BERMUDA

SUPREME COURT

IN THE MATTER OF THE COMPANIES ACT 1981, AND IN THE MATTER OF N-REN INTERNATIONAL LTD, AND IN THE MATTER OF ADRIA AKTIENGESCELLSCHAFT (a.k.a. ADRIA AG)

[2018] SC (Bda) 7 Civ (27 December 2017)

WHETHER APPLICANT WAS PERSON ENTITLED TO DISCLAIMED PROPERTY WHICH HAD PASSED *BONA VACANTIA* TO THE CROWN UPON DISSOLUTION OF COMPANY INDEBTED TO APPLICANT – WHETHER APPLICANT HAD TO SHOW A PROPRIETARY INTEREST OR MERELY A FINANCIAL INTEREST IN DISCLAIMED PROPERTY – WHETHER APPLICANT HAD A PROPRIETARY INTEREST IN DISCLAIMED PROPERTY – COMPANIES ACT 1981 SECTIONS 240(4) AND 263

This was an interesting and unusual application. The applicant, Adria AG, is a company incorporated under the laws of Liechtenstein. By an *ex parte* summons, Adria sought an order under Section 240(4) of the *Companies Act 1981*, ("the 1981 Act") read in conjunction with Section 263 of the 1981 Act, for the vesting of certain property in the company ("the Property"). The Property formerly belonged to another company, N-ReN International Ltd ("N-ReN"), which was incorporated under the laws of Bermuda. When N-ReN was dissolved, the Property reverted *bona vacantia* to the Crown. The Court sought to determine whether Adria had a proprietary interest in the disclaimed property, as this was a precondition for the making of a vesting order.

Background

Adria entered into a consultancy agreement in 1978 with N-ReN concerning a contract for fertilizer plants in Sudan, which N-ReN had entered into with a Sudan-incorporated company, Sudan ReN.

The Property consisted of:

- 12 promissory notes issued by Sudan ReN to N-ReN, representing unpaid retention monies payable under the project contract. The promissory notes were guaranteed by the Government of Sudan.
- Certain debts owed by Sudan ReN to N-ReN under the project contract and the right to demand repayment thereof.
- 403,900 shares in Sudan ReN, comprising a 35% ownership interest in the company.

The promissory notes were held in escrow for the payment of N-ReN's debt to Adria for consultancy services.

In 1994 attorneys were appointed to wind down N-Ren's affairs and complete contracts with creditors, chiefly Adria. In 1995, a Share Transfer Contract and a Deed of Transfer were drawn up to transfer the Sudan ReN shares and full ownership of the promissory notes respectively from N-ReN to Adria, to discharge the outstanding debt.

However, the promissory notes became subject to a United States sanctions regime prohibiting transactions with Sudan, which prevented their release to Adria. The sanctions were in place from 1997 until January 2017.

The promissory notes were released to Adria in March 2017 at which point the company began arbitration proceedings in the International Chamber of Commerce against Sudan ReN and the Government of Sudan ("the ICC Respondents") to enforce Adria's rights in relation to the Property.

The problem

Adria was in for a nasty shock. The ICC Respondents pointed out that N-ReN was struck off the Register of Companies and dissolved in 1994. Upon the dissolution of N-ReN, all its property and rights were deemed to be *bona vacantia* (ownerless property) and accordingly passed to the Crown under Section 262 of the 1981 Act.

This meant that the Share Transfer Contract and Deed of Transfer drawn up in 1995 were ineffective to transfer the Property to Adria, because N-ReN, once dissolved, was incapable of dealing with property. Therefore, the ICC Respondents submitted, Adria has no standing to seek relief in relation to the Property. Hence Adria's application to the Bermuda Court seeking the vesting of the Property.

The problem confronted

Under the 1981 Act, a company once dissolved can in certain circumstances be restored to the Register.

- Under Section 260, the Court may make an order declaring the dissolution to have been void, but only up to five years from the date of dissolution.
- Under Section 261 (6), if a creditor feels aggrieved by the company having been struck off the Register, the Court may order the company to be restored, but only if the application is made by the creditor within 20 years of the notice of the striking off being published in an appointed newspaper.

Due to the time limits, Adria was unable to avail itself of either of these Sections. Instead, Adria sought an order pursuant to Section 240 that the property be vested in it as 'disclaimed property'. To succeed in application under this Section, the applicant must be entitled to the interest claimed in the property; there is no time limit.

Considered in isolation, Section 240 appears to apply only to property disclaimed by a liquidator. However it must be read in conjunction with Section 263, which deals with the power of Crown to disclaim title to property vested in it because it is deemed *bona vacantia.* Section 263 gives the Attorney General power to sign a notice of disclaimer with respect to such property, to which Section 240 will then apply.

The Acting Attorney General signed the notice of disclaimer in November 2017, which meant the Court had jurisdiction to make a vesting order in favour of Adria, provided that Adria could establish that it had a proprietary interest in the Property.

Adria's problem was that none of the actions carried out by N-ReN after its dissolution, including the purported transfers of the Property to Adria, had any legal force or effect. Adria's counsel attempted to establish that Adria had an equitable interest in the Property, relying upon various letters as evidence of a contract between Adria and N-ReN; and that the escrow agreement gave Adria an equitable charge over the promissory notes, the rights under the notes and the underlying debt.

Alternatively, Adria's counsel submitted that to do justice on the particular and highly unusual facts of this case, the Court should adopt a 'financial interest' test and grant that Adria had a financial interest in the Property in the sense that it was the only creditor of N-ReN.

The decision

Justice Hellman determined that Adria had not proven a proprietary interest in the Property and he was not prepared to accept that a mere 'financial interest' was sufficient. He explained further: "Had the Legislature intended that the Court should apply an 'interests of justice' test, then Section 240 (4) would have so provided."

Dismissing the application, Hellman J commented: "On reflection, the case is not that hard. The 1981 Act provides a generous period of 20 years after a company has been struck off for a creditor to investigate its status. If the creditor goes to sleep on its rights during that period it cannot reasonably expect the Court to bend the law to come to its aid. I appreciate that from 1997 to 2017 there were United States sanctions in place. But even without the benefit of hindsight, a prudent creditor, knowing that N-ReN was in financial difficulties, would from time to time have made enquiries of the Registrar of Companies to ascertain whether the company was still in existence."

Adria appealed and Conyers was instructed by the ICC Respondents to resist the Appeal.