The Court of Appeal for Bermuda

CIVIL APPEAL No. 3 of 2017

Between:

BERMUDA BAR COUNCIL

Appellant

-and-

WALKERS (BERMUDA) LIMITED

Respondent

Before: **Baker, President**
Bell, JA
Clarke, JA

Appearances: Lord David Pannick QC of counsel and Mr Delroy Duncan, Trott & Duncan Limited, for the Appellant
Mr Michael Todd QC of counsel and Mr Kevin Taylor, Taylors, for the Respondent

Date of Hearing: **23 March 2017**

Date of Judgment: **12 May 2017**

JUDGMENT

Issue of Certificate of Recognition by Bar Council – section 114 of Companies of Companies Act 1981 – Control of Law Firm by Bermudians – whether test corporate control or commercial control

Clarke, JA

Background

1. The question in this appeal is whether the Chief Justice was right to order the Bermuda Bar Council to grant and issue a Certificate of Recognition to Walkers (Bermuda) Limited pursuant to section 16 C (2) of the *Bermuda Bar Act 1974*

("the 1974 Act"). The central issue in this case is of fundamental importance in relation to the provision of legal services in Bermuda.

The Background Facts.

2. Walkers (Bermuda) Limited ("Walkers Bermuda") was incorporated as a local company on 16 October 2015 under the *Companies Act 1981* ("the 1981 Act"). Its sole director, then and now, is Mr Kevin Taylor, who has Bermudian status. Of the 100 issued and outstanding shares 99 were owned by Mr Taylor and one by his wife, Ms Rachael Barritt. Both Mr Taylor and Ms Barritt hold valid practising certificates issued under section 10 of the 1974 Act. On 22 November 2016 Ms Barritt transferred her share in the company to Mr Jonathan Betts, a member of the Bermuda Bar who holds a permanent residency certificate.

3. Walkers Global is a global law firm with offices in the British Virgin Islands, Dubai, Dublin, Guernsey, London, Hong Kong, Jersey and Singapore. It has no Bermudian ownership. Walkers Bermuda/Mr Taylor entered into negotiations with Walkers Global to establish a relationship. The present position is that commercial terms have been agreed, but not signed, in the form of a draft Licensing and Services Agreement and a draft Loan Agreement. These will be executed only if the Bar Council issues a Certificate, as it is currently required to do.

4. Detailed correspondence was exchanged between Walkers Bermuda and the Bar Council. The upshot was that on 10 June 2016 the Bar Council refused to grant a Certificate. It stated that it

> "*considers that upon entering into the proposed commercial arrangements with Walkers Global, the [Applicant] will not comply with the provisions of section 114 of the Companies Act 1981".*

5. The Bar Council's letter stated

   (i) that Walkers Bermuda would be dependent on Walkers Global in financial and organisational terms so that *"The reality of the proposed arrangement will be that the Company will be so beholden to Walkers Global that the latter is effectively in control*";

   (ii) for Walkers Bermuda to operate in Bermuda without a licence would be a criminal offence contrary to the 1981 Act; and

   (iii) therefore, on public policy grounds, the Bar Council had decided not to issue a Certificate.

The Bar Council Act 1974

6. Section 16 C (2) of the 1974 Act states that a Certificate shall be granted if the company meets the conditions set out in section 16 B.

7. Section 16 B (1) states, so far as material:

   "A professional company shall meet all of the following conditions -

   ...

   (c) all of the issued and outstanding shares of the company must be legally and beneficially owned, directly or indirectly, by one or more individuals, each of whom is a barrister who holds a valid practising certificate issued under section 10;

   (d) ...all of the directors of the company must be barristers, each of whom holds a valid practising certificate issued under section 10;"

8. Section 10 states that a practising certificate may only be granted to a person with Bermudian status, or a person who has a valid work permit or has spouse employment rights.

The Companies Act 1981

9. Section 114(1) of the 1981 Act states that no local company shall carry on business in Bermuda unless it complies with Part I of the Third Schedule to the Act, or it is mentioned in Part II of that Schedule (not here relevant), or it is licensed by the Minister under section 114 B, or other exceptions apply, none of which are here relevant. Section 114 (2) provides that it is a criminal offence, punishable by a fine, for a local company to carry on business in contravention of section 114 (1).

10. Paragraph 1(1) of the Third Schedule states that the first requirement of a local company carrying on business in Bermuda is:

"*The company shall be controlled by Bermudians*".

11. If that is not the case, the Company needs to apply to the Minister for a licence under section 114 B. The Minister has a discretion whether to grant such a licence. Section 114 B (3) sets out the public interest factors to which he must have regard:

> *"(a) the economic situation in Bermuda and the protection of persons already engaged in business in Bermuda;*
>
> *(b) the nature and previous conduct of the company and the persons having an interest in the company whether as directors, shareholders or otherwise;*
>
> *(c) any advantage or disadvantage which may result from the company carrying on business in Bermuda; and*

(d) the desirability of retaining in the control of Bermudians the economic resources of Bermuda".

12. The Bar Council has no express power to refuse a certificate of recognition on the basis that section 114 (1) of the 1981 Act does not apply and no licence has been obtained from the Minister. But it is common ground that the Bar Council could refuse to grant a certificate if that was the case. It would be entitled to do so for public policy reasons because, if Walkers Bermuda was not controlled by Bermudians and had no licence from the Minister, it would be committing a criminal offence.

The Licensing and Services Agreement ("LSA")

13. The parties to the draft LSA were Walkers Global, Walkers Bermuda and Mr Taylor. The material provisions are as follows:

(1) By Clause 2.1, in consideration of the Licence Fee and the other covenants and undertakings of the Respondent, Walkers Global grants to the Respondent

"*a personal, world-wide, royalty-free, non-transferable, sole and exclusive right and licence to use the Walkers Brand strictly and solely for the purpose of the Bermuda Business, subject to the terms and conditions of this Agreement."*

The Licence Fee is defined in Clause 1.1 to be US $125,000 a Quarter, "*or such other amount as may be mutually agreed*" between Walkers Global and Walkers Bermuda, "*in writing from time to time".*

(2) Clause 3.1 states:

"[Walkers Bermuda and Mr Taylor] each acknowledge, confirm and agree that the Walkers brand is owned solely and exclusively by [Walkers Global]. [Walkers Bermuda and Mr Taylor] further acknowledge, confirm and agree that, except as expressly set out in this Agreement, neither [Walkers Bermuda nor Mr Taylor] has any right, title or interest in or to any part of the Walkers Brand. [Walkers Bermuda] agrees not to assert any claim to any goodwill, reputation, ownership, or other right or interest in any of the Walkers Brand by virtue of [Walkers Bermuda's] use of the Walkers brand, except as expressly granted by this Agreement. Any additional good will generated by [Walkers Bermuda] for the Walkers brand shall be the sole property of [Walkers Global]. ...".

(3) By Clause 4.1, Walkers Global agrees to procure the provision of the Services (as defined in Schedule 1) to Walkers Bermuda. These services were divided into 7 categories:

1. Operational Management;
2. Compliance;
3. Finance Support;
4. Human Resources;
5. Information Technology, Training and Project Management Office;
6. Marketing; and
7. Additional Services.

The Services included under **Operational Management** were:

"(a) Office business plan co-ordination to assist with WBL's preparation, delivery and implementation of a business strategy for WBL for the purpose of developing, marketing and promoting the Bermuda Business to clients of the Walkers Group and WBL and to prospective new clients of WBL throughout the world" and

"(*c) office policy and process documentation and implementation*".

Under the **Compliance** heading provision was made for very extensive compliance services enumerated in 17 sub-paragraphs.

Under **Finance Support** the services included treasury management, transaction processing, the maintenance and adherence to global accounting policies and procedures and the development and maintenance of new global accounting information systems, the preparation and filing of financial accounts, audit support, the establishment of banking relationships and the preparation of financial budgets and projections for each financial year.

Under **Human Resources** the services included "*operational and strategic support to WBL on recruitment management evaluation and reward of staff*", the setting of best practices and management of employee benefits, salary and bonus review process and the management of professional development and training function globally. It extended to responsibility for annual evaluation process for staff.

Under **Information Technology** there was included a very wide range of services enumerated under six headings.

Under **Marketing** the services extended to responsibility for business development including "*driving revenue growth, developing and expanding client relationships, managing reputation*" and the "*preparation, delivery and implementation (in conjunction with WBL) of business development, Walkers Brand awareness and marketing plans, including the provision of the services of professionally qualified and experienced marketing personnel of Walkers Group to assist with the implementation of a marketing strategy for WBL*

(4) Clause 4.1(b) states that these services

> "*shall be strictly collaborative, consultative and advisory in nature, and are not intended to be (nor shall such Services be constituted to be) directions, orders, mandatory directives, or other compulsory governance requirements".*

Walkers Bermuda is required to pay a Services Fee each Quarter, the amount of which is to be determined by the application of the formula set out in Schedule 2, being an allocation on the basis set out in paragraph 2 thereof of a share of the total costs in respect of all the affiliated firms to which similar services are provided, plus a mark-up of 6%. Walkers Bermuda is entitled to refuse the provision of any of the services provided that it does not seek such provision from another law firm.

(5) Clause 6.3. provides that Walkers Bermuda "*shall be solely responsible to its clients and other third parties for the performance*

of [Walkers Bermuda]'s obligations of any nature to them". Clause 6.4 states:

> "*For the avoidance of doubt, it shall be the sole decision of WBL whether to make any business decision pursuant to any advice provided by Walkers Global or its Affiliated Firms*".

(6) Clause 20.6 states that Walkers Bermuda:

> "*must not engage in any activity or practice that may be reasonably anticipated to harm the goodwill and reputation of the Walkers Group or the Bermuda Business*".

(7) Clause 20.9 states that Walkers Bermuda

> "*shall not conduct the Bermuda Business or use the Walkers Brand in any way that may adversely affect the goodwill or reputation of WBL, the Walkers Group or the Walkers Brand."*

(8) Clause 20.11 states that Walkers Bermuda shall ensure that all of its employees

> *"conduct themselves so as not to discredit or adversely affect the goodwill or reputation of the Walkers Group or the Walkers Brand".*

(9) Walkers Global has a power under Clause 22.2 to terminate the agreement if the Respondent is in material or persistent breach

of the LSA or the Loan Agreement, and fails to remedy the breach within 30 days of a notice requiring it to do so.

The Loan Agreement

14. Under the draft Loan Agreement Walkers Global ("the Lender") is willing to advance loans of up to US $ 5 million (or such greater amount as the Lender shall from time to time agree) to Walkers Bermuda ("the Borrower") "*for the purpose of establishing and operating the Bermuda Business*": clause 2.1. By clause 4.1 the interest payable is the interest rate defined in clause 1.1. which is the higher of LIBOR plus 1.75% per annum and the rate at which Walkers Global can borrow funds equal to the outstanding loan. By clause 4.2:

> "*Repayment of the Loan is to be made in such amount or amounts and at such times as the Lender shall specify to the Borrower provided that the Lender may not specify an amount for repayment which would cause the Borrower to become unable to pay its debts when they fall due*".

By clause 5.1 Walkers Bermuda is to grant a security interest over all its present and after-acquired assets and personal property, including receivables, to secure repayment of the Loan. Failure to pay the Obligations, as defined, constitutes an Event of Default. If the default is not remedied within 14 days Walkers Global can declare the loan and interest due and payable: clause 8.

The Companies Act 1981 Third Schedule

15. The Third Schedule of the 1981 Act provides as follows:

> ***"PROVISIONS TO BE COMPLIED WITH BY A LOCAL COMPANY CARRYING ON BUSINESS IN BERMUDA"***

1. (1) The company shall be controlled by Bermudians.

(2) Without prejudice to the generality of sub-paragraph (1), at least sixty per centum of the total voting rights in the company shall be exercisable by Bermudians.

2. (1)The percentage of Bermudian directors, and the percentage of shares beneficially owned by Bermudians, in the company shall not be less than sixty per centum in each case:

Provided that the company shall not be deemed to be in breach of this paragraph in so far as, and so long as, it is acting in accordance with sub-paragraph (2).

(2) The company shall act in accordance with this subparagraph if the percentage of shares beneficially owned by Bermudians in it falls below sixty per centum by virtue of factors which are beyond its control and it gives notice in writing to the person who is not Bermudian and whose ownership of shares results in the percentage so falling, as soon as the directors become aware of that fact, that - (a) he must divest himself of his interest in those shares as soon as may be and, in any event, not later than three years from the date upon which he receives the notice; and (b) he must not exercise any voting rights attaching to such shares from the date upon which he receives the notice, and the three years calculated in accordance with paragraph (a) have not elapsed: Provided that the Minister may in any particular case, for good cause, extend the period of three years for a further period not exceeding one year.

(3) For the purposes of sub-paragraph (2), the directors of a company shall be deemed to become aware that the percentage of shares beneficially owned by Bermudians in their company is less than the percentage specified in sub-paragraph (1) three days after the day upon which any director of a company would, if acting with due diligence, have become aware of that fact."

The central issue

16. The central issue in this case is what the 1981 Act means when it requires a company to be controlled by Bermudians. In essence the Chief Justice has found that what the statute is concerned with is what was described in argument and in the judgment [28] as "corporate control" whereby the controller, by one means or another, has control of what is (or is not) resolved by the company in general meeting, or has control of the board of directors, or both – as opposed to what was described as "commercial control" namely the ability to control the business affairs or activities of the company and how it operates by reason of the commercial relationship between the company and the putative controller.

Bermuda Cablevision

17. The provisions of the Act were considered by the Privy Council in *Bermuda Cablevision Limited and Others v Colica Trust* [1998] AC 198. In that case Bermuda Cablevision Ltd ("Cablevision"), a Bermudian company, had been granted by the government a licence to construct, install and operate a cable television system for Bermuda. Mr Wilson, who was the majority shareholder failed to raise the necessary finance. He then met the McDonald brothers ("the McDonalds"). They negotiated a preliminary agreement. The McDonalds' company ("MGI") undertook to provide the funding for the construction of a cable television system in Bermuda; and to undertake the construction and operation of the system. In return it was to receive 60% of the equity of the cable TV system in Bermuda.

18. Thereafter contracts were drawn up. Cablevision entered into:

(i) a Development Agreement with MGI pursuant to which MGI undertook to procure a construction agreement with an appropriate contractor for the construction of the cable television network, and to use its best endeavours to procure appropriate bank finance;

(ii) a Consulting Agreement with the McDonalds' Cayman Islands company Atlantic Communications Ltd ("Atlantic") for the provision of consulting services to Cablevision and for Atlantic to receive a consulting fee equal to 60% of the profits of Cablevision, which agreement was to be terminable only with the consent of both parties.

19. The byelaws of Cablevision were altered to protect the proposed investment of the McDonalds. As a result:

(i) the McDonalds acquired only a minority shareholding in Cablevision, amounting to some 33.55% of its issued share capital;

(ii) however, a comprehensive list of significant matters could only be decided by a special resolution at a general meeting of Cablevision, the passing of which was, therefore, dependent on the assent of the McDonalds;

(iii) the McDonalds were entitled to appoint 3 out of 6 directors, including the vice president and assistant secretary;

(iv) the vice president, or failing him, the assistant secretary was to chair meetings of the board, and thereby had a casting vote. Thus the McDonalds could control the board.

20. One of the questions was whether Bermuda Cablevision was controlled by MGI, Atlantic and William McDonald, who were the 2nd to 4th respondents. The argument for Cablevision was that it was not so controlled since those three persons controlled less than 50% of the votes capable of being cast at general meetings of the company. During the course of argument Lord Browne-Wilkinson indicated to Counsel for the 2nd to 4th respondents that the Board did not require detailed submission from Counsel on the control issue.

21. Lord Steyn delivered the Opinion of their Board. What he said included the following:

> *"The control issue.*
>
> *The question is whether the arrangements put in place to protect the investment made by the McDonald interests have had the result that the company has been carrying on business in breach of paragraph 1(1) of Part I of the Third Schedule which requires that the company "shall be controlled by Bermudians". Counsel for the appellants submitted that the authorities establish that the natural meaning to be given to the word "controlled" in paragraph 1(1) is control by virtue of a simple majority of the votes entitled to be cast at general meetings of the company. For this proposition counsel cited several tax cases which included three decisions of the House of Lords, namely British American Tobacco Company Limited v. Inland Revenue Commissioners [1943] A.C. 335; Inland Revenue Commissioners v. J. Bibby & Sons Limited [1945] 1 All ER 667; and Barclays Bank Limited v. Inland Revenue Commissioners [1961] A.C. 509. The decisions cited do not assist. Indeed a study of the reasoning in those decisions*

shows that expressions such as "control" and "controlling interest" take their colour from the context in which they appear. There is ***no general rule as to what the word "controlled" means.*** *Contrary to the submissions of counsel for the appellants, the expression "controlled by Bermudians" in paragraph 1(1) is not a term of art****. The expression must be given the meaning which the context requires. Paragraph 1(1) is the general provision and paragraph 1(2) is a specific provision i****ntroduced by the words "Without prejudice to the generality of sub-paragraph (1)".* ***Nothing in Part I of the Third Schedule warrants a restrictive interpretation of paragraph 1(1) to limit its scope to control by means of a vote at general meetings.*** *Indeed paragraph 2(1), so far as it requires the percentage of Bermudian directors not to be less than 60%, shows that the legislature did not proceed on the myopic footing that control can be exercised only through a vote at general meetings. That the legislature was alive to the fact that businessmen might by "arrangement, artifice or device" create the appearance of compliance with the legislation is made clear elsewhere: see section 113(2). This was the context in which the legislature adopted* ***the broad general statutory requirement of control by Bermudians****. The* ***generality of the meaning of control*** *in such a context is illustrated by the famous decision of the House of Lords in Daimler Co. Ltd. v. Continental Tyre and Rubber Company (Great Britain) Limited [1916] 2 A.C. 307. Lord Parker of Waddington observed (at page 340):*

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> *"... I think that the analogy is to be found in control, an idea which, if not very familiar in law, is of capital importance and is very well understood in commerce and finance. The acts of a company's organs, its directors, managers, secretary, and so forth, functioning within the scope of their authority, are the company's acts and may invest it*

definitively with enemy character. It seems to me that similarly the character of those who can make and unmake those officers, dictate their conduct mediately or immediately, prescribe their duties and call them to account, may also be material in a question of the enemy character of the company. If not definite and conclusive, it must at least be prima facie relevant, as raising a presumption that those who are purporting to act in the name of the company are, in fact, under the control of those whom it is their interest to satisfy."

While those observations dealing with an issue of trading with the enemy cannot be treated as definitive in the present case they are illustrative of ***a possible wide general meaning of the concept of control in the context of companies.*** *And their Lordships are satisfied that there is* ***nothing in the present contextual scene which justifies any restriction on the natural width of the expression "controlled by Bermudians****". Indeed, if one has regard to the purpose of the legislation this conclusion is reinforced. The purpose of the requirement is plainly to ensure that Bermudian resources remain Bermudian. And it must have been intended to make an effective provision to this end. Giving the words in paragraph 1(1) their ordinary meaning achieves this legislative purpose.*

Once the appellants' restrictive interpretation is rejected, as their Lordships do, it is perfectly plain that the McDonald interests controlled Cablevision by the scheme constituted by the amended Bye-laws and the Consulting Agreement. They controlled the board of directors through a casting vote and they controlled general meetings through the special resolution procedure. And they entrenched their entitlement to receive 60% of the profits of Cablevision by the provision that the Consulting Agreement cannot

be terminated without their consent. In every relevant sense the McDonald interests had and have control of Cablevision. The consequence of this holding must necessarily be that Cablevision has carried on business contrary to the provisions of section 114 of the Companies Act 1981, and unlawfully, since 1987."

[Bold added]

22. In paragraphs 29-30 of his judgment the Chief Justice considered the pre-1981 legislative approach to local business being carried out by foreign companies, and, in particular, the introduction by the Companies Act 1923 of the provision that persons other than British subjects could not be allotted more than two-fifths of the total number of existing shares issued by a Bermudian company ("the 60/40 rule"). He then turned to consider the Companies Act 1981 and different company categories. The conclusion which he reached was in paragraph 43, which I set out below together with the last sentence of paragraph 42:

"42 ……. *So in Bermuda Cablevision, the finding that the company was not "controlled by Bermudians" by reference to both voting control and economic benefit was made in a statutory context in which both voting control and real beneficial (or economic) ownership were explicitly the overlapping key statutory criteria.*

<u>Summary: the meaning of "controlled" by Bermudians</u>

43 In my judgment the breadth of the concept of 'control' articulated by the Privy Council does not extend beyond the parameters of the statutory context in which the term is found, parameters which are crucially elucidated by the factual context in which the Bermuda Cablevision case itself was decided. That context is concerned with ensuring that the 60% voting and beneficial ownership rights attached to a local company's shares are in

> *substance, and not just in form, exercised by and for the benefit of Bermudians. It is noteworthy that the only judicial authority cited by the Privy Council on the meaning of 'control; was [the] House of Lords decision concerned with piercing the corporate veil in order to encore wartime prohibitions on trading with the enemy."*

At paragraph 46 he said that the term "*controlled by Bermudians":*

> *"speaks to the ability to exercise the sort of power and/or to receive the sort of economic benefits equivalent to holding more than 40% of a local company's shares"*

At paragraph 47 he observed that:

> "*Construing section 114 in its statutory context and against the longstanding history of the 60/40 rule in Bermudian legal history, there is no convincing support for concluding that Parliament intended by necessary implication to prohibit commercial influence and potential corporate control in addition to the far clearer prohibition on concrete arrangements designed to circumvent the express provisions of the statute governing beneficial ownership and corporate control*"

23. In my view this is, with respect, a misreading of the 1981 Act and of what Lord Steyn was saying. When Lord Steyn indicated that the expression "*controlled by Bermudians*" must be given the meaning which the context requires he was not saying that the expression must be interpreted so as to be limited to circumstances where there is control of the general meeting or the Board. He had, by then, already rejected the submission that the meaning of "*controlled*" was control by a simple majority of the votes entitled to be cast at a general

meeting of the company. He went on to reject the submission that the expression "*controlled by Bermudians*" was to be treated as a term of art. On the contrary he plainly regarded paragraph 1 (1) as the "*general provision*" in contrast to the "*specific provisions*" in 1 (2) and 2 and that that general provision was untouched by sub-paragraph 1 (2) by virtue of the words "*Without prejudice to the generality of sub-paragraph (1)"* therein. That he regarded 1 (1) as entirely general and unrestricted by what appears in 1 (2) or 2 (1) is apparent from:

(a) his statement that "*Nothing in Part 1 of the Third Schedule"* warranted a restrictive interpretation of paragraph 1 (1) so as to limit its scope to control by means of a vote at general meeting;

(b) his subsequent references to:

(i) "*the broad general statutory requirement of control by Bermudians*", and "*the generality of the meaning of control in such a context*"; and

(ii) the fact that there was nothing which justified any restriction on the natural width of the expression "*controlled by Bermudians*.

It is impossible, therefore, to regard "*controlled by Bermudians*" as limited to control by either the possession or control of a simple majority of the votes at a general meeting or control of the Board.

24. In those circumstances the first two sentences of paragraph 43 of the judgment of the Chief Justice ("*the breadth of the concept of 'control' does not extend beyond the parameters of the statutory context, [which] is concerned with ensuring that the 60% voting and beneficial ownership rights attached to a local company's shares*

are in substance, and not just in form exercised by and for the benefit of Bermudians") are, in my view, the opposite of what the Board decided. What it decided was that the words in 1 (1) were entirely general and that that generality was unaffected by the specific illustrations contained in paragraphs 1 (2) and 2. In paragraph 39 of his judgment the Chief Justice observed that "*It is noteworthy that the generality of the "control" requirements of paragraph 1 (1) are linked with the express voting rights provisions found in paragraph 1 (2)".* Such a restrictive link was, however, exactly what Lord Steyn disavowed. The construction adopted by the Chief Justice, which would appear to make the fact of commercial control irrelevant in all circumstances, is inconsistent with the principles laid down by the Board, and amounted to a restrictive interpretation, not warranted by the language of the statute or of the Board, and one which would be capable of defeating the policy of "Bermudian resources remaining Bermudian".

Walkers Bermuda's submissions

25. Mr Michael Todd QC, for Walkers Bermuda submitted that in general terms, under company law, "control" meant the ability to cast or have cast 50% of the votes at a general meeting. That was the criterion for deciding whether one company was a subsidiary of another. Thus, under section 81 (4) of the 1981 Act a company is controlled by another company or person only if shares in the controlled company carrying more than 50% of the votes for the election of directors are held, otherwise than by way of security only, by or for the benefit of the controlling company or person and the votes carried by such shares are sufficient, if exercised, to elect a majority of the board of directors of the controlled company. For a person to exercise control he may either, Mr Todd submits, be the registered owner, or the beneficial owner entitled to direct the registered owner as to how he shall vote, or be an obligee under a contract under which the obligor is bound to vote at his direction. Section 1 (2) of the Third Schedule introduces a further requirement that at least 60% of the total voting rights in the company shall be exercisable by Bermudians; and section 2 (1) a

further requirement that the percentage of Bermudian directors and of shares beneficially owned by Bermudians shall be not less than 60%.

26. Mr Todd took us through the development of company law in this jurisdiction in relation to the nationality of share owners embodied in the 60/40 rule. He began with the *Companies Act 1923* section 20 (1) of which precluded any allotment of shares in a local company if such allotment would result in the number of shares held by persons other than British subjects exceeding 2/5th of the total number of shares issued. A similar provision now appears in section 118 (1) of the 1981 Act but by reference to Bermudians instead of British subjects. The addition, by the *Companies Amendment Act, 1965* of a new sub-section (9) to section 13 of the Companies Act 1923 underscored the rule.

27. The *Companies Act 1969* introduced, he submitted, the concept of "control" by providing in section 1 (4) that a company should be deemed to be "*a wholly owned subsidiary of another company if the latter company enjoys the beneficial interest in all the shares of the former company through beneficial ownership or as beneficiary under a trust, express or implied, or through a nominee shareholder, to the exclusion of any other person, and* ***control*** *in the former company cannot, by means of any arrangements, artifice or device, be exercised either directly or indirectly by person who are not Bermudians*". This provision now appears in section 113(2) of the 1981 Act. Section 2 (1) of the 1969 Act contained provisions as to when a share should not be deemed to be beneficially owned by a Bermudian. Section 2 (2) provided that "*a company shall be deemed to be Bermudian controlled if the Member is satisfied that* ***effective control*** *is not, either directly or indirectly, or by reason of any arranging, artifice or device vested in, or permitted to pass to, persons who are not Bermudians*". The phrase "effective control" appears again in section 2 (4) (c).

28. However, the Legislature has not chosen to use the term "effective control" in the 1981 Act save in section 115 (3) which deals with hotel companies. Section 1 (4)

of the 1969 Act was replicated in section 113 (2). Section 2 (2) and (4) were not replicated anywhere, although section 113 (2) contains similar provisions (but without the reference to "effective" control).

29. The tenor of Mr Todd's submission was that section 1 (1) of the Third Schedule, which does not use the words "effective control", is only consistent with control in the company law sense. The wider notion of "effective control" was jettisoned and the Third Schedule was intended to cover the field of voting rights, share ownership and directorships, i.e. company law considerations with which the Companies Act legislation is intrinsically concerned. The Schedule is not concerned with arrangements made with someone who is not a shareholder or director as to how the company shall be run (unless perhaps that person is to be treated as a de facto director).

30. I cannot accept this submission for two reasons. First, the difference between "control" and "effective control" is almost imperceptible. The draftsman could well have thought that "control" was sufficient in itself. Second, whatever might have been the position before *Cablevision* it is, in the light of that decision, clear that a narrow view is <u>not</u> to be taken of paragraph 1 of the Third Schedule. Provisions of the 1923 and 1969 Companies Acts were referred to in argument: see page 202 B-C. Mr Todd's submission appears to me to be something of a re-run of the argument that failed in that case. Mr Todd observed that reliance was not placed in Lord Steyn's opinion on the development agreement in that case, nor the large loans made or procured by MGI or that MGI could be said to have operated the business by procuring the necessary construction. Given that the matters referred to in his Opinion established an overwhelming case of control by MGI, this is not particularly surprising; and cannot, in any event, affect the principles laid down.

31. At paragraph 46 of his judgment the Chief Justice said:

> "*Once one arrives at the finding that the term "controlled by Bermudians" speaks to the ability to exercise the sort of power and/ or to receive the sort of economic benefits equivalent to holding more that 40% of a company's shares, [the Bar Council]'s case becomes very doubtful indeed*".

I agree. But that finding was, in my view, erroneous as was the Chief Justice's rejection of Lord Pannick's primary argument that section 114 prohibited all forms of control, including what amounted to commercial control.

Would section 114 be infringed?

32. In the later paragraphs of his judgment the Chief Justice found that section 114 is not infringed merely because a local company is commercially dependent on a foreign loan [48]; nor merely because, in addition to the loan, the local company is dependent on foreign services: (ibid). He also held that where the local company under consideration is 99% owned by a Bermudian and is seeking to operate as a profession company in a regulated profession "*the genuineness of the company's constitutional documents cannot be effectively impeached by reference to admittedly injudicious "marketing hype" from the foreign brand owner, especially since those pronouncements were made before [Walkers Bermuda] was even incorporated*". That was a reference to the material to which I refer in the following paragraph. It was, he said, impossible to believe that a global law firm would announce an intention to flout Bermudian law to the world. He held that the combination of all those factors, properly analysed did not engage section 114 seriously or at all unless one viewed the statutory scheme as prohibiting by necessary implication all such licensing or franchise agreements.

Marketing hype

33. The material to which the Chief Justice referred under this label consisted of three press releases which were exhibited to the affidavit of 16 December 2016 of

Mr Horseman, the then President of the Bar Council. In a Press Release of 21 May 2015 Walkers announced that "*it will … be expanding its global legal footprint to Bermuda where* ***it plans to open an office****, becoming the first major international offshore firm to enter that market as a new entrant*". Details were given of the full-service operation which Walkers would offer its clients in Bermuda. A quote from Walker's Global Managing Partner said that "*As with our other global offices, we intend to become a major force in the legal services industry in Bermuda and to grow and develop talent in that jurisdiction"*. No reference was made to any Bermudian corporation.

34. An article in the Big Law Business Report of 28 May 2015 entitled "*Walkers expands into Bermuda, Professional Services"* also referred to Walkers announcement of its intention to open an office in Bermuda. The article set out what was said to be part of a transcript between a journalist and Mr John Rogers, said to be Walkers Global's managing partner, as well as managing partner of the Singapore office, which included the following:

> "*Big Law Business: Walkers describes itself as the first major international firm to enter Bermuda. What are your plans there?*
>
> *Rogers It's fairly early days in terms of the physical location.* ***We have secured a local Bermuda lawyer and we hope we will be open by the end of the year****. We certainly intend to recruit locally and we've had discussion with lawyers in Bermuda. It's an ongoing process to get to the opening date. We have deliberately decided to go with a greenfield process – we're not merging with anyone. Our Irish project was a very similar approach"*

35. On 21 May 2015 the Royal Gazette carried a report under the headline "*Global firm to set up Bermuda office*" which cited Ms Ingrid Pierce, said to be Walkers managing partner, as saying that Walkers intended to open an office in Bermuda.

36. The Appellants draw attention to the fact that Mr Taylor has not addressed the substance of what Walkers said in these press releases; nor has any evidence been produced from Walkers Global. Mr Todd submits that the Chief Justice was right to regard this material, published 5 months before Walkers Bermuda was incorporated, as marketing hype, for which Mr Taylor was not responsible and which it could not be said that he had approved, and to proceed, as he did, from the starting assumption that a regulated professional such as Mr Taylor intended to obey the law. There was no evidence that the proposed contractual relationship did not fairly set out the true relationship between the parties.

37. The Chief Justice described Lord Pannick's most beguiling argument to be that the essence of Walker's Bermuda's business was the goodwill of the Walkers brand; and that that under the proposed arrangements that goodwill would always be owned by Walkers Global. When the arrangement came to an end Walkers Global would take the local company's key asset away with it. In effect the true beneficial owner of Walkers Bermuda would always be Walkers Global. This was inconsistent with the principal object of the scheme, namely to ensure that Bermudian resources remained Bermudian. For his part, Mr Todd submitted that this analysis was flawed in part because the local lawyers would generate goodwill independent of the license brand name and in part because Walkers Bermuda would own the right to use the brand name in Bermuda.

38. The Chief Justice did not regard these "*rhetorical*" arguments as affecting the pertinent legal analysis. He found that the focus of Part IX of the 1981 Act is "*not on business forms but ensuring that companies which purport to be Bermudian owned and controlled in compliance with the '60/40' rule were in substance and reality conducted on a lawful basis".* The Bermudian resources which section 114 sought to protect were the ability to conduct business and generate profits in Bermuda and the form of statutory protection which Parliament had provided was to provide that only local companies could do business in Bermuda without

a permit and that to qualify they must in substance and in form be at least 50% owned and controlled by Bermudians [51]. He found that the Appellant's proposed operating arrangement as a professional company under the 1974 Act left no doubt that the company "*will be in the requisite statutory 'real world' sense owned and controlled by Bermudians*".

39. In paragraph 52 the Chief Justice found that section 114 prohibited Bermudian beneficial shareholders with a stake of 60% or more proposing to operate in Bermuda without a permit from entering into arrangements which diluted the voting power and economic interest which would ordinarily attach to their stake in the company. Based on the specific facts of the present case he found that the statute did not prohibit a Bermudian shareholder who undoubtedly had the legal right to control the company and obtain a commensurate share of its profits from pursuing the business model contemplated by the Appellant which "*merely [sic] makes the company commercially "beholden" to a key foreign supplier of product/ brand or intellectual property rights, logistical support analysis and/or financial support.*" The formal arrangement could turn out to be sham at worst or sailing too close to the wind at best but that was a matter of speculation and the starting assumption could only be that the parties intended to comply with rather than evade the law.

40. I take the Chief Justice to be finding that control or pressure from a third party which did not amount to depriving the 60% shareholder of his voting power in general meeting would not amount to a breach of the section. It is not clear to me whether, on the assumption that his analysis of the legal issue was incorrect, he was intending to find that the proposed arrangement did not involve any loss of control. His use of the word beholden ("*in duty bound to do something*": see the shorter OED), which reflects the language used by the Bar Council in refusing a certificate ("*will be so beholden to Walkers Global that the latter is effectively in control*"), suggests the contrary.

Conclusions

41. As I have already indicated, I accept:

(a) that "control" in paragraph 1 (1) of the Third Schedule is not limited in the way that the Chief Justice held;

(b) that a company owned and directed by Bermudians may be controlled (directly or indirectly) by non-Bermudians as a result or because of the commercial arrangements which that company has with another party; and

(c) that the court is concerned with the substance and reality of the matter and will be astute to examine any "arrangement, artifice or device", in order to discern the real as opposed to the apparent position.

42. In the light of (a) above it is necessary for this court to re-examine the position by applying the correct test. That exercise begs the question as to (i) the incidence of the burden of proof and (ii) the nature of any appellate review.

43. As to (i) it must be for the applicant for a certificate to establish – on the balance of probabilities - that it is entitled to one. In a case such as the present that will involve establishing that the applicant company will be controlled by Bermudians. As to (ii) the Bar Council has, in effect, reached a conclusion of fact. Section 13 of the 1974 Act confers a right of appeal, upon the hearing of which the Supreme Court may make such order as it thinks just: 13 (2). We were not addressed on the approach that the Supreme Court, or this Court, should adopt. But, on normal principles, the appellate court needs, as it seems to me, to be satisfied that the Bar Council has gone wrong in some way and that, absent the error, it ought to have been satisfied that a licence should be granted. In the

absence of some error I would not regard the Supreme Court as entitled simply to substitute its own decision.

44. If possible it is desirable that applications for Certificates should not be determined solely by reference to the incidence of the burden of proof. At the same time, in a case such as this the Bar Council is being invited to grant a licence in respect of a company which has not yet contractually agreed the arrangements, much less acted on them, and where the way in which it and Walkers Global intend to operate is likely to be of considerable importance. In those circumstances it may, in practice, be incumbent on those concerned – Walkers Bermuda and Walkers Global – to be particularly forthcoming in explaining how they intend to go about things.

45. In the light of all the material now before us I am not satisfied that the Bar Council was in error in the determination which it reached. At the very least it was entitled to have serious doubt as to whether Walkers Bermuda would in fact be controlled by Bermudians and not to be satisfied on the material before it that it would be. Further, even if the right approach is that, because the Chief Justice has applied the wrong test, we should consider the matter *de novo*, I am not persuaded, on the present material, that it is established that Walkers Bermuda will be controlled by Bermudians.

46. The factors, which, in combination, have led me to these conclusions are as follows:

    (i) It is true that the legal work carried out will be carried out by Bermudians or those who are entitled to carry out such work in Bermuda and the profits earned here. But the likelihood, or at least the prospect, is that practically everything else will be carried out by Walkers Global offshore. The list of services that Walkers Global offers to provide encompasses practically

everything a law office does except pure legal work; the costs of these services, payable to Walkers Global, will, no doubt, be a substantial amount;

(ii) In particular, those services included Operational Management and Marketing which include business development, Walkers brand awareness and marketing plans;

(iii) Certain provisions of the LSA contain restrictions which may in practice give Walkers Global a measure of control over the activities of Walkers Bermuda: see sub-paragraphs 13 (5), (6) and (7) above;

(iv) It is possible that Walkers Global will not provide all such services: but, on the present material, the assumption must be, as Mr Todd accepted, that it will do so. Walkers Bermuda is only entitled to refuse the provision of such services on the basis that it does not seek the provision of such services from any other law firm. There is no evidence to suggest that it would be realistic for Walkers Bermuda to provide the services itself, or that it intends to do so;

(v) Walkers Bermuda will be borrowing a large sum – up to US $ 5 million or more - from Walkers Global secured on its present and future property. The terms upon which it is to do so, with payment whenever Walkers Global directs, provided only that Walkers Bermuda is able to do so, however difficult that might be, confers a substantial discretion on Walkers Global, and provides it with a powerful control lever;

(vi) Walkers Bermuda will have to pay Walkers Global a sizeable fee,

amounting to US $ 500,000 a year (unless some other figure is agreed);

(vii) These financial obligations are likely, in practice to confer very substantial power on Walkers Global over the conduct of Walkers Bermuda;

(viii) Walkers Global will own the brand name. True it is that Walkers Bermuda will be able to use it in Bermuda – a right which is fundamental to its existence and intended function – and it is this right which is being exploited in Bermuda by, and only by, Walkers Bermuda. That is a Bermudian resource. But the LSA is terminable on 12 months' notice, or earlier in the event that Walkers Bermuda is in material or persistent breach of the LSA or the Loan Agreement and fails to remedy it: clause 22.2. In the event of termination that right will cease; and any accretion to the value of the brand attributable to the practice in Bermuda will dissipate entirely, or, insofar as it does not do so, will revert to Walkers Global. This fact also affords Walkers Global potential leverage;

(ix) The terms of the information apparently given to the Press by Walkers Global. Whilst care must be exercised in evaluating evidence of this kind, the impression given is of Walkers Global using Walkers Bermuda as a means to open a local office of its own, for which purpose they had "*secur[ed] a local lawyer*", and in effect, pulling the strings;

(x) The absence of any evidence from Walkers Global as to their intentions or by way of denial, rebuttal or clarification as to what was there said.

47. Had some of these factors stood alone, my conclusion might well have been different. To state the obvious, the fact that a company borrows a large sum or receives services from another does not, of itself, mean that it is controlled by the lender or service provider. I recognize, also, that there is a dividing line, which may be fine, between having strong influence and having control. But, as I say, the combination of factors causes me to decline to treat it as established that Walkers Bermuda will, in practice, be Bermudian controlled; as opposed to under the control of Walkers Global which owns the goodwill in the brand name and whose wishes it is, to use Lord Parker's words, in the interest of Walkers Bermuda to satisfy.

48. It seems to me unfortunate that no evidence was filed addressing what appeared in the Press Releases. The Chief Justice was prepared to accept that they were just marketing hype. I am more sceptical. In his first affidavit Mr Taylor said that any such statements "*if indeed they were made*, *could only have been made for the purpose of promoting the Walkers' brand and nothing more*". I disagree. These were statements apparently made by professional lawyers, which *prima facie*, fall to be taken at face value as a statement of intentions. This would be so even if they were made only for promotional purposes. They may, in the nature of things, be more revealing than formal statements of position. I am somewhat surprised that Mr Taylor, who was poised to enter into an important professional relationship with Walkers Global, was disposed to treat the potential significance of their apparent statements in quite such dismissive terms and at the absence of any evidence whatever from Walkers Global.

49. The Chief Justice was right to say that one starts with the assumption that legal professionals do not intend to break the law. It is, therefore, important to express the limits of what I have decided. It was not suggested that the prospective agreements put forward were shams or that there was some secret agreement made; and nothing that I have said is intended to impute dishonesty. What is,

however, said, is that, looking at the matter in the round, the practical reality is that Walkers Bermuda will not be Bermudian controlled. That seems to me a conclusion to which the Bar Council could legitimately come; or, at the lowest, that it was entitled not to be satisfied that Walkers Bermuda would be so controlled.

50. This decision and that of the Bar Council have been based on the material presently before us and it. That does not mean that the position is immutable. Lord Pannick confirmed that the Bar Council had not made a once and for all time decision. It is open to Walkers Bermuda to reapply. It may be that, perhaps in the light of further dialogue between Walkers Bermuda, Walkers Global and the Bar Council, and further evidence, that such an application may be acceptable, or if refused, that the refusal will be successfully appealed. It is not for this court to stipulate in advance what evidence may be needed or helpful. But such evidence might, in addition to dealing with Walker Global's statements to the Press, extend to (i) evidence about what Walkers Global and Walkers Bermuda have said to each other about their plans; (ii) production of a business plan which gives some indication of how Walkers Bermuda intends to function in the light of its obligations to Walkers Global; and (iii) evidence as to how matters have operated in the case of other firms affiliated to Walkers Global.

51. For these reasons I would allow the appeal and set aside the orders and directions made by the Chief Justice on 12 January 2017, save for direction 6. Declarations 2 and 3 would appear to be accurate but, in the light of this decision, otiose. It is for that reason that it seems to me appropriate to set them aside, but I would be prepared to entertain further submission on that point.

52. I would expect the costs to follow the event i.e. that we should order Walkers Bermuda to pay the Bar Council's costs of the appeal to us and to the Chief Justice, including the costs of the hearing before the Chief Justice on 9 February 2007 in relation to costs, such costs to be taxed if not agreed. I would so order in

the absence of any application on the part of Walkers Bermuda, such application to be made within 21 days. I would invite the Bar Council to draw up an order giving effect to this judgment.

BAKER P

53. I agree with Clarke JA's clear and careful analysis of the issues in this case and with his conclusions. I have no doubt that when the 1981 Act speaks of control by Bermudians it covers both corporate and commercial control. I have had more difficulty in deciding whether Walkers Bermuda passed the correct test. The Bar Council held that it did not and for the reasons set out by Clarke JA in paragraph 46 I have ultimately concluded that the Bar Council was right. In any event I can see no basis for interfering with the Bar Council's decision as I can detect no error in their decision letter. I, too, would allow the appeal and make the orders proposed by my Lord.

BELL JA

54. I agree

_____
Clarke, JA

_____
Baker, P

_____
Bell, JA