

UPDATE

Bearer Shares: Development of the BVI Court's power to appoint Receivers

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In the recent decision of *The Bank of Nova Scotia Trust Company (Bahamas) Limited v The Registrar of Companies* the Eastern Caribbean Supreme Court of Appeal confirmed the scope of the BVI Court's jurisdiction to appoint receivers. The Court of Appeal was satisfied that justice demanded the appointment of a receiver to consider exercising a companies' power of redemption over disabled bearer shares, to give effect to the shareholder's constitutional right not to have property taken away without compensation.

Background

Sutton Limited (**Sutton**) and Wembley Limited (**Wembley**) were both International Business Companies duly incorporated in the British Virgin Islands (the **BVI**) under the International Business Companies Act 1984 (the **IBC Act**). Both companies issued only bearer shares. Bearer shares are shares represented by a certificate which states that the bearer of the certificate is the owner of the share. The appellant, the Bank of Nova Scotia Trust Company (Bahamas) Limited, was the bearer of all the bearer shares issued by Wembley and Sutton.

Sutton and Wembley were automatically re-registered as BVI Business Companies pursuant to the BVI Business Companies Act 2004 (the **Act**). The Act brought about a great change for bearer shares in the BVI. The effect of the Act was that the appellant, as the bearer of the certificates for all the bearer shares in both Sutton and Wembley, was required to deposit its bearer share certificates with a custodian to hold the shares, or convert or exchange the bearer shares for registered shares by 31 December 2009 (the **Transition Date**). The legislative change was intended to eliminate the anonymity of the beneficial owner of the bearer shares which was possible under the IBC Act. The appellant failed to deposit its shares with a custodian by the Transition Date and as a result the Sutton and Wembley bearer shares became disabled. This meant that the bearer shares no longer carried any of the entitlements they would otherwise have carried, including the entitlement to vote, to a distribution, or to a share in the assets of the company on winding-up or dissolution. Any transfer of interest in the bearer shares was also deemed to be void and of no effect.

Because Sutton and Wembley continued to hold bearer shares after the Transition Date, the Financial Services Commission (the **Commission**) became entitled to apply to the High Court for the appointment of a liquidator over Sutton and Wembley. Because both companies' bearer shares had been disabled the appellant would not have had any entitlement to a share of the assets of the companies in liquidation and the assets would have gone to the state as *bona vacantia* (vacant or ownerless property). It was possible to redeem the shares at any time prior to the Commission obtaining an order appointing a liquidator, but neither Sutton nor Wembley were able to do so as the last remaining director of both companies had passed away in November 2012. The Articles of Association of both Sutton and Wembley provided that a vacancy in the board of directors could only be filled by a resolution by a majority of the remaining directors (of which there were none) or by resolution of the 'members', namely the appellant, who had

been deprived of its right to vote because its bearer shares were immobilised. It was therefore not possible to constitute a board to exercise the powers of redemption that Sutton or Wembley may have had. The appellant was left with no other option but to apply to the High Court for an order appointing a receiver over Sutton and Wembley, who could exercise the companies' rights of redemption in respect of the bearer shares.

High Court Proceedings

Ellis J, the trial judge in the High Court proceedings, dismissed the claim on the basis that the appointment of a receiver to redeem the bearer shares would undermine the policy of the Act by circumventing the consequences which the legislature had intended to follow where there had been a failure to comply with the statutory directives. Ellis J found that the appellant's delay in applying for a receiver, failure to deposit the shares with a custodian and failure to seek redemption of the shares within the lifetime of the directors, counted against the appellant. The appellant was a professional trustee and the former directors were professional directors who the Court held must be presumed to have known the law or been in a position to seek legal advice. Ellis J's decision was based on her view that the jurisdiction to appoint a receiver was "equitable in origin" and the remedy was one to be granted in her discretion, which she decided against for the reasons above.

Court of Appeal

The Eastern Caribbean Supreme Court of Appeal (the **Court of Appeal**), was tasked with determining two main questions, namely – (i) whether the appointment of a receiver would undermine the policy of the Act; and (ii) whether the Court had the power to appoint a receiver in the circumstances of the case.

Would the appointment of a receiver undermine the policy of the Act?

Ellis J's main concern in the first instance decision was that the order sought by the appellant would facilitate "*contumelious*" behaviour. The provisions of the Act were intended to end the anonymity of bearer shares. The holders of the bearer shares in Sutton and Wembley were able to maintain their anonymity for almost six years longer than the period permitted by the Act.

The Court of Appeal found that Ellis J had failed to appreciate the fact that the Act placed no time limit on the power of redemption. The Court of Appeal held that it was lawful for Sutton and Wembley to issue and hold bearer shares under the IBC Act and the holding of bearer shares was not made unlawful by the Act. The appellant's failure to convert the shares by the Transition Date did not require criminal sanction. The legislative scheme was designed to immobilise the bearer shares with the only option that of redemption and no time limit was placed on redemption. The Act allowed anonymity to continue up until the shares were made the subject of a redemption exercise.

The Court of Appeal found that it would not undermine the policy of the Act if the Court made an order which made it possible for the appellant to redeem its shares and Ellis J erred in her decision to find otherwise. The real question to be determined was therefore whether the Court had the power to assist the appellant in making the order sought.

Did the Court have the power to appoint a receiver?

The Registrar of Companies, the respondent to the appeal proceedings, argued that the appellant was not entitled as of right to have the bearer shares redeemed; the bearer shares were disabled and no longer enjoyed their normal entitlements. All the appellant had was a hope that the companies, through the appointed receiver, would exercise their power of redemption. The Court of Appeal considered that the exercise of the power of redemption was the last and only mechanism by which the appellant could exercise its constitutional right not to be deprived of its property without compensation and therefore Sutton and Wembley, acting through a receiver, would not be obliged to redeem the shares, though there was a strong case to compel the companies *to consider* their power of redemption to redeem the existing shares in the appellant's favour.

The Registrar of Companies also argued that the power to appoint a receiver was restricted to the appointment of a receiver over property but the appellant was seeking an appointment of a receiver to exercise a power of redemption. The appellant argued that the power of redemption was tantamount to property. The Court of Appeal agreed with Counsel for the Registrar of Companies that the exercise of the power of redemption was not tantamount to ownership, but the Court of Appeal determined that the

Court has a broader power to appoint someone to carry its orders into effect. The Court of Appeal had already determined that it was prepared to make an order that Sutton and Wembley were obliged to consider exercising their powers of redemption. It was also necessary to appoint someone empowered to act on behalf of the companies to ensure that the Court of Appeal's order was not futile.

The Court of Appeal emphasised that the appellant had a constitutional right to be paid compensation for the compulsory acquisition of its shares and the power of redemption granted by the Act was the appropriate mechanism for exercising this right.

The Court of Appeal made an order for the appointment of a receiver for the purpose of accepting the bearer shares held by the appellant in Sutton and Wembley and to determine whether the shares should be redeemed under the Act. The Court of Appeal also ordered Sutton and Wembley to consider exercising their powers of redemption of the appellant's shares under the Act.

Conclusion

The question of disabled bearer shares is still an issue which arises from time to time, particularly where bearer shares have been overlooked. It is clear that the Registrar of Corporate Affairs is taking a firm stance about shares which have not already been deposited. The difficulties encountered by the appellants in this case highlight the importance of regularising the situation as soon as possible, but the judgment will give some comfort that the BVI Court will look to exercise its equitable jurisdiction to ensure constitutional rights to property are protected.

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