



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO. FSD 318 OF 2022 (MRHCJ)

IN THE MATTER OF CRADLE HOLDINGS INC.

AND IN THE MATTER OF SECTIONS 159 AND 207 OF THE COMPANIES ACT (2022 REVISION)

AND IN THE MATTER OF SECTIONS 48 OF THE TRUSTS ACT (2021 REVISION) AND ORDER 85 OF THE GRAND COURT RULES (2022 CONSOLIDATION)

AND IN THE MATTER OF SECTION 64A OF THE TRUSTS ACT (2021 REVISION)

BETWEEN

THE EXECUTORS OF THE ESTATE OF EUGENE MELNYK (DECEASED)

Plaintiffs

AND

THE REGISTRAR OF COMPANIES

Defendant

Before	The Chief Justice, the Hon Justice Ramsay-Hale
Appearances	Mrs Shan Warnock-Smith KC and with her, Mr. Christopher Levers and Chris Vincent for the Plaintiffs Mr. Ian Paget-Brown KC, instructed by Ms Marilyn Brandt, Deputy Solicitor General for the Defendant
Date of Decision	2 May 2023
Date draft circulated	27 July 2023
Reasons delivered	4 September 2023

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HEADNOTE

Companies Act- Part XII - Transfer by continuation - Application to set aside deregistration of a company which cannot continue as a company incorporated under the laws of a jurisdiction outside the Cayman Islands - No statutory route to restoration - Inherent jurisdiction to set aside decision not complying with mandatory statutory requirement

INTRODUCTION

1. The Plaintiffs sought an order that a Cayman Islands exempt company that had applied to be, and was, deregistered in the Cayman Islands as part of a plan to move its place of incorporation to Barbados, be restored to the register after the intended redomicile of the company failed. The unintended consequence of its deregistration was that the company was in limbo, having no existence under the laws of either jurisdiction.
2. The question raised by the application was a novel one, which was whether and by what route a company which has been deregistered could be restored to the register of companies, as there is no express route for restoration in the provisions of the **Companies Act**.
3. The matter was ultimately resolved in favour of the Plaintiffs, with the Defendant raising no objections to the relief sought. Given the novel issue raised, I promised to issue a judgment setting out the approach to be adopted by the Courts where a company which has been deregistered but fails to transfer by way of continuation to a jurisdiction outside of the Cayman Islands may be restored to the Register. This I do now.

BACKGROUND

4. Cradle Holdings Inc. (“Cradle”) was incorporated in the Cayman Islands as an exempt company on 27 December 2001. It was utilised to hold valuable real property, namely a farm situate in Marion County, Florida, United States of America (the “Property”). Cradle’s sole director was Mr. Eugene Nestor Melnyk, now deceased (the “Deceased”). He was also its sole shareholder such that his shares in Cradle became an asset of the Estate following his death.

5. In his evidence sworn in support of this application, Mr. Sheldon Plener, one of the Executors of Mr. Melnyk's estate, set out how the Company came to be in limbo which began when Cradle's previous advisers recommended that Cradle be migrated to, or re-domiciled in, Barbados.
6. A Barbados law firm was instructed in December 2020 to assist with the establishment of a new Barbados company in the mistaken belief that a new entity was required in order to effect the migration. A company known as Cradle Holdings Inc. was incorporated in Barbados on 19 April 2021.
7. It was subsequently determined that a new entity was not required in order to for Cradle to be redomiciled in Barbados.
8. The Deceased's representatives retained West Bay Global Services (Cayman Islands) ("West Bay") to assist with the transfer of the company to Barbados. On 28 October 2021, Cradle's Barbados attorneys and West Bay (together, the "Service Providers") were instructed to migrate Cradle from the Cayman Islands to Barbados.
9. On 8 December 2021, West Bay confirmed in correspondence that the de-registration process had been completed. The documents which comprised the deregistration documentation included:
 - (i) A certificate of deregistration from the Registrar of Companies of the Cayman Islands dated 3 December 2021;
 - (ii) The Balance Sheet;
 - (iii) A director's undertaking (undated);
 - (iv) A notice of no proposed change in the applicant company's name dated 30 November 2021;
 - (v) A notice of proposed registered office: and
 - (vi) A director's declaration dated 30 November 2021.
10. The director's declaration stated as follows:

IT IS NOTED THAT:

- (a) Pursuant to Section 206 of the Companies Act of the Cayman Islands (the "Act") and the Memorandum and Articles of Association of the Company, the Company is applying to the Registrar of Companies to be deregistered in the Cayman Islands as it proposes to be registered by way of continuation as a body corporate limited by shares under the laws of Barbados (the "Relevant Jurisdiction");
- (b) Pursuant to Section 206(3) of the Act, a director of a company applying to be deregistered in the Cayman Islands, on behalf of such company, must make certain declarations.

NOW, THEREFORE, I, the undersigned director of the Company, do solemnly and sincerely declare the following:

- (a) no petition or other similar proceeding has been filed and remains outstanding or order made or resolution adopted to wind up or liquidate the Company in any jurisdiction;
- (b) no receiver, trustee or administrator or other similar person has been appointed in any jurisdiction and is acting in respect of the Company, its affairs or its property or any part thereof;
- (c) no scheme, order, compromise or other similar arrangement has been entered into or made whereby the rights of creditors of the Company are and continue to be suspended or restricted;
- (d) the Company is able to pay its debts as they fall due;
- (e) the application for deregistration accompanying this declaration is bona fide and not intended to defraud creditors of the Company;
- (f) any consent or approval to the deregistration required by any contract or undertaking entered into or given by the Company has been obtained, released or waived, as the case may be;
- (g) the deregistration is permitted by and has been approved in accordance with the Company's memorandum and articles of association;
- (h) **the laws of the relevant jurisdiction with respect to deregistration have been or will be complied with;**
- (i) the Company will upon registration under the laws of the relevant jurisdiction continue as a body corporate limited by shares; and
- (j) attached hereto as Exhibit A is the interim balance sheet of the Company reflecting its assets and liabilities effective as at 30 September 2021 and there have been no material changes to the Company's assets and liabilities since that date."

11. The certificate of deregistration was issued on 3 December 2021.
12. On 3 March 2022, Cradle's attorneys advised that the migration could not be completed because the company initially incorporated in Barbados had the same name. They proposed that either the name of the Barbados company be changed or Cradle's name be changed.
13. The Executors were later advised that a name change would not advance the migration as the Barbados Registrar required, among other things, a certificate of good standing from the Cayman Islands Registrar which could no longer be obtained owing to Cradle's deregistration.
14. The failure of the transfer to Barbados by continuation threatened the conclusion of an agreement for the sale and purchase of the land held by Cradle which had been made when the Deceased was alive, as the company had no existence in either jurisdiction.
15. The sale of the land hanging in the balance, the Executors made this application to the Court seeking to set aside the deregistration of the company and an order restoring Cradle to the Register.

The Issues

16. The primary issue for resolution was whether Cradle was capable of being restored to the Register and on what basis in the absence of any statutory provision for setting aside the deregistration of a company.

The Statutory Scheme

17. Part XII of the **Companies Act** (2023 Revision) (the "**Act**") deals with transfers by way of continuation. The provisions for the transfer of companies out of the Cayman Islands are set out in section 206 under the heading **Deregistration of exempted companies** which provides that an exempted company incorporated and registered with limited liability and a share capital under the laws of the Cayman Islands may de-register by way of continuation as an exempted company limited by shares and transfer to any other jurisdiction which permits or does not prohibit the transfer of a company seeking to redomicile in the manner provided (the "relevant jurisdiction")

18. Section 206(2) provides that, once certain matters have been demonstrated, the Registrar shall de-register the company. Section 206(2)(1) provides, relevantly for this application, that:

*"The Registrar shall so deregister an applicant if:
...(1) the laws of the relevant jurisdiction with respect to transfer have been or **will be** complied with."*

19. Section 206(3) provides that this requirement, amongst others, may be satisfied by filing a declaration with the Registrar that, "having made due enquiry", the person filing the declaration is of the opinion that the requirement has been met.

20. The section 207 provides that,

"207. (1) Upon de-registration of an applicant under this Part, the Registrar shall issue a certificate under that person's hand and seal of office that the applicant has been de-registered as an exempted company and specifying the date of such deregistration.

(2) The Registrar shall enter in the register of companies the date of de-registration of the applicant.

*(3) From the commencement of the date of de-registration the applicant **shall cease to be a company for all purposes under this Act and shall continue as a company under the laws of the relevant jurisdiction.**"*

21. Section 207 (3) makes it clear that deregistration does not have the same legal effects as a striking off by the Registrar pursuant to the provision of Part VI of the Act for the removal of defunct companies. Section 207 expressly provides that a deregistered company continues in existence, unlike a company which is struck off under Part VI which ceases to exist and whose assets become *bona vacantia*.

22. The proviso to section 207(3) states:

"Provided always that this shall not operate —

(a) to create a new legal entity;

(b) to prejudice or affect the identity or continuity of the applicant as previously constituted;

(c) to affect the property of the applicant;

(d) to affect any appointment made, resolution passed or any other act or thing done in relation to the applicant pursuant to a power conferred by the memorandum and articles of association of the applicant or by the laws of the Islands;

(e) except to the extent provided by or pursuant to this Part to affect the rights, powers, authorities, functions and liabilities or obligations of the applicant or any other person; or

(f) to render defective any legal proceedings by or against the applicant, and any legal proceedings that could have been continued or commenced by or against the applicant before its de-registration hereunder may, notwithstanding the de-registration, be continued or commenced by or against the applicant after de-registration.

23. The final step in the deregistration process is the publication in the Gazette of notice that the company has migrated which is set out in section 209 which provides that,

*"The Registrar shall forthwith give notice in the Gazette of the deregistration of an applicant under this Part, **the jurisdiction under the laws of which the applicant has been registered by way of continuation and name of the applicant, if changed**".*

The Plaintiffs' Submissions

24. In her written submissions on behalf of the Plaintiffs, Mrs. Warnock-Smith, KC asserted that the fundamental underpinning of the deregistration scheme must be that, prior to a company being deregistered, the Registrar is satisfied that the transfer has been or will be successfully completed.
25. She contended that support for this proposition can be found in section 206(2) provision that the Registrar de-register the company if the laws of the relevant jurisdiction *have been or will be* complied with, and section 209 which requires the Registrar to give notice in the gazette of the jurisdiction in which the company has continued.
26. Mrs. Warnock-Smith submitted that the intention of the legislature to be inferred from the relevant provisions is that the deregistration would only become effective when the company was registered in the relevant jurisdiction. She suggested that the legislative policy was obvious in that the legislature did not intend a company to be deregistered here if the entity being deregistered had no place to go. In other words, the legislative scheme is geared towards ensuring that the very position Cradle finds now finds itself in is avoided.

27. Describing the requirement for the company to be successfully migrated before the certificate of registration is issued as a “*mandatory statutory provision of the de-registration scheme*,” Mrs. Warnock-Smith submitted that, in the circumstances where it had not been complied with, the purported deregistration was invalidated or otherwise rendered void and that the Court should grant the Plaintiffs’ application to set aside the deregistration and order the company restored to the Register.

The Applicable Principles

28. The phrase “*mandatory statutory provision*’ was borrowed from the decision of Kawaley J in *In re Real Estate and Finance Fund (Dissolved)* (unreported, 24 August 2022) on which Mrs. Warnock-Smith relied in support of her application in the circumstances there are no decided cases dealing with the power to restore a company following de-registration in the context of a migration of a company to a jurisdiction outside the Cayman Islands.
29. She submitted that the principle to be derived from that case was applicable notwithstanding that case was concerned with an application to declare the dissolution of a company following a voluntary liquidation void and an order that it be restored to the register.
30. Confirming that the Court had no express statutory power to grant the relief sought, Kawaley J in *In re Real Estate and Finance Fund* unrep. 24 August 2022, held that the Court could do so in the exercise of its inherent jurisdiction to grant a declaration that an act is void pursuant to section 11(2) of the **Grand Court Act**, which provides that,

"11. (1) The Court shall be a superior court of record and, in addition to any jurisdiction heretofore exercised by the Court or conferred by this or any other law for the time being in force in the Islands, shall possess and exercise, subject to this and any other law, the like jurisdiction within the Islands which is vested in or capable of being exercised in England by —

(a) Her Majesty’s High Court of Justice; and

(b) the Divisional Courts of that Court,

as constituted by the Senior Courts Act, 1981[U.K. Act], and any Act of the Parliament of the United Kingdom amending or replacing that Act.

(2) Without prejudice to subsection (1), the Court shall have and shall be deemed always to have had power to make binding declarations of right in any matter whether any consequential relief is or could be claimed or not."

31. Discussing the parameters within which such a jurisdiction should be exercised, Kawaley J said this at [20]:

"The key question which arose for consideration in my judgment ought properly to be framed as followed: has a fatal non-compliance with a mandatory statutory provision...occurred which completely invalidates the purported conclusion of the voluntary winding-up proceeding...In my judgment a voluntary winding-up is a form of statutory proceeding which is subject to various procedural requirements including...steps which a liquidator must take to bring the winding-up to an end."

32. In considering what was the appropriate remedy for such non-compliance, Kawaley J noted that,

"The problem of having to discern what Parliament intended the consequences of non-compliance with a statutory provision should be is a familiar one...valuable guidance as to how the courts should approach the question of legal consequences for non-compliance with statutory provisions may still be found in the judgment of Dame Mary Arden LJ (as she then was) in 7 Strathray Gardens Limited v Pointstar Shipping and Finance Ultratown Ltd [2004] EWCA 1669".

33. In *Strathray*, Arden LJ, herself quoting from various judgments, stated,

*"43. I have gained most assistance from *Burman v Mount Cook Land Ltd* [2002] Ch 256 and *Petch v Gurney* [1994] AER731. As to the *Burman* case I gratefully adopt the summary given by Lord Carnwath LJ in the *M25* case cited above,*

"16. ... [Burman v Mount Cook Land Ltd] concerned a requirement under the Leasehold Reform, Housing and Urban Development Act 1993, for the landlord to

serve a counter-notice saying whether or not the right to a new lease was admitted and, if so, which of the tenants' proposals were acceptable. The notice in question did not contain such a statement. The judge had upheld the notice on the basis that 'a reasonable tenant' would not have been misled. That decision was reversed in this court. Chadwick LJ, giving the leading judgment said that the answer could only be found by construing the statutory language in the context of the statutory scheme. Having reviewed the complex statutory requirements in detail he concluded that the landlords' counter-notice was 'integral' to the proper working of the statutory scheme, and the failure to comply with the statutory requirements was fatal to its validity.'

44. *The decision in the Burman case does not turn on the mandatory/directory distinction. However, it is **authority for the proposition that the effect of non-compliance with a particular statutory requirement must depend on the particular statutory scheme in point.** ...*

47. *The second authority which I have found of particular assistance on this appeal is Petch v Gurney, above. In this case Millett LJ, with whom Henry LJ agreed, illuminated the distinction between mandatory and directory requirements by these words: -*

'The question whether strict compliance with a statutory requirement is necessary has arisen again and again in the cases. The question is not whether the requirement should be complied with; of course, it should: the question is what consequences should attend a failure to comply. The difficulty arises from the common practice of the legislature of stating that something 'shall' be done (which means that it 'must' be done) without stating what are to be the consequences if it is not done. The court has dealt with the problem by devising a distinction between those requirements which are said to be 'mandatory' (or 'imperative' or 'obligatory') and those which are said to be merely 'directory' (a curious use of the word which in this context is taken as equivalent to 'permissive'). Where the requirement is mandatory, it must be strictly complied with; failure to comply invalidates everything that follows. Where it is merely directory, it should still be complied with, and there may be sanctions for disobedience; but failure to

comply does not invalidate what follows. The principles upon which this question should be decided are well established. The court must attempt to discern the legislative intention....

In a well-known passage of his judgment in Howard v Bodington (1877) PD 203 at 211 Lord Penzance said,

'I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.'

34. Lady Arden concluded at [48] that her task was to consider,

"... the substance of the statutory requirement and the reasons for it. If Parliament properly regarded the requirement as one that had to be fulfilled in all cases, the court should give it that effect. The court must not substitute its own view."

35. Having reviewed the authorities, Kawaley J observed at [24] that the question "*fundamentally involves an exercise of statutory construction,*" adding that,

"The core principle to be extracted from these cases ... is one of general application. Where a court is invited to declare that anything done under a statutory provision should be set aside on the grounds that a statutory requirement has not been complied with, the relief sought may only logically be granted where either:

(a) the statute contains an express power to set aside the relevant decision or proceeding;

or

(b) the statute contains an implied power to set aside the relevant decision or proceeding on grounds of substantial non-compliance."

Discussion

36. The thrust of Mrs. Warnock-Smith submissions on behalf of the Plaintiffs is that the provision in section 206(2)(1) of the Act, that the Registrar “*shall deregister the company if ... (l) the laws of the relevant jurisdiction with respect to transfer have been or will be complied with*”, makes it clear that it is a necessary condition of the exercise of the Registrar’s power that the company is able to continue in the new jurisdiction. In the circumstances where Cradle was unable to comply with the laws of Barbados, there was a fatal non-compliance with statute that invalidated the deregistration of the company which should now be set aside.
37. The Registrar accepts, as do I, Mrs. Warnock-Smith’s submission that the legislature did not intend that a company seeking to continue in another jurisdiction be deregistered in Cayman unless and until the laws of the jurisdiction of the intended redomicile had been complied with and the company had been registered by continuation registration continued in that jurisdiction.
38. No criticism can be made of the Registrar for the position that Cradle now finds itself in as the statutory requirements for the exercise of her power to deregister Cradle had been met in that the director’s declaration was compliant with section 206 (2). The statute provides in mandatory terms that the Registrar shall deregister a company where a declaration is made that the laws of the relevant jurisdiction have been or *will be* complied with.
39. Through a series of missteps on the part of Cradle and the Service Providers, the director’s declaration was in fact wrong, as at the time it was made, Cradle had not and - as it would transpire - could not comply with the provisions for continuation in Barbados.
40. Unfortunately, section 206 (2), as presently drafted, allows for such a situation to arise as it does not provide - nor does any other part - that the Registrar be satisfied that the Company *has been continued* in the new jurisdiction before deregistering the company here.
41. That the intention of the legislature is that the deregistration be contingent on the registration by continuation in the relevant jurisdiction may be inferred from the wording of section 207(3) which provides “*from the commencement of the date of de-registration the applicant shall cease to be a company for all purposes under this Act and shall continue as a company under the laws of the*

relevant jurisdiction” and of section 209 which requires the Registrar to gazette a notice of deregistration *and* the place where the company *has been* registered by way of continuation. It is implicit that the Registrar must be satisfied, before the certificate of deregistration is issued, that the company is continuing in the relevant jurisdiction.

42. I was satisfied that, as matter of construction, the proper working of the legislation that permits a company to change its place of incorporation requires that the company can be registered as continuing in the relevant jurisdiction before it is deregistered here.
43. Although there is nothing in Part XII which sets out a route to restore a company which has been deregistered if it cannot continue in the relevant jurisdiction, I accepted the submission that the principle to be extracted from *In re Real Estate and Finance Fund*, described by Kawaley J as being of general application, could be relied on to assist Cradle which would otherwise remain in limbo. That principle is that where a statute requires something to be done, relief may be granted on the basis that the statute contains an implied power to set aside the relevant decision or proceeding on grounds of substantial non-compliance.
44. I accepted that a necessary condition for the deregistration of the company was not satisfied and concluded that it was a proper exercise of the Court’s power to set aside the deregistration given that a mandatory statutory requirement was not met. I granted the relief sought by the Executors and ordered that the Registrar restore the Cradle to the Register of Companies.
45. The lack of clarity in the legislation that allowed Cradle to become ‘homeless’ might be addressed by an amendment to the Act to require that a notice of continuation in the relevant jurisdiction be filed with the Registrar by the company’s registered agent before the Registrar issues a certificate of deregistration. It is difficult otherwise to see how the Registrar could give the requisite section 209 notice on the basis of a declaration that the laws of the relevant jurisdiction *will be complied with* as provided for in section 206(2)(1). An express provision in the law that a company does not cease to be a Cayman Islands company until it has been continued in its new domicile¹ would also provide for the situation that Cradle found itself in.

¹ See for example section 184 (2) of the BVI **Business Companies Act 2004**
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46. In the absence of any change to the existing legislation, it would still be open to the Registrar to make the issuing of a certificate of deregistration conditional on receipt of evidence that the company has successfully migrated, such as a certificate of continuation from the jurisdiction outside the Cayman Islands.
47. Mrs. Warnock-Smith made other attractive submissions on the alternate bases on which the de-registration of a company could be set aside to which it is unnecessary to refer, as the basis on which the Company could be restored had been agreed and the Registrar did not address the question of relief being available on other grounds.

Dated this 4 September 2023

A handwritten signature in blue ink, appearing to read "Anee CS".

Hon. Justice Margaret Ramsay-Hale
Chief Justice