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#### **IMPORTANT JUDGMENT FROM UK COURT FOR LIQUIDATORS SEEKING ASSISTANCE FROM BVI COMPANY DIRECTORS**

In a judgment issued by Mrs. Justice Joanna Smith DBE in the High Court of Justice Business and Property Court of England and Wales , Insolvency and Companies List in the matter of the Joint Liquidators of MBI International & Partners Inc (in liquidation) (the “Company”) (the “Liquidators”) v. Sheikh Mohamed Bin Issa Al Jaber (the “Sheikh”) and others, the Court provided helpful direction on the duties of directors of British Virgin Islands entities subsequent to the appointment of liquidators. The judgment is important for liquidators seeking assistance from the company’s directors.

As background to the litigation, the current Liquidators’ predecessors were originally appointed in 2012. In May 2016 the Liquidators learned that legal title to shares in a related company incorporated in BVI were transferred from the Company to another related entity in Guernsey. These shares were subsequently transferred to another entity under the Sheikh’s control. Since that time the Guernsey entity entered liquidation .

The duties owed by the directors of BVI company pre-liquidation are set out in sections 120 to 125 of the BVI Business Companies Act, 2004. Relevant provisions are as follows:

“120. (1) Subject to this section, a director of a company, in exercising his powers or performing his duties, shall act honestly and in good faith and in what the director believes to be in the best interests of the company.

...

121. A director shall exercise his powers as a director for a proper purpose and shall not act, or agree to the company acting, in a manner that contravenes this Act or the memorandum or articles of the company.

122. A director of a company, when exercising powers or performing duties as a director, shall exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances taking into account, but without limitation,

(a) the nature of the company;

(b) the nature of the decision; and

(c) the position of the director and the nature of the responsibilities undertaken by him.

...

124. (1) A director of a company shall, forthwith after becoming aware of the fact that he is interested in a transaction entered into or to be entered into by the company, disclose the interest to the board of the company”.

The status of a director after a company has gone into liquidation is set out in section 175(1)(b) of the BVI Insolvency Act, 2003:

“175. (1) Subject to subsection (2), with effect from the commencement of the liquidation of a company

(b) the directors and other officers of the company remain in office, but they cease to have any powers, functions or duties other than those required or permitted under this Part;

What Section 175 (1) (b) meant was the heart of the dispute and on which the Court provided helpful guidance.

From the commencement of a liquidation, a liquidator has “custody and control” of the assets of a company. Whilst the directors and other officers of a company that has entered into liquidation remain in office pursuant to the provisions of section 175 IA 2003, they cease to have any powers, functions or duties other than those “required or permitted” under Part VI of that Act (i.e. the Part concerned with “Liquidation”).

The duties “required or permitted” under Part VI appear to be extremely limited. Duties exist pursuant to the specific provisions of section 77 in the context of an execution process (which is not relevant here) and a person who has been an officer of the company may be required to prepare and submit a statement of affairs and must do so in the prescribed form (see Part VI, section 225 and Part XI, sections 276 and 277). However, Part VI of the Act contains no other express duties.

Notwithstanding the statutory regime identified above, the Liquidators in this case contended that the Sheikh and the Sheikh’s daughter, Ms Al Jaber, continued to owe duties as directors post-Liquidation. That contention was advanced in a number of different ways:

- i) First, relying primarily upon the recent case of *Re Systems Building Services Group Ltd (in Liquidation)* [2020] ALL ER (Comm) 565, the Liquidators said that the Sheikh and Ms Al Jaber continued to owe the duties they had *qua* directors pre-liquidation in the period post-liquidation. Put shortly, in *Re Systems Building Services*, ICC Judge Barber held that, in circumstances where a company had entered administration and the effect of the (English) Insolvency Act 1986 was that administration did not of itself operate to remove directors from office, the general duties of directors under sections 170-177 of the 2006 Act continued to survive.
- ii) Second, further or alternatively, the Liquidators said that the Sheikh and Ms Al Jaber each owed a fiduciary duty to the Company, alternatively each was a constructive trustee liable to account to the Company, as if they owed such a fiduciary duty, after the commencement of the Liquidation:
  - a) in respect of any property of the Company that remained in either of their hands or under their control, or in the hands or under the control of a corporate entity over

which either of them was able to exercise control, or in respect of which they had otherwise taken stewardship either directly or indirectly; and/or

- b) in respect of any property of the Company in respect of which either of them set up or purported to set up a beneficial title of their own or a beneficial title adverse to the rights of the Company.
- iii) Third, the Liquidators contended that at all times following the Liquidation the Sheikh owed duties as a director of the Company to account to the Company acting by its Liquidators for (i) his stewardship of the Company and its assets prior to the commencement of the Liquidation and (ii) his stewardship of any assets that remained in his hands or otherwise under his custody or control).

The Court did not find that the duties of directors of a BVI company extend to items (i) and (iii). However, in respect of (ii), the Court was persuaded that the obligations of fiduciary stewardship owed by directors are capable of continuing post-liquidation in respect of company property (albeit in a much-reduced form and applicable only in circumstances where there is unauthorised dealing with company assets), whether they are described purely as fiduciary obligations or as giving rise to liability as a constructive trustee.

This judgment is important for BVI liquidators, who come “as stranger[s] to the affairs of the company which has sunk to its financial doom” (see *In Re Rolls Razor Ltd (No. 2)* [1970] Ch 576 per Megarry J at 591G-H). In the case of BVI liquidations, where there is frequently limited or no relevant information in the jurisdiction, liquidators often find that the directors are the primary persons to seek information and assistance. The finding that a director of a BVI company has very limited duties after a liquidator is appointed means that liquidators may find it difficult to obtain the information that they require on the affairs of the company they are investigating, particularly if there is fraud or allegations of misconduct by the directors. The need to bring a claim for post liquidation conduct is rare and there are statutory provisions in the BVI requiring a director to furnish a liquidator with limited information. But as this case has demonstrated <https://www.judiciary.uk/wp-content/uploads/2022/07/Al-Jaber-v-Mitchell-Judgment.pdf>, the director is immune from civil action (at least in a court supervised liquidation) for any incorrect answers he/she gives to questions in an examination..

Liquidators of BVI companies will want to explore all the tools in their toolbox of powers and authority in order to get access to relevant information on the affairs of the company over which they are appointed to investigate and to collect the assets for the benefit of creditors.