Law provides that an offence is committed if a company fails to have a register of members; (ii) Article 44(4) of the Law provides that an offence is committed if a company fails to maintain a register of members at its registered office; (iii) Article 67(9) provides that an offence is committed if a company does not maintain a registered office; and (iv) Article 71(6) provides that an offence is committed if a company does not file its annual returns. 18. Thus it is said that as the Court cannot order someone to be a director or to provide a registered office, and Diesel neither has a director nor a registered office ready to be appointed or provided, it would be wrong to order that Diesel's name go back on the register of companies. 19. It seems to us there is an answer to this contention at a number of levels. The first point to make is that Article 213 of the Law confers a discretion on the Court to lift the dissolution of a company. If the

application were to be made by these shareholders of the company in circumstances where no one was prepared to act as a director, or to provide a registered office, it may well be that in the exercise of its discretion the Court would take that matter into account in determining not to declare the dissolution void and reinstate the company. That is not the position we face here however. Here we have the position where those who are said to own the company would deliberately not appoint directors or provide a registered office in order to ensure that a claimant against the company had his claim defeated because the company was not reinstated. That seems to us to be such an unjust result that we cannot think that Article 213 of the Law was intended to provide any mandatory requirement that the reinstated company have directors and a registered office as a condition of reinstatement. 20. Secondly we accept Advocate Preston's submission that the responsibility for providing a registered office and directors is that of the second respondent, the holding company in respect of Diesel's shares. Such appointments are within the second respondent's power and it ill lies in the mouth of the second respondent to assert that because it is not willing to exercise that power, the company should not be reinstated. Furthermore, as Advocate Preston indicated, he only needs an address for service of documents. Advocate Garrood could agree to accept service and no doubt if there were to be a strike out application following the reinstatement of Diesel and the service proceedings, there does not seem any obvious reason why the litigation could not proceed. In reply, Advocate Garrood submitted that it would always be possible to declare a dissolved company en désastre under Article 4(1)(d) of the Bankruptcy (Désastre) (Jersey) Law 1990 , and that this therefore filled the gap. It seems to us that this argument really amounts to a submission that the Court cannot reinstate a company where a désastre is possible, and that submission we would reject. The désastre order is not concerned with filling gaps in the Companies' legislation. Furthermore, it is undesirable to impose upon the Viscount the obligation to pick up the administration of a company which the beneficial owners are not prepared to see properly administered in accordance with the Law. Accordingly, this submission is rejected. 21. In all these circumstances the Court considers it right to make an order declaring the dissolution of Diesel void on the strength of the undertaking by the representor to pay all outstanding fees and duties due by Diesel in order to achieve that reinstatement. 22. Order accordingly. Authorities Companies (Jersey) Law 1991. In Re Independent Marines Services

[1996] JLR 294 . Stanhope Pension Trust Limited v Registrar of Companies (2) [1994] 1 BCLC. Bankruptcy (Désastre) (Jersey) Law 1990. Page Last Updated: 18 Dec 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/je/cases/UR/2017/>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/itkin-v-jfsc-2017-jrc-207-08-december-2017>

Prepared on 25 October 2026 · Esheria