



5th INTERNATIONAL TRUSTS & COMMERCIAL LITIGATION CONFERENCE 2022

NEW YORK

COMMERCIAL BREAKOUT GROUP SCENARIO

Waterfall Investments Limited (“**Waterfall**”) is a BVI Company. Waterfall is the defendant in a breach of contract claim brought by Ms Bells before the courts of New York (where it has substantial assets), where Waterfall is represented by Snipe, Woodcock & Grouse PLLC (“**SWG**”). The proceedings are at the interlocutory stage. Waterfall believes that the written agreement on which the claim is based is a forgery, and there is strong evidence this is the case. Waterfall has also previously been involved in a long-running fraud claim before the courts of England and Wales against a Mr Whistles. Waterfall won, securing a judgment of £120m against him. Waterfall’s regular English solicitors are Pheasant & Co LLP. At one stage during that litigation Mr Whistles spent 2 months in prison for contempt of court. On account of their knowledge Waterfall’s business, Pheasant & Co are also involved in instructing SWG on Waterfall’s behalf.

On 1 November 2022, Pheasant & Co and SWG receive a letter on Waterfall’s headed notepaper, which states:

- (a) That one “Robert Major” along with 4 Marshall Islands Companies (Sunshine Limited, Ocean Limited, Winter Wind Limited and Torrent Limited) have consented to act as so-called “protective directors” of Waterfall;
- (b) That the “protective directors” had convened a board meeting at which the following resolutions were purportedly passed:
 - (i) the existing directors were terminated as directors;
 - (ii) 10,000 shares were issued to a further Marshall Islands company, Octave Limited (making them a 90% shareholder);
 - (iii) the retainers of Pheasant & Co and SWG were terminated; and
 - (iv) Mr Major was authorised to settle the New York litigation by paying Ms Bells up to \$100m;
- (c) That their retainer was terminated and they were no longer authorised to act on behalf of Waterfall.

The letter is signed by Mr Major, contains an email address at which he can be reached, and encloses a copy of the minutes of the meeting held, and a register of directors purporting to record the status of the “protective directors” as directors of Waterfall.

Pheasant & Co contact Waterfall’s registered agent in the BVI, who confirms the official register of Waterfall’s directors has not been changed, a matter which is confirmed by the pre-existing directors of Waterfall from whom Pheasant & Co take their instructions.

Pheasant & Co reply to Mr Major’s letter stating that the action of the “protective directors” has been ineffective and asking them to cease and desist from holding themselves out connected with Waterfall.



serle court

A week later, Pheasant & Co are served with a claim form issued by the High Court in England and Wales. The named claimants are Waterfall and Sunshine Limited. The named defendants are Pheasant & Co and SWG, with the address for both being stated as Pheasant & Co's address in London. The claim form seeks declarations of the validity of the actions of the protective directors and injunctions restraining Pheasant & Co and SWG from acting for Waterfall.

On the same day SWG receives a letter from Ms Bell's attorneys. They state that they are instructed that their client has entered into a settlement agreement with Waterfall under which Waterfall agree to pay Ms Bell \$100m, and enclose a copy. The agreement is signed by Mr Major, purportedly on behalf of Waterfall. SWG then file a Notice of Settlement Agreement with the New York court stating that the proceedings will be dismissed when the settlement agreement is performed.

SWG file papers with the New York court contending that Waterfall has not had a change in its board and has not settled the proceedings. Ms Bells' attorneys file responsive papers disputing this. Amongst the papers was a series of documents that bear Bates numbers from Mr Whistle's disclosure in the concluded English proceedings and which had never been deployed at trial. The New York court decides to stay the proceedings pending the outcome of the new claim filed in England.

Meanwhile Pheasant & Co have been carrying out research into Mr Major. It transpires that he is himself a convicted contemnor and was in the same prison as Mr Whistles at the same time. Further he has staged 3 other attempted corporate takeovers using a similar modus operandi, resulting in several reported cases before the courts of England and Wales, all of which he has lost.

1. How should Pheasant & Co, SWG and the "real" Waterfall respond to the Claim Form?
2. What final relief can the "real" Waterfall obtain in England and against whom?
3. What procedural steps is it necessary for Waterfall to take to obtain it?
4. Who should pay the costs?
5. In this scenario Waterfall is a BVI Company. Discuss what problems might arise where an English company (or LLP, or LP) had its records altered at Companies House without its authority (and what interim remedies might be available in that situation).



Reading list:

- *Kiliminjaro AM Limited v Mann Made Corporate Services (UK) Limited* [2020] EWHC 1804 (Ch)
- *Hurricane Energy plc v Chaffe* [2021] EWHC 2258
- *BMF 4 v Hussain* [2021] EWHC 171 (Ch)
- *Eurosail-UK 2007-4BL PLC v Wilmington Trust SP Services (London) Limited* [2022] EWCA Civ 1172
- *Kea Investments Limited v Farrer & Co LLP* [2022] EWHC 2449 (x3)
- *Bank of Beirut v HRH Prince Adel El-Hashemite and another* [2015] EWHC 1451 (Ch)