IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-2324
[2016] NZHC 497

UNDER	Section 290 of the Companies Act 1993
BETWEEN	MEDITRADE LIMITED Applicant
AND	ALCARIN LIMITED Respondent

Hearing: 24 February 2016

Appearances: Mr T Fitzgerald for the Applicant
Mr A Swan for Respondent

Judgment: 22 March 2016

JUDGMENT OF ASSOCIATE JUDGE J P DOOGUE

This judgment was delivered by me on
***22.03.16 at 4.30 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Introduction

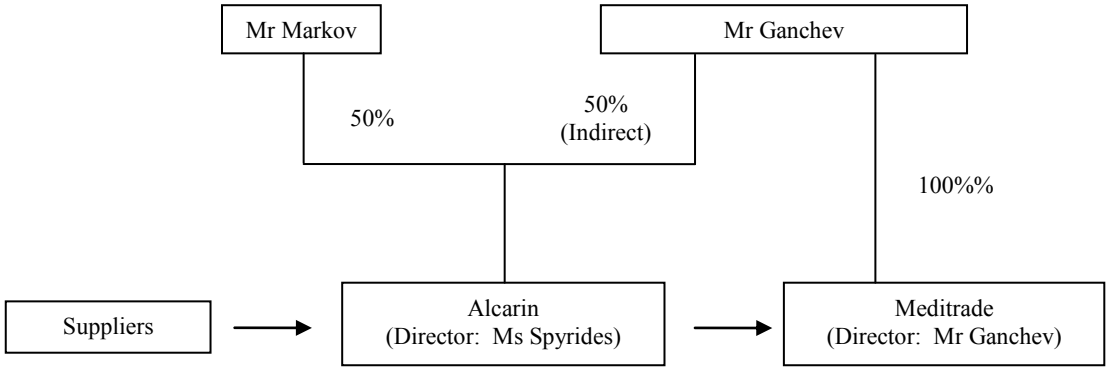
[1] These proceedings arise out of an originating application by Meditrade Ltd (Meditrade), which seeks to set aside a statutory demand issued by Alcarin Ltd (Alcarin).

[2] There is a close connection between the parties to these proceedings. Both companies were founded by Mr Ganchev, who remains the sole shareholder of Meditrade. Mr Ganchev is also (indirectly) a 50% shareholder in Alcarin along with Mr Markov. Alcarin Ltd is registered in the Seychelles Islands. On 24 September 2015, at the instigation of Mr Markov, Alcarin served a statutory demand on Meditrade. Mr Ganchev opposes the statutory demand against his company and he has subsequently initiated this application to set it aside. In response, Mr Markov has taken steps which led Alcarin to file a notice of opposition.

Background

[3] Prior to their recent dispute, Mr Ganchev and Mr Markov had been close friends for a number of years. When the two companies were founded in 2011, Mr Ganchev invited Mr Markov to participate in the business. Mr Markov would be responsible for Meditrade's New Zealand operations, while Mr Ganchev would remain in Bulgaria. In April 2012, Mr Ganchev agreed that Meditrade should also hire Mr Markov's wife, Penka Markova. Her role included managing Meditrade's MYOB software.

[4] In his submissions on behalf of Meditrade, Mr Fitzgerald included an organisational chart which set out the various entities and the people associated with them.



[5] Mr Markov was largely responsible for the day-to-day operations of the business from its inception in 2011 until his departure in March 2015. The current dispute concerns invoices that Alcarin purported to issue to Meditrade during that period.

[6] Meditrade carries on business, amongst other things, as an importer of Bulgaria-sourced products into New Zealand. Alcarin was responsible for sourcing those products and on-selling the goods to Meditrade.

[7] Mr Ganchev contends that it was always understood that Alcarin would supply products to Meditrade at cost price. However Meditrade complains that Alcarin did not adhere to this suggested arrangement. Instead, Alcarin was imposing mark-ups of between 53% and 104% on the amounts actually charged by suppliers. If these amounts were paid, it would have the effect of draining money from Meditrade to Alcarin (which Mr Markov half owns). Mr Markov denies that there was any such arrangement.

[8] I interpolate that it has not been explained how Alcarin was going to make any profit if the cost-price arrangement described by Meditrade was implemented. However in any event, it turns out that it will not be necessary for the court to resolve this particular issue.

[9] In late 2014 and early 2015, the relationship between Mr Markov and Mr Ganchev collapsed, with Mr Ganchev asserting that there had been misconduct by Mr Markov and his wife in their administration of Meditrade. Mr Ganchev and Mr Markov (and his wife) are now in dispute on several fronts, all of which involve versions of the same question: what did Mr Markov and Mr Ganchev agree to in respect of Mr Markov's entitlement to profit from the Alcarin/Meditrade business?

[10] It is also necessary to briefly mention the various disputes about the circumstances in which the statutory demand was served. At the heart of those disputes is the question of whether Mr Markov had authority to issue the statutory demand and now, to resist the demand being set aside in the present proceedings.

[11] Neither Mr Markov nor Mr Ganchev was a director of Alcarin. The sole director was a Cypriot lawyer, Ms Spyrides. She granted a power of attorney to each of the shareholders, on a joint and several basis, for the purpose of enabling each of them to act on behalf of the company. She later took steps to revoke the power of attorney, arguably attempted to reinstate the power of attorney and then finally confirmed her revocation.

[12] Whether the power of attorney was revoked, whether a purported revocation was legally valid and whether the power of attorney has in any case simply expired by effluxion of time as at November 2015 are all matters which have been raised in the present proceeding. It is relevant because Meditrade asserts that the revocation of the power of attorney did in fact occur and that from that point onwards, Mr Markov had no authority to act on behalf of Alcarin. Meditrade argues that this alleged lack of authority is a fatal flaw which undermines Alcarin's opposition to the present application. In particular, Meditrade's position is that Mr Markov had no authority to instruct lawyers to file the opposition, nor to take part in the hearing on behalf of Alcarin. It argues that only Ms Spyrides could have authorised those steps and that she did not do so.

Issues to be determined

[13] There are two main issues.

[14] The first issue concerns the contention that Mr Markov has no authority to proceed further with steps to wind up Meditrade. I observe that at the time when the statutory demand was issued, the power of attorney was arguably extant. However, the power of attorney has subsequently expired. Accordingly, the steps which Mr Markov has taken to oppose the present application were not authorised by Alcarin. Mr Markov does not dispute that the proceeding brings into question his authority to act in the name of Alcarin. However he contends that he was authorised to take those steps. The way in which the parties framed the dispute on this point means that the statutory demand will be set aside if it is reasonably arguable that Mr Markov was not properly authorised to take the steps that he did on behalf of Alcarin.

[15] The second and more straightforward issue is whether there is a substantial dispute concerning the existence of the debt which Meditrade allegedly owes to Alcarin. It was common ground between the parties that the decision of the court on this issue would depend upon the application of s 290(4) of the Companies Act 1993, which provides as follows:

> (4) The court may grant an application to set aside a statutory demand if it is satisfied that—
>
> (a) there is a substantial dispute whether or not the debt is owing or is due; or
>
> (b) the company appears to have a counterclaim, set-off, or cross-demand and the amount specified in the demand less the amount of the counterclaim, set-off- or cross-demand is less than the prescribed amount; or
>
> (c) the demand ought to be set aside on other grounds.

[16] Before I examine the contentions of the parties it will be necessary to briefly make reference to principles which govern applications to set aside statutory demands.

Dispute over the power of attorney

[17] The statutory demand was served on 24 September 2015.

[18] There is no question that it was Mr Markov who issued the statutory demand in this case. Nor is it disputed that, purportedly on behalf of Alcarin, he caused that company to file a notice of opposition to Meditrade's originating application to set aside that statutory demand (the present application). Mr Markov contends not only that he had authorisation to take those steps under the power of attorney, but also that he kept Ms Spyrides fully informed of the actions that he was taking and that Ms Spyrides:[1]

> … has agreed that I do what is necessary to collect the sums owing to Alcarin by Meditrade.

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[1] Affidavit of Anastas Markov, dated 21 October 2015 at [2].

[19] On 25 September 2015, shortly after the service of the statutory demand, Ms Spyrides passed a resolution as sole director of Alcarin in the following terms:[2]

> 1. Effective as of the date hereof I WITHDRAW and CANCEL the General Power of Attorney issued on 08th December 2014… in favour of [Mr Ganchev] … and [Mr Markov][.]

[20] Mr Markov complains that Ms Spyrides took this step following a unilateral approach to her by Mr Ganchev. I interpolate that there is no doubt that Mr Ganchev prevailed upon Ms Spyrides to take this step. I would observe though that it does not matter for present purposes whether or not complaints can be made about the process leading up to the cancellation of the power of attorney. What is of significance in the present context is that she actually took that step. It is not essential for the determination of the current dispute to come to a firm view regarding the validity of that revocation. However, it would seem that the revocation of the power must be treated as having effect until it is retracted or a competent court determines that it was the result of an unauthorised exercise of the director's powers to issue and retract powers of attorney. This court certainly could not authoritatively pronounce upon the validity of the revocation in the course of an originating application to set aside a statutory demand.

[21] The retraction of the power of attorney was only one of several steps in a somewhat confusing sequence. On 30 September 2015, Ms Spyrides passed a further resolution which, so far as relevant, provided:[3]

> 1. Effective as of the date hereof [Alcarin] WITHDRAWS the Statutory Demand issued in its name and dated 23 September 2015 to [Meditrade][.]

[22] The next relevant occurrence in the chronology was that Ms Spyrides sent an email to Mr Markov on 10 October 2015 which read as follows:[4]

> Please be informed that I the undersigned being the sole director of [Alcarin], realize that there is a conflict between the two owners who hold 50% each in the company.
>
> Therefore:

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2 Affidavit of Milen Ganchev, dated October 2015 at MDG6.
3 Affidavit of Milen Ganchev, dated October 2015 at MDG7.
4 Affidavit of Anastas Markov, dated 21 October 2015 at Attachment F.

1) No documents shall be executed by me unless such instruction is sent in original signed by both you and Mr Ganchev[.]

2) The original resolution dated 25/9/2014 whereby the joint power of attorney dated 8/12/2014 is cancelled, is in my possession and shall be destroyed until Mr Ganchev returns the original power of attorney which is in his possession. Any usage of the scan copy sent already shall be deemed as invalid and not effective.

3) The original power of attorney dated 8/12/2014 has been requested to be returned by Mr Ganchev for cancellation.

4) The original resolution dated 30/9/2015 whereby the company withdraws the statutory demand issued in the name and dated 23/9/2015 to [Meditrade] is also in my possession and shall also be destroyed. Any usage of the scan copy sent already shall be deemed as invalid and not effective.

[23] There was considerable discussion at the hearing before me about the meaning that ought to be attributed to this document. I have not been assisted by closer analysis of the text of the document because the phrasing which Ms Spyrides used is unclear for the most part. What however does seem to be apparent is that Ms Spyrides acknowledged the existence of a dispute between the two shareholders in Alcarin and recognised that it would be wrong to act solely at the instigation of one or the other in relation to the alleged debt. Rather oddly, though, the document does not seem to attempt the revocation of the statutory demand, even though that had apparently been issued unilaterally by Mr Markov. That matter aside, the purpose of the document would seem to have been to state Ms Spyrides' decision that thenceforth she would only exercise her powers of director in cases where the two shareholders were in agreement regarding her proposed action.

[24] In a subsequent notarised statement that Ms Spyrides made on 5 November 2015, she said, amongst other things:[5]

(c) I have not withdrawn the Resolutions dated 25th of September 2015 and 30th of September 2015, as I initially intended. The resolutions remain effective. Notwithstanding my email to Mr Markov of 10 October 2015, the resolutions have never been revoked.

(d) The Statutory Demand purportedly issued by [Alcarin] dated 23 September 2015 to [Meditrade], and the invoices referred to in that Statutory Demand, were issued without proper authority from the

5 Affidavit of Martha Spyrides, dated 14 December 2015 at 4.

> Company and I confirm that the Company does not recognise them or ratify their issue.

[25] The reference to the email to Mr Markov would appear to be to the document which I have set out at [22] above. If that is so, it adds to the lack of clarity about the effect of that document. The most likely explanation for this aspect of the notarised statement is that Ms Spyrides perceived that her email of 10 October 2015 might have been construed as a retraction of her previous resolution cancelling the power of attorney; and, if so, she wished to reject that interpretation of her email.

[26] Ms Spyrides has given an affidavit in the proceeding which broadly confirms that, as the sole director of Alcarin, she passed resolutions as noted above on 25 September 2015 and 30 September 2015. She also states that the statutory demand against Meditrade was not issued with proper authority. Amidst the confusion regarding Ms Spyrides' various communications, her last word on the subject seems to be that contained in her affidavit. At the very least there is a dispute of substance concerning whether Mr Markov has any continuing power to bind Alcarin. The questions about his lack of authority extend to whether he is entitled to take steps pursuant to the power of attorney, or from any other source; and whether it is open to him to conduct these court proceedings to oppose Meditrade's originating application.

[27] Meditrade relied upon one further point. As the dispute has developed, it has become clear that the power of attorney formally expired on 7 November 2015. It is at the very least arguable that by 7 November 2015, regardless of whether the power of attorney had been effectively withdrawn previously, it expired by effluxion of time. This is a compelling point because the expiry date actually appears on the power of attorney itself. No argument has been presented to me which would suggest that the court is able to go behind the expiry date explicitly stated in the document itself.

[28] Meditrade's position on the question of agency, therefore, may be summarised as follows. By resolution of its director, Ms Spyrides, Alcarin has resolved not to take steps to oppose the setting aside of the statutory demand. The steps that have been taken purportedly in its name to do just that have not been

carried out with proper authority. In any case, such authority as Mr Markov might have had to make decisions for and which bound the company was terminated when the power of attorney expired on 7 November 2015. Any steps taken in the subsequent proceedings purportedly in the name of Alcarin were taken without its true authority.

[29] I will now briefly set out my conclusions below on the results of the various arguments I heard concerning the authority of Mr Markov.

[30] There is a substantial dispute concerning whether Mr Markov has any authority from the company to conduct the present proceedings. It is at the very least arguable that notwithstanding her confusing and ambiguous statement of 10 October 2015, Ms Spyrides withdrew any authority which either shareholder had arising from the power of attorney. Her ultimate statement on the issue dated 5 November 2015 confirms that that is the position. In any case, the power of attorney expired two days later on 7 November 2015.

Section 290(1)(d) of the Companies Act

[31] In his submissions in opposition, Mr Swan argued that while an applicant need only establish that there is a substantial dispute where the ground relied upon is that contained in s 290(4)(a), the position is otherwise where the ground is that contained in subs (4)(c), namely that:

> (c) the demand ought to be set aside on other grounds.

[32] In summary, Mr Swan's argument was that an applicant will not be able to rely upon subs (4)(c) unless the court is satisfied that the demand ought to be set aside on other grounds.

[33] The first question though is whether the applicant is required to come within the terms of subs (4)(a). To the extent that the applicant relies upon a lack of authority on the part of those who issued the statutory demand in the name of the

respondent, it does not seem that the case is based upon a substantial dispute whether or not the debt is owing or is due.[6] I agree with Mr Swan's submission to that extent.

[34] In my view, any assessment of the grounds that are put forward in a particular case where subs (4)(c) is in issue needs to consider the wider context and particularly, the purpose of statutory demands. The purpose of a statutory demand is to give rise to a presumption that the company is unable to pay its debts. That presumption is available in any case where a company does not comply with a statutory demand requiring payment within the statutory period of 15 working days.[7] If however there is a reasonable basis for concluding that the recipient of the notice may have had grounds upon which a failure to pay was justified, then it would not be correct to view the failure to pay as being evidence of insolvency.

[35] In this case, the applicant contends that there were such reasonable grounds. Those grounds were that the statutory demand was not issued with the authority of the respondent company and ought never to have been issued in the first place.

Conclusion on subs (4)(c) ground in the context of this case

[36] Even placing the most favourable interpretation on the facts from the perspective of Meditrade, there seems to be little doubt that Mr Markov in fact had authority to issue a statutory demand, because at that time he held a power of attorney and was therefore authorised to act upon behalf of the company. No argument was addressed to me to the effect that this authority did not extend to issuing statutory demands. I conclude that Meditrade is unable to establish that the initial service of the statutory demand can be impugned upon the ground that Mr Markov lacked the requisite authority.

[37] However, the issue concerning Mr Markov's authority (or lack thereof) to oppose the present application remains to be determined. There is no doubt that Ms Spyrides revoked Mr Markov's power of attorney after the statutory demand was served, but before steps were purportedly taken on the part of Alcarin to oppose Meditrade's application to set aside the statutory demand. In any event, the power of

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6 That is the ground in subs (4)(a).
7 Companies Act 1993, s 290.

attorney expired by effluxion of time on 7 November 2015 and there does not seem to be any argument to the contrary that from that point, if not before, Mr Markov lacked authority. It is not open to Alcarin to contend that the court ought not to be "satisfied" in terms of s 290(4)(c).

[38] There is one remaining issue that I have not dealt with and if my conclusion in the previous paragraph is correct, it is not strictly necessary for me to consider it. However, in case it is of assistance, I will give brief consideration. The point which Mr Markov through his counsel puts forward is that, having granted a power of attorney to him, Ms Spyrides was not entitled to revoke it. I will consider that point next.

Restrictions on the authority to revoke the power of attorney

[39] Mr Swan submitted that the revocation of the power of attorney was governed by the law of the Republic of Cyprus. It was his contention that the relevant legal code, which states the law of Cyprus in regard to powers of attorney and agency, conforms to the common law. The argument would therefore be resolved by having regard to common law principles.

[40] Mr Fitzgerald did not dissent from this approach. However he took the view that the way in which Mr Swan had stated the law was mistaken. It will be necessary to make reference to the key contentions of both parties on this point.

[41] Mr Swan said that two key aspects of the relevant chapter of the codified law of contract of Cyprus were as follows:

> When principal may revoke agent's authority
>
> **163.** The principal may, save as otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.
>
> Revocation where authority has been partly exercised
>
> **164.** The principal cannot revoke the authority given to his agent after the authority has been partly exercised so far as regards such acts and obligations as arise from acts already done in the agency.

[42] Mr Fitzgerald on the other hand said that while it was true that a principal could not retrospectively cancel the authority of his agent, it was undoubtedly the case that the donor of a power could prospectively cancel an agent's authority to act in future transactions.

[43] Mr Swan in support of his argument referred to an extract from *Bowstead and Reynolds on Agency* which should be set out in full:[8]

> **10-010 Reference to irrevocable authority in other contexts.** Where in the execution of his authority the agent incurs a personal liability to a third party, such that he would be entitled to reimbursement or indemnity in respect of it, the principal cannot, by purporting to revoke the agent's authority to discharge it, destroy that right. Thus where in the pursuance of his authority the agent incurs contractual liability to pay money to a third party, he is entitled to reimbursement in respect of payments which he makes even though the principal has subsequently forbidden them. The principle applies also where the agent incurs a liability in respect of an authorised transaction which it is proper for him to discharge even though it could not be legally enforced, e.g. a liability to pay wagering debts, or barrister's fees. It may also be that this principle extends to the agent's right to take positive action, e.g. initiate proceedings, in respect of matters occurring while he had authority, even though, again, the principal forbids such action. It would not, however, extend to prevent revocation merely because the agent has incurred other liabilities, for example given a personal undertaking that he would have authority at a certain time in the future.

[44] The *Bowstead* text states the common law. Mr Swan accepted that the Cyprus code, which is applicable in the circumstances of this case, is intended to also apply the common law.

[45] Mr Swan in his submissions referred to the decision in *Daly v Lime Street Underwriting Agencies Limited* which he said supported the submission that there may be circumstances in which the principal cannot revoke the authority of the agent.[9] In reply, Mr Fitzgerald submitted that the *Daly* case does not seem to have been cited with approval in any other authority and anyway, the authors of *Bowstead on Agency* are probably correct in noting that in that case there had been no attempt

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8 Peter Watts and FMB Reynolds *Bowstead and Reynolds on Agency* (20th ed, Thomson Reuters, London, 2014) at 692–693 (citations omitted).

9 *Daly v Lime Street Underwriting Agencies Ltd* [1987] 2 FTLR 277 (QB).

to revoke the authority before it was exercised and that may be the best explanation for the decision.

[46] Mr Fitzgerald argued that there was an inherent error in the argument that an agent in the circumstances of the present case could proceed to do what his principal had expressly declined to do, which could be illustrated by an example. What would happen, Mr Fitzgerald asked, if during the course of his employment an agent was given an authority which included the power to issue a statutory demand but in circumstances where the employment was terminated before any further steps could be taken to oppose an application setting aside that statutory demand? Could the employee insist that it was his right to take steps to defend the statutory demand by opposing the setting aside application even though the principal did not wish for that step to be taken, Mr Fitzgerald rhetorically asked? Could he instruct counsel on behalf on, incur legal costs and expose his former employer are to an order for costs notwithstanding that that would arise from a course of action that the employer did not wish to follow?

[47] There is no doubt that, pursuant to the law of Cyprus stated in the code,[10] the power of attorney in this case was generally revocable. Because it is accepted by the parties that the circumstances limiting the power to revoke a power of attorney are those which are generally available at the common law, brief reference must be made to authority.

[48] The position is stated as follows in *Halsbury's Laws of England* in the following terms:[11]

> **(2) IRREVOCABLE AUTHORITY**
>
> **171. Authority coupled with interest.**
>
> Where the agency is created by deed, or for valuable consideration, and the authority is given to effectuate a security or to secure the interest of the agent, the authority cannot be revoked. Thus, if an agreement is entered into on a sufficient consideration whereby an authority is given for the purpose of securing some benefit to the donee of the authority, the authority is irrevocable on the ground that it is coupled with an interest. So an authority to sell in consideration of forbearance to sue for previous advances, an

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10 The relevant parts of that code are quoted above.

11 *Halsbury's Laws of England* (5th ed, 2008) vol 1 Agency at [171] (citations omitted).

> authority to apply for shares to be allotted on an underwriting agreement, a commission being paid for the underwriting, and an authority to receive rents until the principal and interest of a loan have been paid off or to receive money from a third party in payment of a debt, have been held to be irrevocable. On the other hand, an authority is not irrevocable merely because the agent has a special property in or a lien upon goods to which the authority relates, the authority not being given for the purpose of securing the claims of the agent.

[49] In an early English authority, *Clerk v Laurie*, the law is described in the following terms:[12]

> What is meant by an authority coupled with an interest being a revocable is this-that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purposes of securing some benefit to the donee of the authority, such an authority is irrevocable.

[50] *Clerk v Laurie* was approved in the Court of Appeal of England decision in *Carmichael's Case*.[13] The factual situation in that case was that one party to the contract, Phillips, agreed to sell certain mining property to a company which had been incorporated and in regard to which there was to be a public issue of shares. Carmichael agreed to acquire a number of the shares pursuant to an underwriting arrangement and to secure that objective, authorised Phillips to acquire shares on his behalf. Carmichael attempted to repudiate the arrangement but Phillips proceeded and acquired shares on his behalf anyway. In his judgment, Lopes LJ stated:[14]

> The question in this case is whether the company had authority to allot these shares to Mr Carmichael. That question depends upon whether the authority given to Mr Phillips, who was the vendor, was revocable or not. If it was an authority coupled with an interest, it would be irrevocable. The question that really arises is whether in this case it is an authority coupled with an interest. I think the answer is a very short and a very complete one. What was the object? The object was to enable Mr Phillips, the vendor, to obtain his purchase money, and, in the language of Williams J, it therefore conferred a benefit on the donee of the authority.

[51] Lopes LJ together with the other members of the court agreed that having entered into the underwriting contract, the object of which was to secure to Phillips the purchase money for the property he was selling to the company, it was not open to the donee, Carmichael, to withdraw from the underwriting agreement. The

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12 *Clerk v Laurie* (1857) 2 H & N 199.

13 *Re Hannan's Empress Gold Moning and Development Co, Carmichael's Case* [1896] 2 Ch 643 (CA).

14 At 648.

authority which he had given to Phillips, in other words, was an authority coupled with an interest and was therefore irrevocable.

[52] In this case, Mr Markov was given an authority to act for the interests of the company. The agreement was not intended to secure to Mr Markov what decisions such as *Carmichael's Case* described as "an interest". The interest for which Mr Markov must be contending is a power to commence winding up proceedings to recover a debt owed to Alcarin as debtor. That is not a personal benefit which the power of attorney was intended to secure to Mr Markov. No doubt in certain circumstances he could indirectly benefit if such a power was exercised on behalf of Alcarin. However, it cannot be said that the contractual objectives of delegating power to him in the first place contemplated that he should be able to rely upon the power as conferring on him an authority that the company constitution did not give him, namely, to unilaterally determine that Alcarin should adopt a course of action even though the director of the company was unwilling to do so.

[53] The power of attorney was issued in order to permit individual shareholders to advance the interests of the company. It was not designed to give one party or the other a tactical advantage in collateral disputes between the two shareholders. For that reason, there would be no justification for refusing to give effect to the revocation of the power of attorney which Ms Spyrides effected.

[54] It is necessary to deal with one subsidiary point, which is that Mr Ganchev behaved improperly or even fraudulently in prevailing upon the director of the company, Ms Spyrides, not to proceed with the statutory demand procedure.

[55] However, I consider that the answer to this contention is, as Mr Fitzgerald submitted, that Mr Ganchev was entitled to draw to the attention of Ms Spyrides the fact that there was a wider dispute between himself and Mr Markov and that it was desirable to hold the company in its current position until the dispute between the shareholders was resolved.[15]

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[15] Affidavit of Anastas Markov, dated 21 October 2015 at Attachment F.

Conclusion on whether Mr Markov can assert that power of attorney was irrevocable

[56] It follows that the steps which Mr Markov has purportedly taken on behalf of Alcarin in order to give effect to the statutory demand, including filing an opposition to the present application, were not authorised by Alcarin. It follows that the solicitor who filed the present proceedings did not, in contravention of r 5.36, have authority to do so.

Consequences of court findings that Mr Markov lacked authority

[57] The correct approach which the court ought to take as a matter of principle, it appears to me, is to proceed as though the opposition had not been filed. On such a basis, it would have been incumbent upon Meditrade to prove its case.[16] The uncontested evidence before the court would have been that Alcarin had withdrawn the statutory demand or alternatively that the court was entitled on the basis of the evidence to conclude that there was a substantial dispute as to whether the debt that was the basis of the statutory demand was, in fact, owing. The uncontested evidence entitles the applicant to an order setting aside the statutory demand. There will be an order accordingly.

Costs

[58] When I enquired into the attitude of each party concerning costs on the present application, counsel for Meditrade advised me that in the event that the court accepted its submission that Mr Markov did not have authority to take steps on behalf of Alcarin in giving effect to the statutory demand, then Meditrade would be applying for costs orders against Mr Markov personally. Those costs would be sought on an indemnity basis.

[59] In order to progress that issue the following timetable directions are given:

(a) Meditrade is to file an interlocutory application identifying the orders that are sought and the grounds upon which they are sought within 15 working days from the date of this judgment.

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[16] High Court Rules, r 10.7.

(b) Any affidavit evidence is to be restricted to establishing the quantum of costs which are sought to be recovered from Mr Markov is to be filed and served within the same time limit as in (a).

(c) Notice of opposition and any evidence on the question of quantum is to be filed and served within a further 15 working days.

(d) The proceeding is to be called in the statutory demand list at **11:45 am on 8 April 2016** at which time a fixture will be allocated unless the parties have been able to reach agreement on the disputed issues.

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J.P. Doogue
Associate Judge