COMMONWEALTH OF THE BAHAMAS **2021**

IN THE SUPREME COURT **COM/com/00049**

Commercial Division

IN THE MATTER of Baron's Court Holdings Ltd., a Bahamian International Business Companies Act incorporated on the 18th day of May A.D. 2004

AND IN THE MATTER OF the International Business Companies Act, 2000 and the International Business Companies (Amendment) Act, 2010.

BETWEEN

BARON'S COURT HOLDINGS LTD.

First Plaintiff

AND

WELWYN LIMITED

Second Plaintiff

AND

THE REGISTRAR GENERAL

Defendant

Before: The Honourable Sir Brian M. Moree Kt., Chief Justice

Appearances: Mr. Dwight Glinton for the Plaintiffs
Mr. Kingsley Smith for the Defendant

JUDGEMENT

Moree, CJ:

Introduction

1. This case raises the important issue of whether the name of a company incorporated under the International Business Companies Act, 2000 ("***the IBC Act***") which has been struck off the Register of Companies ("***the Register***") can be restored to the Register after the company has been dissolved. It is clear that prior to a dissolution, the name of an International Business Companies Act ("***IBC***") can be restored to the Register under section 166 of the IBC Act (as amended).

2. Counsel for the Plaintiffs submits that, even though the current statutory regime applicable to International Business Companies does not provide for the restoration of dissolved companies, the court can nevertheless make an order under its inherent jurisdiction for the name of a dissolved company to be restored to the Register of Companies.

3. The Defendant's counsel does not oppose the relief sought in this action and he is content to adopt a neutral position in this case on the basis that the Registrar General will comply with any orders made by the court. However, he seeks a fixed costs order against the Plaintiffs in respect of the Defendant's costs in this action.

4. The First Plaintiff, Baron's Court Holdings Ltd. ("***BCH***"), was incorporated under the IBC Act on 18 May, 2004. The Second Plaintiff, Welwyn Limited ("***Welwyn***") was one of its two subscribers and was also the shareholder and director of BCH. The other subscriber was Rosencrantz Limited. Both Welwyn and Rosencrantz Limited are owned by Lennox Paton Corporate Services Limited ("***LPCS***") and act as nominee companies in the incorporation of IBC's for its clients.

5. The Registered Office of BCH was located at the office of LPCS and that company was appointed the Registered Agent of BCH. Welwyn held its share in BCH on trust for the

late Lord Luis Gomez del Campo Bacardi ("***Lord Bacardi***") under a declaration of trust dated 18 May, 2004.

6. In February, 2005 BCH was placed into voluntary liquidation and ultimately dissolved by a Certificate of Dissolution dated 29 March, 2005. The name of the company was removed from the Register by the Defendant.

7. This action was commenced by Originating Summons filed on 10 September, 2021 seeking:

    (i) A Declaration that the dissolution of Baron's Court Holdings Ltd. is void *ab initio;*

    (ii) An Order that the name of Baron's Court Holdings Ltd. be restored to the Register of Companies;

    (iii) An Order that Baron's Court Holdings Ltd. pay all outstanding fees to the Registrar General;

    (iv) An Order that the Registrar General advertise the restoration aforesaid in the Gazette;

    (v) An Order that Baron's Court Holdings Ltd. be deemed to continue in existence as if its name had not been dissolved;

    (vi) Such further or other relief as to the Court deems just.

The Originating Summons is supported by two Affidavits of Michael L. Paton filed on 10 September, 2021 and 7 April, 2022 respectively ("***the Affidavits***").

The Facts

8. Lord Bacardi was a man of substantial means. According to the Affidavits, his assets included the beneficial ownership of shares in Bacardi Limited, a company incorporated in Bermuda ("***Bacardi***"), through two Liechtenstein companies named Arateo Anstalt ("***Arateo***") and Rantex Anstalt ("***Rantex***"). Arateo was the registered owner of 739,927 shares in Bacardi and 664,295 shares of Bacardi were registered in the name of Rantex ("***the Anstalt Shares***"). Lord Bacardi was the beneficial owner of both Arateo and Rantex.

9. The Affidavits show that in July of 2003 a fiduciary company in Liechtenstein by the name of Walpart Trust Reg. ("***Walpart***") set up a trust called the Bastille Trust for the benefit of the Lord Bacardi. The trustees were Lord Bacardi, Dr. Ernst Walch, a shareholder and director of Walpart, and Louis Mudry, Esq. who was at that time Lord Bacardi's attorney in Switzerland. The Bastille Trust was intended to be a succession instrument for the benefit of Lady Monika Gomez del Campo Bacardi ("***Lady Bacardi***"), the wife of Lord Bacardi, and his only daughter, Miss Maria Luisa Monika Gomez del Campo Bacardi ("***Miss Bacardi***").

10. The Anstalt Shares were a part of the assets of the Bastille Trust. In 2004, Lord Bacardi received advice from his Bahamian attorney, Mr. Lennox Paton, which caused him to reconsider the use of the Bastille Trust as a succession instrument for his wife and daughter. He was advised that two of the three trustees (acting without him) could make decisions affecting the Bastille Trust which might be adverse to his intentions. That was unacceptable to Lord Bacardi and he concluded that the Trust did not provide the intended level of security for his wife and daughter. In those circumstances, he wished to revoke the Bastille Trust and transfer the trust assets to a Bahamian company which he intended to incorporate. In that regard, Lord Bacardi caused BCH to be incorporated and he wrote to Ms. Gail Butterworth of Bacardi requesting that (i) the share certificates and the registration of the Anstalt Shares in the names of Arateo Anstalt and Rantex Anstalt be cancelled; (ii) the Anstalt Shares be registered in the name of BCH; and (iii) a new share certificate be issued by Bacardi showing 1,404,222 shares registered in the name of BCH. All of this is recorded in more detail in the Affidavits and the documents attached at Exhibits "MLP2", "MLP6" and "MLP17".

11. The law firm of Conyers Dill & Pearman acted as special counsel to Bacardi in Bermuda. They wrote to Lord Bacardi on 12 November, 2004 to inform him that the other two trustees of the Bastille Trust, Dr. Ernst Walch and Mr. Louis Mudry, had directed Bacardi that it should not accept instructions from him in connection with the Anstalt Shares. Presumably, they were contending that acting together as two of the three trustees of the Bastille Trust, they had control of the trust assets which included the Anstalt Shares. In view of the conflict between the instructions from Lord Bacardi on the one hand and Dr.

Walch and Mr. Mudry on the other hand, the letter from Conyers stated that Bacardi was not prepared to comply with the instructions of Lord Bacardi to transfer the Anstalt Shares to BCH until it confirmed who was authorized to give instructions on behalf of Arateo and Rantex.

12. Aggrieved by the decision of his fellow trustees to block the transfer of the Anstalt Shares to BCH, Lord Bacardi requested Dr. Walch and Mr. Mudry to resign as trustees of the Bastille Trust. They did not do so and on 29 October, 2004 Lord Bacardi commenced legal proceedings in Liechtenstein to remove them as trustees.

13. Earlier, in or around May, 2004, Lord Bacardi had retained Mr. Claude Brechbuhl, a partner in the Swiss law firm of Pestalozzi Lechnal Patry (***"Pestalozzi"***), to represent him. Approximately 8 months later, on 23 January, 2005 Lord Bacardi died in Monaco. At that time, the Anstalt Shares had not been transferred to BCH.

14. I digress to note that Lord Bacardi had a Will at the time of his death which is dated 8 October, 2004. Clause 5 of that Will provides as follows:

> "5. RESIDUARY ESTATE
>
> I GIVE the rest of my property whatsoever and wheresoever including any property over which I may have any power of appointment of disposition ("my Residuary Estate") to my Trustee UPON TRUST after payment of my funeral and testimony expenses and debts on the terms of the trust set out below:"

15. Carey Langlois Sam Esq. and Lady Bacardi were appointed as trustees and executors. The beneficiaries under the Will Trust were Lady Bacardi, Miss Bacardi and any person appointed by the Protector pursuant to Clause 2.1 and not removed pursuant to Clause 2.2.

16. The Dispositive Provisions of the Will Trust reads as follows:

> *After payment of the rightful income of the Trust, the remaining income shall be divided into two equal shares and shall be payable to or for the benefit of the daughter of Mr. GOMEZ DEL CAMPO BACARDI, Maria Luisa Monika and the widow of Mr. GOMEZ DEL CAMPO BACARDI, Mrs. Monika GOMEZ DEL CAMPO BACARDI in accordance with the following provisions:*

(i) *the whole of the share of income for Mrs. Monika GOMEZ DEL CAMPO BACARDI shall be payable to her without delay upon receipt of the income by the Trustees;*

(ii) *the share of income for Maria Luisa Monika shall be put aside in trust for her to pay to her one third of the income of her trust on her attaining the age of 18 years, two thirds of the same on her attaining the age of 25 years, and the whole of the same on her attaining the age of 32 years together on each occasion with the income accumulated on her behalf of the Trust Fund.*

Income payments to each of the persons named in paragraph (i) and (ii) hereof shall cease on the date of the death of that person and for the final year shall be paid pro rata.

(1) On either the date of death of the said Monika or the 40th birthday of Maria Luisa Monika, whichever is the later, the Trust Fund shall be distributed absolutely to the said Maria Luisa Monika and the Trust Period shall come to an end and the Trust shall terminate."

17. The Will is attached to the Affidavit of Mr. Paton filed on 10 September, 2021 at Exhibit "MLP8".

18. Returning to the narrative, the Affidavits show that, following the death of Lord Bacardi there was a misstep relating to the legal representation of the Estate of Lord Bacardi which resulted in the dissolution of BCH. It arose in this way.

19. On 25 February, 2005, shortly after the death of Lord Bacardi, Pascal de Lucia Esq. of Pestalozzi sent an email to LPCS, the Registered Agent of BCH, instructing them to liquidate and dissolve BCH. It will be remembered that under the declaration of trust signed by Welwyn and dated 18 May, 2004, Lord Bacardi was the beneficial owner of BCH and Pestalozzi represented Lord Bacardi personally prior to his death.

20. Here is where the misstep occurred. LPCS, assuming that Pestalozzi (Lord Bacardi's personal lawyers at the time of his death) represented the Estate of Lord Bacardi, carried out the instructions and proceeded with the liquidation of BCH and subsequent dissolution of the company under the Plan of Dissolution approved by the Member's Resolution passed on 28 February, 2005. As stated above, BCH was dissolved on 29 March, 2005. At that time, Miss Bacardi, the daughter of Lord Bacardi, was 4 years old.

21. In fact, it was later discovered that while Pestalozzi represented Lord Bacardi personally prior to his death, they did not represent Lord Bacardi's Estate when they issued the instructions to dissolve BCH. The position is described by Mr. Paton in paragraph 19 of his Affidavit filed on 10 September, 2021 in these terms:

> *"I am informed by Dr. Bruno Capone, Lextray Corporate and Tax.....the attorneys for Miss. Maria Luisa Monika Bacardi in Luxemburg, and verily believe that Pestalozzi Lachenal Patry were not the attorneys for the Estate of Luis Bacardi, who had passed away approximately one month earlier. Further, I am informed and verily believe that Pestalozzi Lachenal Patry did not have the authority to issue instructions for the dissolution of Baron's Court Holdings. Lennox Paton Corporate Service was not aware that Pestalozzi Lachenal Patry were not authorised to issue instructions with regard to Baron's Court Holdings when the request to have the company dissolved was made. Therefore, Lennox Paton Corporate Service had Baron's Court Holdings dissolved in accordance with the instructions from Pestalozzi Lachenal Patry."*

22. Again, in paragraph 6 of Mr. Paton's second Affidavit filed 7 April, 2022 he addresses the matter in this way:

> *"In or around May 2004, Messr. Claude Brechbuhl, a partner in Pestalozzi Lechenal Patry, in Geneva, Switzerland was retained by Luis Bacardi as his new Swiss counsel. Approximately 9 months after the incorporation of the First Plaintiff and a few weeks after Luis Bacardi's death, Pestalozzi Lachenal Patry instructed Lennox Paton Corporate Services to have the First Plaintiff dissolved. Messr. Brechbuhl would have issued the instructions to his colleagues who contacted Lennox Paton Corporate Services to have the First Plaintiff dissolved. Lennox Paton Corporate Services accepted the instructions with the belief Pestalozzi Lechenal Patry represented the estate of Luis Bacardi's in Switzerland at the time. However, I am now instructed that these instructions did not emanate from the executor nor beneficiaries of the estate of Luis Bacardi, who would have had legal control of the affairs of that estate. Pestalozzi Lachenal Party and anyone who may have instructed them in connection with Luis Bacardi's affairs did not have the proper authority to issue instructions for the First Plaintiff to be dissolved. Unaware that Pestalozzi Lachenal Patry did not have proper authority in the matter, Lennox Paton Corporate Services prepared the necessary documentation to dissolve the First Plaintiff as was indicated in paragraphs 19 and 20 of the First Affidavit."*

23. The litigation commenced by Lord Bacardi in Liechtenstein in October, 2004 relating to the Bastille Trust continued after his death. In December, 2008 the Constitutional Court of Liechtenstein removed Dr. Walch and Mr. Mudry as trustees of the Bastille Trust. Subsequently, in 2009, three other persons and Lady Bacardi became trustees of the Bastille Trust. As a result of ongoing disputes between the parties, at the instance of Lady Bacardi and Miss Bacardi, an investigation was carried out in or around 2019 into their inheritance under Lord Bacardi's Will, the circumstances surrounding the creation of the Bastille Trust by Lord Bacardi, the refusal to transfer the Anstalt Shares to BCH and other matters relating to the business affairs of Lord Bacardi. At that time, Miss Bacardi was 18 years old which engaged the provisions of Clause 15 (ii) of the Will of Lord Bacardi. During the investigation it was discovered by Lady Bacardi and Miss Bacardi that BCH had been dissolved and struck off the Register.

24. The investigation led to a plethora of litigation – 7 cases in Liechtenstein and 1 case in Monaco. The cases are listed in paragraph 9 of Mr. Paton's second Affidavit. Two additional court cases in The Bahamas and Bermuda respectively are foreshadowed in the Affidavits. BCH features in a number of those cases and it is expected to have a significant role in the foreshadowed cases in this jurisdiction and Bermuda. In the Affidavits, Mr. Paton expresses the concern that the dissolution of BCH may nullify legal proceedings commenced by it or to be commenced by the company.

25. Therefore, on 21 June, 2021 Lady Bacardi and Miss Bacardi instructed counsel to apply to court to have the dissolution of BCH set aside and its name restored to the Register. In the case of Lady Bacardi, those instructions were given in her capacity as heir of Lord Bacardi, as executor of Lord Bacardi's estate and as trustee and beneficiary of the trust under his Will. For her part, Miss Bacardi issued the instructions as heir of Lord Bacardi and as beneficiary of the trust under his Will.

Submissions

26. Counsel for the plaintiffs, Mr. Glinton, did not rely on a statutory power to support his contention that the court can restore HBC to the Register.

27. Rather, Mr. Glinton, submits that the court has an inherent jurisdiction to enable the name of a dissolved company to be restored to the Register quite apart from any statutory power to do so which might or might not exist. He contends that this is based on judge-made rules and relies on the case of ***Re Lehman Brothers International (Europe) (in administration) and others [2017] UKSC 38, [2018] A.C. 465, [2018] 1 All ER 205.*** In that case the administrators of three Lehman entities issued proceedings seeking the determination of a number of questions arising out of the administration of certain companies. The Supreme Court in the United Kingdom had to determine whether the relevant insolvency legislation and regulations contained provisions for various aspects of the administration of the companies and, if not, whether the court had the power to make a decision with respect to the applications. Lord Neuberger stated:

> ***"[13] Further, despite its lengthy and detailed provisions, the 1986 legislation does not constitute a complete insolvency code. Certain long-established judge-made rules, albeit developed at a time when the insolvency legislation was far less detailed, indeed by modern standards sometimes positively exiguous, nonetheless survive.*** [After giving numerous examples His Lordship continued] ***Provided that a judge-made rule is well-established, consistent with the terms and underlying principles of current legislative provisions, and reasonably necessary to achieve justice, it continues to apply. And, as judge-made rules are ultimately part of the common law, there is no reason in principle why they cannot be developed, or indeed why new rules cannot be formulated. However, particularly in the light of the full and detailed nature of the current insolvency legislation and the need for certainty, any judge should think long and hard before extending or adapting an existing rule, and, even more, before formulating a new rule."***

28. Mr. Glinton submits that declaring the dissolution of BCH to be void and restoring its name to the Register would be consistent with judge-made rules. In this regard, he cited the case of ***Ivanishvili and others v. The Registrar General and others [2017] 2 BHS J. No. 119*** where it was held that the court has an inherent jurisdiction to make an order to restore a company which has been dissolved where the dissolution was caused by fraud.

29. Additionally, counsel contends that the court can, under its inherent jurisdiction, grant the relief sought in the Originating Summons on the ground of mistake. He relies on three cases decided in this jurisdiction to support this position. In the cases of ***Rushmorehills Limited v. the Attorney General of the Commonwealth of the Bahamas, Supreme Court***

Action No 90 of 2011 and ***Kato Holdings Limited v the Attorney General of the Commonwealth of the Bahamas, Supreme Court Action No. 107 of 2011*** the court held that a dissolved company could be restored where a mistake had occurred. The court in both of those cases granted declarations that the resolutions of the shareholders and directors of the companies to voluntarily wind up the companies and all subsequent acts were *void* and ordered that the companies be restored to the Register.

30. In the third case of ***Higham (Bahamas) Limited v Attorney General of the Commonwealth of The Bahamas (2014/COM/com/00002)***, an application was made to restore the name of the company on the ground of a mistake in liquidating the company before all assets were distributed. The court decided that it was just and equitable and/or just and reasonable that the company be restored so as to enable the distribution of assets which ought to have been distributed before the company was dissolved.

31. Applying the dicta of Lord Neuberger in ***Lehman Brothers International,*** it is submitted on behalf of the Plaintiffs that the restoration of BCH would be consistent with the judge-made principle in ***Ivanishvili, Rushmorehills Limited, Kato Holdings Limited*** and ***Higham (Bahamas) Limited*** and also with the legislative principles of the IBC Act and the IBC Amendment Act which allow the restoration of IBC's which have been removed from the Register. In referring to the IBC Amendment Act, Mr. Glinton invites the court to "....*rectify the apparent gap in the amended legislation by permitting the restoration of* [BCH].

32. Unfortunately, I do not have the benefit of a written Ruling or Judgment in any of the three Bahamian cases setting out the reasons for the decision. It seems that either there is no written Judgment in those cases or if there is, it could not be found by counsel. Nevertheless all of these cases were cited in ***Ivanishvili*** with a brief description of the facts and a statement of the outcome.

33. Mr. Glinton submitted that ***Ivanishvili, Rushmorehills Limited, Kato Holdings Limited*** and ***Higham (Bahamas) Limited*** (all decided after the enactment of the IBC Amendment Act) clearly establish that, notwithstanding that there is no statutory power to restore the

name of a dissolved company to the Register, the court has the inherent jurisdiction to do so in cases involving fraud or mistake. He referred to the fact in this case that BCH was dissolved on the instructions from the law firm of Pestalozzi on the belief that they had authority to act on behalf of the Estate of Lord Bacardi. According to the Affidavits, they had no such authority – see paragraphs 21 and 22 above. Therefore, Mr. Glinton contends that the voluntary winding up and dissolution of BCH were based on a mistake and should be declared void and the name of the company should be restored to the Register. He submits that this is just and reasonable given the litigation surrounding the Estate of Lord Bacardi and the shares of Bacardi. In his submissions he put it this way:

> *"45. The proceedings that have been recently commenced by Miss. Maria Luisa Monika Bacardi in connection with the estate of Luis Bacardi is claim in which she seeks possession of the Bacardi shares which she believes she is entitled to receive under her father's Will Trust. In this connection, she craves in the alternative in section IV page 62 of the Assignment an order that the Bacardi shares be transferred to the First Plaintiff. In order for the same to be effected, the First Plaintiff would have to be restored. The importance of the First Plaintiff in the Monaco proceedings appear clear from the pleadings in that action so the ground that the company be restored for the purposes of ongoing litigation appears to have been constituted."*

34. In conclusion, Mr. Glinton submitted that it is fair and reasonable for BCH to be named as a plaintiff in this action since it is the company seeking to be restored. He contended that this would be consistent with the provisions in the repealed and the current section 166 of the IBC Act that allowed a company which had been struck off to apply to have its name restored to the Register.

35. As for Welwyn, it is submitted that it has the standing to bring this action as it was the director and the shareholder of BCH. Under the statute, directors and shareholders have the power to dissolve a company and so, Mr. Glinton submits, they should have the standing to apply to the court for the restoration of the name of the company under the inherent jurisdiction of the court.

Discussion and Disposition

(i) The Statutory regime

36. The starting point is to consider the current state of the relevant legislation.

37. The IBC Act (prior to its amendment) provided in sections 165 and 166 that:

> *"165. (1) Where the Registrar has reasonable cause to believe that a company incorporated under this Act no longer satisfies the requirements prescribed for an International Business Company under section 14(1), 38(1) and 44 the Registrar shall serve on the company an order for compliance as prescribed in Part A of the Second Schedule.*
>
> *(2) If the Registrar does not receive a reply within ninety days immediately following the date of the service of the order referred to in subsection (1), the Registrar shall strike the name of the company off the Register, unless the company or any other person satisfies the Registrar that the name of the company should not be struck off and the Registrar shall publish notice of the striking-off in the Gazette.*
>
> *(3) Where a company has otherwise complied with the requirements of the Act the Registrar shall upon request by the company issue a declaration of compliance as prescribed in Part B of the Second Schedule.*
> *(4) A company that has been struck off the Register under this section remains liable for all claims, debts, liabilities and obligations of the company, and the striking off does not affect the liability of any of its members, directors, officers or agents.*
>
> *166. (1) If the name of a company has been struck off the Register under section 165, the company or a creditor, member or liquidator thereof, may within five years immediately following the date of the striking off, apply to the Registrar to have the name of the company restored to the Register and upon payment to the Registrar of the prescribed fee and all fees due under this Act, the Registrar shall restore the name of the company to the Register and upon restoration of the name of the company to the Register, the name of the company shall be deemed never to have been struck off the Register.*
>
> *(2) If upon an application under subsection (1) the court is satisfied that it would be fair and reasonable for the name of the company to be restored to the Register, the Court may order the name of the company to be restored to the Register upon payment to the Registrar of all fees and upon restoration of the name of the company to the Register, the name of the company is deemed never to have been struck off the Register.*
>
> *(3) **If a company has been dissolved or the period of five years has expired under subsection (1), the company or a creditor, member or liquidator thereof, may***

apply to the court to have the name of the company restored to the Register. (My emphasis)

38. A lacuna in the IBC Act was highlighted in the case of ***Tenesheles Trust et al v BDO Mann Judd et al*** **[2009] 2 BHS J No 17** where the court held that the Registrar General did not have the power under the IBC Act to restore an IBC that had been struck off the Register for non-payment of prescribed fees. Shortly after ***Tenesheles,*** the court had to consider in ***Arcadian Development Corporation Limited v The Registrar General [2010] 2 BHS J No 1*** whether, under the IBC Act the court, as opposed to the Registrar, had the power to restore an IBC that had been struck of the Register for non-payment of fees. It was held, on the same reasoning as used in ***Tenesheles,*** that the court had no such power under the IBC Act.

39. These two cases seemed to have engaged the attention of the Legislature as in March, 2010 Parliament passed the International Business Companies (Amendment) Act, 2010 (***"the IBC Amendment Act"***) which amends sections 165, 169 and 176 and replaces section 166 of the IBC Act with a new provision. Under the amendments, the Registrar and the court are expressly given the power to restore the name of an IBC which was struck off for non-payment of prescribed fees and thereby eliminated the lacuna identified in ***Tenesheles*** and ***Arcadian Development Corporation Limited.***

40. However, another issue has arisen on the amendments introduced by the IBC Amendment Act. The new (and current) section 166 of the IBC Act provides that:

> *"(1) If the name of a company has been struck off the Register under section 165(2), the company, or a creditor, member or liquidator thereof, may within five years immediately following the date of the striking off, apply to the Registrar to have the name of the company restored to the Register.*
>
> *(2) If upon an application under subsection (1), the Registrar is satisfied that it would be fair and reasonable for the name of the company to be restored to the Register, the Registrar shall restore the name of the company to the Register and upon restoration, the name shall be deemed never to have been struck off the Register.*

(3) If the name of the company has been struck off the Register under section 165(3B), the company, or a creditor, member or liquidator thereof, may within five years immediately following the date of the striking off, apply to the Registrar to have the name of the company restored to the Register, and upon payment to the Registrar of –

(a) the restoration fee specified in the First Schedule;

(b) the licence fee stated in the notice referred to in section 165(3A); and

(c) the licence fee in the amount stated in the notice referred to in paragraph (b) for each year or part thereof during which the name of the company remained struck off the Register, the Registrar shall restore the name of the company to the Register and upon restoration of the name of the company to the Register, the name of the company shall be deemed never to have been struck off the Register.

(4) If the period of five years under subsection (1) or (3) has expired, the company or a creditor, member or liquidator thereof, may apply to the Court to have the name pf the company restored to the Register."

41. This section does not contain an equivalent provision to the repealed section 166(3) which specifically conferred on the court the power to restore the name of an IBC to the Registry after it has been dissolved. The absence of such a provision in the IBC Act (as amended by the IBC Amendment Act) means that currently, in The Bahamas, there is no statutory power to restore the name of an IBC to the Register after it is dissolved.

42. I observe parenthetically that this position is anomalous and is out of line with the legislative regime for IBC's (or their functional equivalent) in most jurisdictions which operate as International Financial Centres. In 2000, through section 166(3) of the IBC Act, the court was specifically given the power to restore the name of a dissolved IBC. In my view, it is unlikely that in passing the IBC Amendment Act in 2010, which was directed at curing the *casus omisus* identified in ***Tenesheles*** and ***Arcadian Development Corporation Limited***, it was intended to take away that power.

43. Under the IBC Amendment Act, the repeal and replacement of section 166 of the IBC Act was consequential to the inclusion of subsections (3A) and (3B) in section 165. In introducing those consequential amendments in the new section 166, the power to restore the name of a dissolved IBC to the Register, which previously existed under the repealed section 166(3) was, for unknown reasons, not included. It seems to me that this was an oversight but this is a matter for Parliament. There is no ambiguity here which can be resolved by the court through the application of established principles of statutory interpretation. It is clear that the power for the court to restore the name of a dissolved IBC to the Register was contained in section 166(3) of the IBC Act and it is similarly clear that this power was repealed and not replaced in the new section 166 under the IBC Amendment Act. If, indeed, this was an oversight of the draftsman, it is for Parliament to correct it by the appropriate legislative intervention.

44. Based on the current legislative landscape as outlined above, Mr. Glinton properly conceded that there is no statutory power in The Bahamas for the court to restore the name of BCH (which has been dissolved) to the Register. For this reason, the Plaintiffs have grounded this action in the common law. At paragraph 33 of his written submissions Mr. Glinton states that:

> *"Given the IBC (Amendment) Act does not provide for the restoration of dissolved companies, the Plaintiffs must rely upon the common law in seeking to have the court void the dissolution of the First Plaintiff and restore it to the Register of Companies."*

(ii) Inherent jurisdiction - Fraud

45. Therefore the first issue is, apart from statute, does the Court have an inherent jurisdiction under the common law to restore the name of a dissolved company to the Register?

46. I have carefully considered the case of ***Ivanishvili*** together with the English cases of ***In re Pinto Silver Mining Company (1878) 8 Ch. D. 273; In re London and Caledonian Marine Insurance Company [1879] 11 Ch. D 140;*** and ***In re Cornish Manures Ltd [1967] 1 W.L.R 807.*** In ***Ivanishvilli*** the Bahamian court was asked to restore the name of a dissolved company to the Register on the ground of fraud. The two English cases of ***In re Pinto*** and ***In re London and Caledonian*** involved petitions to compulsory wind-up a

company after the company was deemed to have been dissolved. In the third English case of ***In re Cornish Manures*** the court was asked to declare the dissolution of a company void.

47. The decision in the case of ***In re Pinto*** must be understood in the context of the facts in that case. For the purpose of this Judgment I need only briefly summarize those facts. The shareholders of Pinto Silver Mining Company, Limited passed resolutions on 22 January, 1873 which were confirmed at a subsequent meeting on 12 February, 1873 to, *inter alia*, voluntarily wind up the company and appoint liquidators. On 6 January, 1874 the final account of the liquidators was laid before the shareholders of the company in accordance with section 142 of the Companies Act, 1862 ("***the 1862 Act***") and on 12 January, 1874 a return of the meeting was made to the Registrar and registered as required by section 143.

48. Sections 142 and 143 of the 1862 Act provide that:

> *"142.* ***As soon as the affairs of the company are fully wound up,*** *the liquidators shall make up an account showing the manner in which such winding-up has been conducted, and the property of the company disposed of; and thereupon they shall call a general meeting of the company for the purpose of having the account laid before them and hearing any explanation that may be given by the liquidators: The meeting shall be called by advertisement, specifying the time, place, and object of such meeting; and such advertisement shall be published one month at least previously to the meeting, as respects companies registered in England in the London Gazette, and as respects companies registered in Scotland in the Edinburgh Gazette, and as respects companies registered in Ireland in the Dublin Gazette.* (My emphasis)
>
> *143. The liquidators shall make a return to the registrar of such meeting having been held, and of the date at which the same was held; and* ***on the expiration of three months from the date of the registration of such return the company shall be deemed to be dissolved:*** *If the liquidators make default in making such return to the registrar, they shall incur a penalty not exceeding five pounds for every day during which such default continues."*(My emphasis)

49. By virtue of those two sections the company was deemed to be dissolved on 12 April, 1874.

50. In December, 1876 a petition for the compulsory winding up of Pinto Silver Mining Company, Limited was filed by Thomas Key, a creditor of the company. The Petition contained the following paragraphs:

> *"10. Nothing has been done under the voluntary winding-up to or towards liquidation of its affairs or payment of its creditors.*
>
> *11. Your Petitioner believes that if the assets of the company were realized there would be sufficient funds applicable to the payment of his claim to satisfy it, or nearly so.*
>
> *12. Under present circumstances the company cannot pay its debts.*
>
> *13. The company has not done any business for a year prior to the presentation of this petition.*
>
> *14. It is just and equitable that the company should be wound up by this Honourable Court."*

At the hearing of the Petition evidence was given on behalf of the liquidators that Mr. Key was fully aware of the proceedings under the voluntary winding up and assented to them.

51. Counsel for Mr. Key contended that the company could not be deemed dissolved under section 143 of the 1862 Act as "*the affairs of the company..*" *had not been fully wound up*" and this was the gateway to section 143. That being the case, counsel submitted that it was still open for the court to make a compulsory winding-up Order. The first instance court accepted the submissions of counsel for Mr. Key and made the Order.

52. On appeal, reversing the first instance decision, the Court of Appeal dismissed the Petition. In doing so James L.J. stated:

> ***"This case must have been decided under some misapprehension as to the facts. The first point raised is whether the Court has any jurisdiction to make a winding-up order after a dissolution of the company under a voluntary winding-up, and I much doubt whether there is any such jurisdiction. Where there has been a de facto winding-up; liquidators appointed; the accounts of the liquidators laid before a meeting, as required by the Companies Act, 1862, s. 142; a return duly made to the Registrar, and the statutory period of three months elapsed, it would need a great deal of argument to satisfy me that the Court can go behind the return. The provisions of the Act as to dissolution would be of very little value if a creditor could, after that period, come and open the whole matter because,***

> ***through mistake, some formality has been omitted, some creditor had not come in, or some asset has been left undiscovered. The only case in which it is desirable that what has been done should be undone is where there has been a fraud by which some one is injured. Such a fraud must be the fraud of somebody, and the person guilty of it would be personally liable; but it may be that it would also invalidate the proceedings. Such a case, however, must be established in a petition impeaching the proceedings on the ground of fraud, not on a petition alleging that nothing was done under the winding-up."*** (My emphasis)

53. The judge continued:

> ***"But in the present case I am of opinion that the Petitioner is estopped from disputing the validity of the dis-solution.....when a person having knowledge of what is being done assents by his trustees to the transfer of the property of the company to another company, be-ing aware that the former company was in course of winding up, and takes no step during the whole of that winding-up, it is utterly out of the question that he should be at liberty to come after the lapse of years and upset all that has been done. The petition must be dismissed with costs, and the Appellant must have his costs of the appeal."***

54. In his concurring judgment Cotton LJ stated:

> ***"It is urged that the company has not been completely wound up, and that therefore sect. 143 does not ap-ply. It is not necessary to give any opinion as to what is to be done where there has been a substantial non-compliance with the provisions of the Act, but the mere fact that there are debts remaining unpaid is no such non-compliance, otherwise an insolvent company could never be dissolved; and as to the other matters alleged, I do not think they would justify opening the winding-up if the Court had jurisdiction to do so. More-over, the Petitioner has substantially been aware of all that has been done; he knew that the property was to be transferred to the other company, and that a final meeting was called to consider the liquidators' account. After having thus lain by, he cannot now come to have the proceedings ripped up."***

55. Clearly the Court of Appeal accepted the evidence that Mr. Key had assented to the voluntary winding up of the company and therefore was estopped from challenging the dissolution of the company. James L.J. observed that the proceedings in a voluntary winding-up and consequential dissolution of a company might be impeached on the ground of fraud. However, that was not the position in ***Re Pinto*** and the appellate judges stridently rejected the notion that in the circumstances of the case, Mr. Key should be allowed to go behind the deemed dissolution of the company under section 143 of the 1862 Act on the ground that the liquidators had failed to comply with section 142.

56. Approximately a year after ***In re Pinto*** the English court had to consider the application of the principles enunciated in that case when hearing the case of ***In re London and Caledonian***. Briefly the facts were that the London and Marine Insurance Company (and other underwriters through separate insurance policies) insured the cargo of the ship *Isabel*. On 5 August, 1866 the ship was lost under circumstances which led the insurers to refuse payment under the policies on the ground of fraud. Legal proceedings were commenced in Havana by The Association for the Protection of Commercial Interests in respect of Wrecked and Damaged Property (***"the Association"***) on behalf of the underwriters to set aside the several insurance policies. The London and Marine Insurance Company (***"LMIC"***) agreed to pay its share of the costs and expenses incurred in the litigation. In August, 1866 LMIC made an initial payment to the Association on account of their proportion of the legal costs incurred up to that date.

57. In April, 1868 the members of LMIC passed resolutions to voluntarily wind-up the company and liquidators were appointed. In February, 1873 the liquidators made another payment to the Association thinking that it was the final payment in connection with its liability for its share of the legal expenses in connection with the litigation in Havana. In September, 1875 the contributories of LMIC agreed by resolution for the liquidators to put aside a specified sum of money to cover future admitted claims in the liquidation with any surplus going to pay the liquidators for their services in the liquidation.

58. On 5 February, 1876 a general meeting of LMIC was held pursuant to section 142 of the 1862 Act to pass the final accounts. Subsequently, on 10 February, a report was made to the Registrar under section 143 of that Act. The liquidators had stated in evidence that when presenting their final accounts they were not aware of any pending proceedings in Havana and had not received a claim from the Association.

59. In January, 1878 the Association submitted a claim to the liquidators for an additional payment in connection with the litigation in Havana. They were told that the liquidation had been completed and LMIC was deemed dissolved under section 143 of the 1862 Act. The Association claimed that it was not aware that LMIC was no longer in existence.

60. On 15 April, 1878 the Association filed a Petition to have LMIC wound up by Order of the Court. The Petition was dismissed at first instance and that decision was upheld in the Court of Appeal on the basis that the case was governed by the decision in ***Re Pinto***.

61. In dealing with the appeal in ***Re London and Caledonian*** James L.J. (who was on the appellate panel which heard the ***In re Pinto*** case) stated in his judgment:

> ***"I have considered this case, and it seems to me that in all respects it is governed by the decision of this Court in In re Pinto Silver Mining Company...and what was decided in*** [that] ***case....was, that we could not put upon these words, "as soon as the affairs of the company are fully wound up,*** [in section 142 of the Companies Act, 1862] ***the construction contended for, namely, to make that a condition precedent and construe it to mean that everything had been done which was to be done. We are of opinion that those words could not mean that if there were a single asset outstanding or a single debt unpaid, the affairs of the company were not to be considered as wound up.***
>
> .....
>
> ***We must put some practical and sensible meaning on the words, and in my opinion they mean "as far as the liquidators can wind them up; that is, when the liquidator has done all that he can to wind up the company, when he has disposed of the assets as far as he can realize them, got in the calls as far as he can enforce them, and paid the debts as far as he is aware of them, and has done all that he can do in winding up the affairs, so that he has completed his business so far as he can, and is functus officio. Then it is his duty to call a meeting, to give in his account of the affairs of the company, and to make a return to the Registrar under the Act. We thought that was the meaning of "fully winding up" and that being so, we thought there was no power to go behind the dissolution except in the case which I suggested as a possible case – the case of absolute fraud – fraud which the company could be fixed with. If there were a case of that kind, then very likely the whole thing might be set aside; that is to say, it might, on proper proceedings being taken, be made clear that the whole winding-up was null and void, and then the company would be restored again to its position, subject to claims of creditors and contributories, or any other persons who might have rights to enforce or equities to be adjusted in relation to the company. But in the absence of fraud of that kind it seems to me that the Court has no jurisdiction whatever."*** [My emphasis]

62. It is interesting to note the following extract from the short concurring judgment of Baggallay L.J. when he stated:

> ***"Also, while thinking that after the three months limited by the Act have expired the Court has no jurisdiction to order the winding-up, I agree in that which was said by Lord Justice James, to the effect that where some particular reason exists***

> ***why that which has been done should be undone, as in a case, for instance, of fraud in connection with the proceedings, there should be some way of setting aside those proceedings."*** [My emphasis]

63. It seems that Baggallay L.J. was stating that a reason might exist where something in the voluntary winding-up and dissolution proceedings which was ***"...done should be undone"*** and in that case ***"there should be some way of setting aside those proceedings."*** Fraud in connection with the proceedings was postulated merely as an example of such a reason.

64. In the third case of ***In re Cornish Manures*** a company (***"the first company"***) was placed into voluntary liquidation by its members in February, 1963 and a liquidator was appointed. At about the same time the undertaking of the first company was transferred to another company (***"the second company"***). As part of the arrangement, and as a way of providing consideration for the stock-in-trade of the first company, the second company assumed liability for the bank overdraft of the first company. However, the amount of the overdraft was more than the consideration for the stock-in-trade and the net result was that the first company was indebted to the second company in the sum of £8,701 2s 2d. The evidence was that the first company had sufficient assets to pay this debt.

65. In March 1964, the directors of the second company waived the indebtedness of the first company. That transaction was, in effect, an outright gift by the second company to the first company and neither of the counsel in the case sought to defend the transaction.

66. In September 1966, the second company was placed into a creditors' voluntary winding-up and a liquidator was appointed. As it turned out, the ultimate result of the waiver of the debt of £8,701 was that the sum was paid to the beneficial owners of the first company rather than to the creditors of that company (which included the second company on the basis that the waiver of the debt was invalid). In those circumstances the liquidator of the second company sought to re-open the liquidation of the first company. By that time, the liquidator of the first company had complied with the provisions of section 290 of the Companies Act, 1948 (***"the 1948 Act"***) and that company was deemed to have been dissolved on 21 October, 1964 under section 290(4) which provides as follows:

"The registar on receiving the account and either of the returns hereinbefore mentioned shall forthwith register them, and on the expiration of three months from the registration of the re-turn the company shall be deemed to be dissolved."

67. The application by the liquidator of the second company for an order declaring the dissolution of the first company void was made on 18 November 1966 under section 352(1) of the 1948 Act which reads:

> *"352 (1) Where a company has been dissolved, the court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the court to be interested, make an order, upon such terms as the court thinks fit, declaring the dissolution to have been void, and there-upon such proceedings may be taken as might have been taken if the company had not been dissolved."*

68. It is apparent that the date of the application (i.e.18 November, 1966) was after the expiration of two years from the date of the dissolution of the first company (i.e.21 October, 1964). In order to overcome that insuperable impediment to the application, counsel for the liquidator of the second company submitted that when the liquidator of the first company made up his final account he had not yet fully wound up the affairs of the company as required by section 290(1) of the 1948 Act. That section provides that:

> *"Subject to the provisions of the next following section, as soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the winding-up, showing how the winding-up has been conducted and the property of the company has been disposed of, and thereupon shall call a general meeting of the company for the purpose of laying before it the account, and giving any explanation thereof."*

69. It will be seen that this submission raised under the 1948 Act essentially the same point which had been dealt with by the court in ***Re Pinto*** and ***Re. London and Caledonian*** under the 1862 Act. The provisions are substantially similar and Pennycuick J. followed the two earlier cases in dismissing the application. After referring to ***Re Pinto*** and ***Re. London and Caledonian*** he stated:

> ***"It is quite clear from the judgments in both cases that the section*** [i.e. section 142 of the 1862 Act which is substantially similar to section 290(1) of the 1948 Act] ***cannot be construed as meaning have been fully wound up. It is at least sufficient that they should have been fully wound up so far as the liquidator is aware."***

70. The judge concluded his judgment in this way:

> ***"So far as the present application is concerned, the position is that the registration was effective under s 290(4). Accordingly, the old company was dissolved upwards of two years before the date of the present notice of motion. The notice of motion is out of time and I have no jurisdiction to exercise any discretion in the matter."***

71. The ***Ivanishvilli*** case was decided by Charles J in the Supreme Court of The Bahamas. The case involved an IBC which had been incorporated to hold funds and investments of a Trust. The Plaintiffs were the sole beneficiaries of the Trust. The IBC was voluntarily wound up and dissolved in May of 2015. Four months after its dissolution, the First Plaintiff discovered that there had been fraudulent activity in the management of his accounts held with a bank in Singapore. Legal proceedings were commenced in that jurisdiction and the plaintiffs sought to restore the IBC to the Register for the sole purpose of joining in proceedings currently before the High Court of Singapore to recover losses sustained on the accounts.

72. It was common ground between the parties, and it was accepted by the court that:

> ***"21. .....under its inherent jurisdiction, the Court may, after considering the circumstances under which an IBC was dissolved, restore that company to the Register once it is satisfied that such dissolution was perpetuated by fraud. This is the position at common law."***

73. At paragraph 43 of her Judgment Charles J concluded that:

> ***".....there is conclusive evidence to show that a fraud has been perpetrated in respect of the Company that led to its dissolution. The Plaintiffs' sole purpose of wishing to restore the Company to the Register is to join in litigation which has already begun in the High Court of Singapore and to obtain information with respect to the Company."***

74. Again, in paragraph 44 Justice Charles said:

> ***"The short answer is a fraud has been perpetuated on the Company and the Plaintiffs wish to join in proceedings in Singapore to investigate more about this fraud and to put the matter beyond doubt."***

75. On this finding of fraud, the learned judge granted the Order sought by the Plaintiffs that the company be restored to the Register for the limited purpose of commencing, defending

or joining in proceedings in Singapore, provided that it pays all outstanding fees and penalties in full. In doing so, the learned judge considered ***In re Pinto, In re London and Caledonian,*** and ***In re Cornish Manures*** and relied on those cases in coming to her conclusion.

76. After reviewing all of the cases cited above I am of the view that the Court has an inherent jurisdiction to restore the name of a dissolved IBC to the Register where it is established that the dissolution was caused, induced or involved fraud in connection with the proceedings. This jurisdiction is wholly separate and distinct from any statutory power which may or may not exist.

77. However, this does not dispose of the case before me as fraud is not alleged in connection with the voluntary winding-up and dissolution of BCH.

(iii) Inherent jurisdiction - Mistake

78. The evidence of Mr. Paton does not show that there was any fraudulent activity which caused or led to the dissolution of BCH. Rather, on his evidence, this is a clear case of mistake. LPCS acted on instructions to voluntarily wind up and dissolve the company from a party (i.e. Pestalozzi) who it thought was authorized to act on behalf of BCH when, in fact, that party had no such authority. The Affidavits show that Lord Bacardi was the beneficial owner of BCH and prior to his death, he wanted to transfer the Anstalt shares to that company. There is no indication that during his life he changed his position on that subject and wanted to dissolve BCH. Similarly, after his death, there is no evidence to suggest that those legally responsible for his estate, and therefore lawfully able to give instructions in connection with BCH, ever wanted to dissolve BCH.

79. In these circumstances, I turn now to consider whether the Court has an inherent jurisdiction to restore the name of BCH to the Register, not on the ground of fraud, but on the ground of mistake and, if so, should it do so in the circumstances of this case?

80. In considering the judgments of the English Court of Appeal in the cases of ***In re Pinto*** and ***In re London and Caledonian*** it seems to me that the primary basis of the decisions related to the interpretation of section 142 of the 1862 Act. The main point in each of those two cases focused on whether the "...***the affairs of the company*** [had been]... ***fully wound up***..." when the liquidators presented their final accounts at the general meeting convened pursuant to section 142. It was contended that if that was not the case there would be no deemed dissolution under section 143 of the 1862 Act and therefore the court could make a compulsory winding-up order. In both cases the court declined to go behind the deemed dissolution under section 143. The lead judgment in both cases was given by James L.J. and in **Re *London and Caledonian*** he summarized the decision in ***Re Pinto***. It bears repeating what he said:

> "***what was decided in*** [Re Pinto]***....was, that we could not put upon these words, "as soon as the affairs of the company are fully wound up,*** [in section 142 of the Companies Act, 1862] ***the construction contended for, namely, to make that a condition precedent and construe it to mean that everything had been done which was to be done.***
>
> ***We must put some practical and sensible meaning on the words, and in my opinion they mean "as far as the liquidators can wind them up; that is, when the liquidator has done all that he can to wind up the company, when he has disposed of the assets as far as he can realize them, got in the calls as far as he can enforce them, and paid the debts as far as he is aware of them, and has done all that he can do in winding up the affairs, so that he has completed his business so far as he can, and is functus officio.***

81. In my view, that was the basis of the decision in ***Re Pinto*** together with the fact that the court held that Mr. Key was estopped from challenging the validity of the dissolution. James L.J. stated "....*in the present case I am of opinion that the Petitioner* [i.e. Mr. Key] *is estopped from disputing the validity of the dissolution.....* " In his Judgment, Cotton L.J. stated that "*I am of opinion that there has been such a complete assent by the creditor* [i.e. Mr. Key] *to the voluntary winding-up as to preclude him from attempting to impeach it* " and again at the end of his Judgment that *"I come clearly to the conclusion that Mr. Key assented to the winding-up, and it is out of the question that he should be allowed to come after a lapse of four years to impeach proceedings to which he assented at the time."*

82. I note the statements of James L.J. in his Judgment in ***Re Pinto*** when he said that "*[t]he only case in which it is desirable that what has been done should be undone is where there has been a fraud by which someone is injured. Such a fraud must be the fraud of somebody, and the person guilty of it would be personally liable; but it may be that it would also invalidate the proceedings.*" He made similar statements in his Judgment in **Re *London and Caledonian***. Those statements must be viewed in their context. In both instances, His Lordship was considering the issue of whether the court should go behind the return sent to the Registrar under section 142 of the 1862 Act and the consequential deemed dissolution of the company under section 143. This is clear in this extract from ***In re Pinto***:

> "***Where there has been a de facto winding-up; liquidators appointed; the accounts of the liquidators laid before a meeting, as required by the Companies Act, 1862, s. 142; a return duly made to the Registrar, and the statutory period of three months elapsed, it would need a great deal of argument to satisfy me that the Court can go behind the return.....The only case in which it is desirable that what has been done should be undone is where there has been a fraud by which someone is injured.***"

83. I understand the decisions in ***Re Pinto*** and ***In Re London and Caledonian*** in this way. The words "*as soon as the affairs of the company are fully wound up*" in section 142 of the 1862 Act are to be taken to mean "*as soon as the affairs of the company are fully wound up as far as the liquidators can wind them up....so that he has completed his business so far as he can, and is functus officio.*" Once that has occurred and (i) the meeting under section 142 has taken place to present the liquidator's final accounts; (ii) the liquidator has sent in the return to the Registrar under section 143; and (iii) the three month period set out in section 143 has expired, the court has no power to go behind the dissolution except on evidence of fraud in connection with the proceedings. A mistake merely as to the omission of "*.... some formality.....some creditor.....* [not making a claim], *or some asset* [being]..... *undiscovered*" would not be enough to go behind the dissolution of the company.

84. It seems to me that in those two cases the court was not considering a case like the one before me where the entire voluntary winding up and subsequent dissolution of the company were based on a mistake in that they had been put in train and carried out by LPCS on the instructions of a party who was not authorized to act on behalf of BCH. It

must be remembered that Welwyn, the shareholder and director of BCH which signed the Resolution approving the Plan of Dissolution of BCH involving the voluntary winding-up of the company, was a mere nominee of LPCS. On these facts, the mistake in this case is a vitiating element in the circumstances surrounding the dissolution of BCH thereby leaving it open to the court to declare the dissolution void *ab initio*. Adapting the language of Baggallay L.J. in ***Re London and Caledonian***, the mistake by LPCS in purporting to act for BCH when it had no actual authority to do so, is a reason why the voluntary winding-up and dissolution of BCH *"...should be undone..."* and *"there should be some way of setting aside those proceedings."*

85. In his Judgment in ***Re Cornish Manures Ltd*** Justice Pennycuick stated that the case fell *".....clearly within the reasoning in* [***Re Pinto and Re London and Caledonian***]*"* and therefore that case did not take the jurisprudence any further.

86. In this jurisdiction the common law power to restore the name of a dissolved company has been extended to include cases involving mistake. It was accepted by the court in the 2011 cases of ***Rushmorehills Limited v. the Attorney General of the Commonwealth of the Bahamas*** Supreme Court Action No 90 of 2011 and ***Kato Holdings Limited v the Attorney General of the Commonwealth of the Bahamas, Supreme Court Action*** Supreme Court Action No. 107 of 2011 that the name of a dissolved company could be restored where a mistake had occurred. These cases were decided after the passage of the IBC Amendment Act and therefore in the absence of a statutory power to restore a dissolved IBC. Again, in 2014 (in the absence of a statutory power) the court, acting through Barnett CJ (as he then was), accepted the same principle in ***Higham (Bahamas) Limited v Attorney General of the Commonwealth of The Bahamas*** (2014/COM/com/00002), and restored the name of a dissolved company. I am told by counsel that after the enactment of the IBC Amendment Act in 2010 there are numerous other cases in this jurisdiction where the Supreme Court made an order (without issuing a written Ruling or Judgment) to restore the name of a dissolved company on the ground of mistake involving assets discovered after the dissolution. This point is also acknowledged in paragraph 53 of the Judgment of Charles J in ***Ivanishvilli*** when she stated *"Notwithstanding that observation with respect to sections 166(6) and 168, learned Counsel Mr. Gaitor submitted that the Court, on multiple*

occasions, has restored dissolved companies to the Register even in the absence of legislation."

87. The ***Ivanishvilli*** case was decided on the ground of fraud and therefore the observations of the learned judge on the ground of mistake are, in my view, *obiter.* However, they are nonetheless interesting. In addressing the three Bahamian cases Charles J said:

> ***"54. In the case of Higham (Bahamas) Limited v Attorney General of the Commonwealth of The Bahamas (2014/COM/com/00002), the application with respect to Higham was made on the grounds of (i) mistake and (ii) it was just and equitable and/or just and reasonable that the company be restored so as to enable it to distribute the assets which remained to be distributed and which ought to have been distributed before the company was dissolved as was done in at least two previous Bahamian cases, namely, Rushmorehills Limited v. the Attorney General of the Commonwealth of the Bahamas, Supreme Court Action No 90 of 2011 and Kato Holdings Limited v the Attorney General of the Commonwealth of the Bahamas, Supreme Court Action No. 107 of 2011. These cases, though not binding on this Court, are precedents and persuasive authorities in this jurisdiction for restoration on the ground of mistake (and I will add fraud).***
>
> ***55. In Higham, the mistake in liquidating the company before all assets were distributed was recognised by Mr. Justice Stephen Isaacs. In Rushmorehills Limited and Kato Holdings Limited, Barnett C.J. also recognised the mistake. Both learned justices accordingly declared the resolutions of the shareholders and directors of the companies to voluntarily wind up the companies and all subsequent acts void and ordered that the companies be restored to the Register."***

88. After considering the authorities, I am of the view that the court has an inherent jurisdiction, unrelated to statute, to restore the name of a dissolved IBC on the ground of mistake in appropriate circumstances. In this case, the evidence shows that there was never a proper basis to voluntarily wind-up HCB and dissolve the company. The entire process, which was dealt with by LPCS (and its nominees), was a mistake and carried out from start to finish without valid instructions from persons who were authorized to act on behalf of BCH. On that basis, and given the scope and fundamental nature of the mistake in this case, I am of the opinion that the winding-up and dissolution of BCH are null and void.

89. Bearing in mind my view of the Judgments in ***Re Pinto, Re London and Caledonian*** and ***Re Cornish Manures*** expressed earlier in this Judgment, I see no inconsistency between those cases and my decision in this case.

90. Since 2010, when the IBC Amendment Act was enacted which did not contain an express power to restore a dissolved IBC, there has developed a body of common law in this jurisdiction recognizing the court's inherent jurisdiction to restore a dissolved IBC on the ground of mistake – see paragraph 86 above. Unless required to do so by an appellate court, I would not be inclined to hold that all of those cases were wrongly decided. Even if that was the case, it would not in my view relate to the case before me which involves a wholesale mistake about the entire winding up and dissolution process. The facts in this case are quite unlike any of the earlier cases which were cited.

(iv) Delay and Standing

91. I am mindful of the elapse of 16 plus years between the date of the dissolution of BCH and the date of the commencement of this action. This would normally be a formidable and perhaps an insuperable obstacle to the granting of the relief sought in this action. However, in this case, the delay, albeit very long, must be considered in the context of the fact that Miss Bacardi was a minor until 2019 and also that, on the evidence, she and Lady Bacardi did not discover that BCH was dissolved until in or around 2019 as a result of investigations which were carried out into the Bastille Trust and their inheritance under the Will of Lord Bacardi. On these facts, I do not regard the delay as a bar to the orders which are sought in the Originating Summons.

92. The Second Plaintiff in this action, Welwyn, is the registered shareholder and director of BCH, which is the First Plaintiff. I accept the submission of Mr. Glinton that Welwyn has the legal standing to bring these proceedings seeking the relief in the Originating Summons. It may well be that BCH itself also has standing to bring this action grounded in the common law but I need not consider this point in view of my decision on Welwyn.

93. In ***Ivanishvili*** Justice Charles considered the issue of standing to bring the action at common law. She stated:

> ***"As stated before, the IBC Act 2000 and the IBC (Amendment) Act, 2010 are inapplicable to the case at hand as there is no provision in those Acts to restore IBCs which have been dissolved to the Register so recourse has to be had to common law. At common law, any person who can show an interest in making the application for restoration can do so."***

94. I respectfully agree with that statement and there can be no doubt that Welwyn, as the shareholder and director of BCH, has an interest in making an application to restore that company.

Conclusion

95. There is pending and foreshadowed serious litigation concerning, *inter alia*, BCH. The Affidavits of Mr. Paton summarize the nature and scope of the disputes and claims relating to the matters pertaining to Lord Bacardi and his estate. Bearing in mind the circumstances of this case it is my view that it is fair and reasonable for the name of BCH to be restored to the Register so it can pursue any claims which it may have in connection with the Bastille Trust, the shares in Bacardi, the estate of the late Lord Bacardi and all other related matters.

96. In all the circumstances of this case and exercising my discretion, I make the following declarations and orders:

(i) A Declaration that the dissolution of Baron's Court Holdings Ltd. is void *ab initio;*

(ii) An Order that the name of Baron's Court Holdings Ltd. be restored to the Register of Companies for the limited purpose of commencing, defending or joining in legal proceedings in any jurisdiction in connection with the Bastille Trust, the shares in Bacardi, the Estate of the late Lord Bacardi and all other related matters;

(iii) An Order that Baron's Court Holdings Ltd. pay all outstanding fees to the Registrar General;

(iv) An Order that the Registrar General advertise the restoration aforesaid in the Gazette;

(v) An Order that Baron's Court Holdings Ltd. be deemed to continue in existence as if its name had not been dissolved; and

(vi) An Order that Welwyn pay to the Defendant the fixed sum of $2,500.00 as costs in connection with these proceedings.

Dated this 21st day of July, 2022

Sir Brian M. Moree, Kt., QC
Chief Justice