1974
June 27
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LANITIS BROS. LIMITED (NO. 2) v. CENTRAL BANK OF CYPRUS

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

LANITIS BROS. LIMITED (NO. 2),

Applicant,

and

THE CENTRAL BANK OF CYPRUS,

Respondent.

(*Case No.* 74/74).

Exchange Control Law, Cap. 199—*Resident Company controlled by non-resident Corporation—Lending of money to—Requires permission of the Central Bank—Section* 32 (3) *of the Law.*

Exchange Control Law, Cap. 199—"*Persons*" *in section* 32 (3) *of the Law—Includes corporate bodies—*"*Controlled* (*whether directly or indirectly*)" *in the said same section—Refer to the type of control that a non-resident person, including a corporate body, has over a resident company—And not to the control or controlling interest that the shareholders of the non-resident company may have over their own corporation.*

Statutes—Construction—Construction of "*persons*" *and* "*controlled* (*whether directly of indirectly*)" *in section* 32 (3) *of the Exchange Control Law, Cap.* 199.

This recourse turns on the construction of section 32 (3) of the Exchange Control Law, Cap. 199, which reads as follows:

> "Except with the permission of the Central Bank, no person resident in the Republic shall lend any money or securities to anybody corporate resident in the Republic which is by any means controlled (whether directly or indirectly) by persons resident outside the Republic".

The applicant Company, a Public Company limited by shares, was incorporated in Cyprus in 1944 under the provisions of the Companies Law. In the year 1963, the Food Products Corporation Ltd., to be referred hereinafter as "the corporation", was incorporated in the Bahamas Islands and the 93.595 per cent of the shares of the applicant Company were exchanged

by their holders who, admittedly, are residents of Cyprus, with shares of the corporation. In this way, the overwhelming majority of the shares of the corporation are in the hands of residents of Cyprus who control the corporation through their voting rights at a general meeting and are in a position to appoint and remove its directors.

When the applicants applied for banking facilities to their financiers in Cyprus, namely, the Barclays Bank International Ltd, the latter were informed by the respondent Bank that for exchange control purposes the applicant Company was considered as a resident Company controlled by persons resident outside the Republic; and, consequently, pursuant to the provisions of the aforesaid s. 32 (3) the continuation of granting of banking facilities to the applicant Company required the approval of the respondent Bank. Hence the present recourse.

The basic contention advanced on behalf of the applicant Company was that in such case as the present one where the control of the resident Company is in the hands of a body corporate, one has, for the purpose of section 32 (3) of the Law, to go beyond the register of the shareholders of the resident Company and see who are the persons who ultimately control the mother Company. In other words, the veil of such corporate body having the control of the resident Company should be lifted. The Court, therefore, had to examine whether in the said section 32 (3) there were such clear words that would compel a Court to ignore the corporate entity of the corporation. In other words, to disregard the principle that a Company is considered in law as a person separate and distinct from its members.

Held, (1) In my view, the word "persons" to be found in the said subsection, includes corporate bodies. It is a presumption, not necessarily a strong one, but the very circumstances in the context show that the word should be so construed (See *Pharmaceutical Society* v. *London and Provincial Supply Association Ltd.* [1880] 5 A.C. 857 (H.L.) and section 2 of the Interpretation Law, Cap. 1 which provides that "person" includes, *inter alia*, any company or body of persons corporate).

(2) In the present case, we have direct control of the resident Company by a corporate body which, as such, is non-resident, and in my view, the words "directly or indirectly" in section 32 (3) of the Law, refer to the type of control that a non-re-

sident person, and this includes a corporate body, has, over a resident company and not to the control or controlling interest that the shareholders of the non-resident company may have over their own corporation.

(3) The sentence " controlled by any means directly or indirectly" in the said section 32 (3) covers the direct control by a person or corporation and the indirect control through an agent, trustee or nominee. It is to such instances that the word " indirectly" refers and the Law itself calls for the ascertainment of the person on whose behalf the control is exercised. This is not a case, however, where it could be said that the corporation is controlling the applicant Company in the capacity of an agent, trustee or nominee of its shareholders. The words in the statute are not such as to constitute an instance under which the principle that the company is an independent legal entity should be disregarded. (See, also, section 32 (4) of the Law).

(4) In the light of the conclusions to which I have come regarding the meaning and effect of the words " controlled (whether directly or indirectly)", the said sub-section has no application to the facts of the present case, inasmuch as we are not concerned with ascertaining who has the control of the non-resident company but the control of the resident company as such.

Application dismissed.

Cases referred to:

De Beers Consolidated Mines Ltd. v. *Howe* [1906] A.C. 455;

Inland Revenue Commissioners v. *Harton Coal Co. Ltd.* [1960] 3 All E.R. 48;

S. Berendsen Ltd. v. *Inland Revenue Commissioners* [1957] 2 All E.R. 612;

British American Tobacco Co. Ltd. v. *Inland Revenue Commissioners* [1943] 1 All E.R. 13;

Bank voor Handel en Scheepvaart N.V. v. *Slatford* [1953] 1 Q.B. 248 at p. 278;

Salomon and Salomon & Co. Ltd. [1897] A.C. 22;

Pharmaceutical Society v. *London and Provincial Supply Association Ltd.* [1880] 5 A.C. 857 (H.L.).

Recourse.

Recourse against the decision of the respondent to consider, for the purposes of the Exchange Control Law, Cap. 199, the applicant Company as a company resident in Cyprus but controlled by non-residents of Cyprus and to prohibit applicant's bankers from granting banking facilities to the applicant Company without the approval of the respondent.

K. Michaelides, for the applicant.

L. Loucaides, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

The following judgment was delivered by:-

A. LOIZOU, J.: This recourse raises a novel point on the construction of the Exchange Control Law, Cap. 199 and in particular section 32, sub-section (3) thereof.

The necessary facts are these:-

The applicants are a Public Company limited by shares, incorporated in Cyprus in 1944 under the provisions of the Companies Law, for the purpose of carrying on the business of distillation, production, preparation or purification of essential oils, manufacture of juices, etc. and they carry on the business, *inter alia*, of bottlers in Cyprus of Coca Cola and other beverages.

In the year 1963, the Food Products Corporation Ltd., to be referred hereinafter as " the Corporation", was incorporated in the Bahamas Islands and the 93.595 per cent of the shares of the applicant Company were exchanged by their holders who, admittedly, are residents of Cyprus, with shares of the said Corporation. In this way, the overwhelming majority of the shares of the Corporation are in the hands of residents of Cyprus who control the Corporation through their voting rights at a general meeting and are in a position to appoint and remove its Directors. At the time, the Bahamas Islands were within the Sterling Area which was called in the Exchange Control Law, Cap. 199, " The Scheduled Territories" and defined in the First Schedule to the Act, and no permission was required, except, as claimed, approval, pursuant to the provisions of section 32 (2), thereof, for the passing of the control of the

applicant Company to the foreign non-resident Company; this point, however, is not in issue in this case.

By the enactment of the Exchange Control (Amendment) Law, 1972 (Law No. 53 of 1972) which came into force on the 6th July, 1972, the scheduled territories were abolished and the transfer of funds from Cyprus to any country of the world, including former scheduled territories, require permission from the Central Bank of Cyprus. Furthermore under sub-section (3) of section 32, " except with the permission of the Central Bank, no person resident in the Republic shall lend any money or securities to anybody corporate resident in the Republic which is by any means controlled (whether directly or indirectly) by persons resident outside the Republic".

The applicant Company, being a resident Company controlled by the Corporation, became, according to the respondent Bank, a resident Company controlled by persons resident outside the Republic. Their financiers in Cyprus, namely, the Barclays Bank International Ltd., were informed by letter dated the 23rd October, 1973 (*exhibit* 11) that for exchange control purposes the applicant Company was considered as above, and consequently, pursuant to the provisions of section 32 (3) of the Law, the continuation of granting of banking facilities required their approval, and they were advised that an application on the appropriate form for authority to lend money to the applicant Company had to be submitted to them for the purpose.

An application for the granting of a permit to establish overdraft facility of an amount of £150,000.- until the 31st January, 1974, was submitted and approval of same was given by the respondent Bank on the 8th December, 1973. This facility was increased to £200,000.- and extended till the 28th February, 1974. They were also informed at the time, that any further request on their behalf, would be considered in the light of the particular circumstances and the supply of the information in respect of their group of companies.

It has not been claimed that the Corporation as such is a resident of the Republic. On the contrary, it was stated on behalf of the applicant Company that the business of the Corporation is carried out from abroad and that, with the exception of Mr. N. C. Lanitis, the other three Directors of the Corporation are not residents of Cyprus (see *exhibit* 7). This assertion

which has not been contested by the respondent Bank—in fact it constitutes the basis of the *sub judice* decision—satisfies the well established test for determining the residence of a company, namely, that a company's residence is where it really keeps house and does its business, where the central management and control is exercised, as laid down in the *De Beers Consolidated Mines Ltd.* v. *Howe* [1906] A.C. 455. (See also Palmer's Company Law, 21st edition, page 65 and Pennington Company Law, Third Edition, page 19).

The basic contention advanced on behalf of the applicant Company is that in such cases as the present one where the control of the resident Company is in the hands of a body corporate, one has, for the purpose of section 32 (3) of the Law, to go beyond the register of the shareholders of the resident Company and see who are the persons who ultimately control the mother company, so to speak. In other words, the veil of such corporate body having the control of the resident Company should be lifted.

Reliance has been placed, on the one hand, on the interpretation given to the words "control" and "controlling interest" in a number of English decisions with which I shall be dealing first, and on the other hand, on the presence of the words "whether directly or indirectly" (to be found in the section) following the words "by any means controlled". The construction given to the presence of the word "indirectly" is that for the purposes of the said section and the Exchange Control Law in general, they authorize the disregard of the corporate entity of the body having the control of the resident Company.

It was also contended that the intention of the legislator in enacting the said sub-section, was to safeguard against non-residents having the control and the benefits of controlling a resident Company. For that purpose, sub-section (3) should be read in conjunction with sub-section (1) of section 32.

The case of *Inland Revenue Commissioners* v. *Harton Coal Co., Ltd.* [1960] 3 All E.R. 48, has been cited in order to show that there is no difference between "control" and "controlling interest". The question that arises in this case was whether that company was during certain years a subsidiary company within the meaning of section 21 of the Finance Act, 1922. In fact, in sub-section (6) thereof, provision was made to the effect that "for the purposes of this sub-section, a company

shall be deemed to be a subsidiary company, if, by reason of the beneficial ownership of shares therein, the control of the company is in the hands of a company not being a company to which the provisions of this section apply....." It was stated by Pennycuick, J. at page 53 F of the judgment that " it is established that the expression 'control' in relation to a company means the power by the exercise of voting rights to carry a resolution at a general meeting of the company. It is also established that, in the absence of an indication to the contrary in the context in which the word occurs, the persons who possess these voting rights are to be ascertained by reference to the articles of the company and its register of members (see as to those points *British American Tobacco Co., Ltd.* v. *Inland Revenue Comrs.* [1943] 1 All E.R. 13; 29 Tax Cas. 49; *Inland Revenue Comrs.* v. *Bibby & Sons Ltd.* [1945] 1 All E.R. 667; 29 Tax Cas. 167 in the House of Lords; *Barclays Bank, Ltd.* v. *Inland Revenue Comrs.* [1959] 3 All E.R. 140; affirmed [1960] 2 All E.R. 817, H.L. (The speeches in the House of Lords delivered after date of this judgment). It appears from these cases that there it for the present purpose no relevant distinction between the expressions 'control' and 'controlling interest' ".

The next case referred to is that of *S. Berendsen Ltd.* v. *Inland Revenue Commissioners* [1957] 2 All E.R. p. 612. It is again a tax case and the determination of the question in issue depended on whether it was a company " the directors whereof had a controlling interest therein" in accordance with paragraph 11 of Schedule Four to the Finance Act, 1937. Applying the *British American Tobacco Co. Ltd.* v. *I.R.C.*, (*supra*), it was held that although it might not be possible to look beyond the company's register to ascertain who were the beneficial owners of shares held on trust, it was permissible to ascertain who were the shareholders of a limited company on the register, in order to ascertain with whose voice the latter company spoke. It is apparent that both cases relate to revenue matters where most of the statutory directions to lift the veil of a corporate body occur, and in particular where the question of the " controlling interest" is in issue.

As observed in Modern Company Law by Gower, Second Edition, after dealing with the question of companies and taxation at page 172—" Corporate personality still confers substantial tax advantages. These, however, are diminishing and offset by some disadvantages, and whenever the separate

entity of a corporation has been too blatantly abused the legislature has ruthlessly torn aside the veil of incorporation". It is from this angle that the cases of Revenue Laws where the corporate entity of a corporation was disregarded should be viewed, apart from the fact that questions of construction of particular statutory provisions were determined.

As Devlin, J. said in *Bank voor Handel en Scheepvaart N. V.* v. *Slatford* [1953] 1 Q.B. 248 at p. 278—"No doubt the legislature can force a sledgehammer capable of cracking open the corporate shell; and it can, if it chooses, demand that the Courts ignore all the conceptions and principles which are at the root of company law". It is in fact what the legislature has done in the field of taxation, but as pointed out by Gower (*supra*) at page 193,—"The Courts, however, have only construed statutes as 'cracking open the corporate shell' when compelled to do so by the clear words of the statute; indeed they have gone out of their way to avoid this construction whenever possible".

It has to be examined, therefore, whether in section 32 of the Law and in particular sub-section (3) thereof, there are such clear words that would compel a Court to ignore the corporate entity of the corporation. In other words, to disregard the principle that a company is considered in law as a person separate and distinct from its members.

This principle of the independent corporate existence of a company was explained and emphasized by the House of Lords in the case of *Salomon and Salomon & Co. Ltd.* [1897] A.C. 22 and reasserted in later cases, though the veil of incorporation has been lifted since then either by statutory direction or through judicial inroads. The latter, however, cannot be reduced to any consistent principles. As observed by L. S. Sealy, in Cases and Materials in Company Law, (1971), p. 58.

> "Commentators have on the whole discerned no set pattern in the decided cases; and although the plea is sometimes heard for 'some principles to be injected into this area of law' from which litigants can predict when the Courts will, and will not, lift the veil of the corporate entity, there is much to be said for retaining the flexibility of the present approach, especially where it enables the Court to counter fraud, oppression or sharp practice or to condone some informality in the affairs of small companies".

The material words in section 32 (3) relied upon by learned counsel for the applicant Company in support of his argument, are, " controlled (whether directly or indirectly) by persons resident outside the Republic" and in particular the word "indirectly" which, if it was not to be treated as superfluous and with no meaning, it had to be considered as authorizing the lifting of the veil of the corporate entity in control of the resident company. In effect, it has been said, that the word " indirectly" qualifies the word " directly" and gives to the word " controlled" in the said sub-section, the meaning of ultimately controlled, so that the Court, as well as the administration, so to speak, has to climb up the ladder and see where the ultimate control lies.

In answering this proposition is should be stated here and now, that in my view, the word " persons" to be found in the said sub-section, includes corporate bodies. It is a presumption, not necessarily a strong one, but the very circumstances in the context show that the word should be so construed. (See *Pharmaceutical Society* v. *London and Provincial Supply Association Ltd.* [1880] 5 A.C. 857 (H.L.)). Additional guidance for my conclusion is derived from the definition of the word " person" given in section 2 of the Interpretation Law, Cap. 1 which provides that " person" includes, *inter alia*, any company or body of persons corporate.

In the present case, we have direct control of the resident Company by a corporate body which, as such, is non-resident, and in my view, the words " directly or indirectly" in section 32 (3) of the Law, refer to the type of control that a non-resident person, and this includes a corporate body, has, over a resident company and not to the control or controlling interest that the shareholders of the non-resident company may have over their own corporation. In other words, the sentence " controlled by any means directly or indirectly" covers the direct control by a person or corporation and the indirect control through an agent, trustee or nominee. It is to such instances that the word " indirectly" refers and the Law itself calls for the ascertainment of the person on whose behalf the control is exercised. This is not a case, however, where it could be said that the corporation is controlling the applicant Company in the capacity of an agent, trustee or nominee of its shareholders. The words in the statute are not such as to constitute an instance under which the principle that the company is an independent

legal entity should be disregarded. Finally, reference should be made to sub-section (4) of section 32 which reads:-

> " For the purposes of this section and of the Second Schedule, persons resident in the Republic or outside the Republic shall be deemed to control a body corporate notwithstanding that other persons are associated with them in the control thereof if they can together override those other persons".

In the light of the conclusions to which I have come regarding the meaning and effect of the words " controlled (whether directly or indirectly)", the said sub-section has no application to the facts of the present case, inasmuch as we are not concerned with ascertaining who has the control of the non-resident company but the control of the resident company, as such.

For all the above reasons, the present recourse fails, because any other interpretation of this statutory provision would have defeated the very purpose of the Exchange Control Law, namely the protection of the national economy, and permit the discarding of the corporate character for one's own benefit and at his own option. This outcome on the merits renders unnecessary the determination of the issue raised by the respondent that the recourse is out of time.

In the result, the case is dismissed with no order as to costs.

Application dismissed. No order as to costs.