IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(LAND DIVISION)

CRN: 632/10; 696/10; 699/10; 700/10; 190/11; 189/11; 262/11; 263/11; 264/11; 265/11; 467/11; 468/11; 469/11; 359/11; 360/11; 361/11; 362/11

BETWEEN	**BUSINESS TRADE & INVESTMENT BOARD** Informant
AND	**TAAKOKA ISLAND VILLAS LIMITED** First Defendant
AND	**JOHN FRANCIS McELHINNEY** Second Defendant

Hearing: 5 September 2011

Counsel: C Evans for the Informant
L Rokoika for the Defendants

Judgment: 16 December 2011 (NZT)

JUDGMENT OF THE COURT

Introduction

[1] The Business Trade and Investment Board ("BTIB"), a statutory board incorporated under and pursuant to the Development Investment Act 1995–1996 (the "Act"), has laid a number of Informations charging the first and second defendants in relation to various offences under the Act. The first defendant ("the company" or "Taakoka") is now the subject of 13 charges and its Cook Islands-based "agent", Mr McElhinney, faces 4 charges.

[2] The first and second defendants have been committed for trial but expressly subject to a reservation of rights in terms of s 111 of the Criminal Procedure Act 1980-1981 which provides:

> **111 Power to discharge defendant after committal for trial** - Where any person is committed for trial under section 99 of this Act,-
>
> (a) The Judge may in his discretion, after a perusal of the written statements tendered for the trial, direct that the defendant shall not be arraigned on the information laid and direct that the defendant shall be discharged;
>
> (b) The Judge may in his discretion, at any stage of the trial, whether before or after his verdict, direct that the defendant be discharged.
>
> (2) A discharge under this section shall be deemed to be an acquittal.
>
> (3) The provisions of subsection (3) of section 112 of this Act shall extend and apply to a discharge under this section.
>
> (4) Nothing in this section shall affect the power of the Court to convict and discharge any person.

[3] The parties agree that the relevant threshold for the purposes of s 111 is that set out in *Auckland City Council v Jenkins*[1] where Speight J stated:

> A tribunal deciding whether or not there is a case to answer must decide whether a finding of guilt *could* be made by a reasonable jury or a reasonable judicial officer sitting alone on the evidence thus far presented. (emphasis in original)

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1 *Auckland City Council v Jenkins* [1981] 2 NZLR 363, 365.

[4] There are various written statements which have been tendered by the Informant together with other evidence which I describe in more detail below. I have relied upon this evidence in reaching my conclusions now set out. I do not accept an argument made by the Informant (in its supplementary submissions) which appears to require the defendants to tender evidence as well. While the exact ambit of this argument is unclear, there appears to be a suggestion that there is some burden upon the defendants which could not possibly be correct.

Relevant Facts

[5] The company received approval to carry on business in the Cook Islands from the Cook Islands Monetary Board at its meeting held on 1 December 1987. That Board was established under the Development Investment Act 1977, the predecessor to the current Act. The Board registered the Company to carry out the following activities within the Cook Islands:

> Owning and operating a resort complex of superior villas.

[6] In September 1996 the current Act came into force. The Development Investment Board replaced the Cook Islands Monetary Board, and has, in turn, been re-named the BTIB following an amendment in 2007. From September 1996 the company then fell within the definition of *"foreign enterprise"* in the new Act. Indeed, the same definition appeared in the 1977 Act.

[7] On 11 March 2004 the BTIB (which description I will use in this judgment for convenience) passed the following resolution concerning the company:

> To revoke registration on the grounds it was operating outside the ambit of its registration approval "owning and operating a resort complex of superior villas".

[8] It seems there may have been further materials before the BTIB when it passed its resolution as to why it concluded that Taakoka *"was operating outside the ambit of its registration approval..."*. These have not been made available to the

Court. In any event, I do not believe the exact reason is material for the purposes of my decision.

[9] On 11 March 2004 Mr Henry on behalf of the BTIB wrote to Taakoka advising that it had revoked its registration and invited representations. A day later, on 12 March 2004, Mr Henry wrote a further letter describing this as a *"clarification"*. In the second letter he stated that the *"opinion"* of the Board was that Taakoka was in contravention of their registration. This *"clarification"* is significant for reasons which will become more apparent below. At this stage I simply observe that the letter of 12 March is fundamentally inconsistent with the resolution of revocation passed on 11 March 2004.

[10] It appears that Taakoka made submissions to BTIB sometime during March 2004 but these do not appear to be before the Court. Nothing turns on that because it is common ground that submissions were made.

[11] At its meeting on 8 April 2004, the Board passed a further resolution:

> The Board noted the representation and agreed there was no grounds to change its decision to revoke foreign enterprise registration. However, the Board also agreed that the company can re-apply for foreign enterprise registration following its Court cases.

[12] The reference to *"Court cases"* in the second resolution was a reference to various claims involving the company and some land owners of the leasehold estate owned by the company. That litigation has been hard fought and continues to this day.

[13] On 19 May 2004 Mr Brown as Chair of the BTIB wrote to Taakoka. This letter appears to follow on from the 8 April 2004 meeting of the Board but the letter incorrectly refers to this as having occurred on 8 March. The letter included the following sentence: *"The Board gave due consideration of* (sic) *your submissions but did not believe they provided grounds for the Board to reverse its decision."*

[14] It is fairly clear, both from the resolution dated 8 April 2004 and the subsequent letter of 19 May 2004, that the Board believed that registration had been revoked at its meeting on 11 March 2004.

[15] In its written submissions before me, the BTIB emphasised that the relevant revocation of registration followed from the resolution dated 11 March 2004 by reference to ss 22 and 23 of the Act (e.g. submissions paragraph 11.5). It then argued that the company had three months to wind up its business in the Cook Islands. It can be observed that that submission appears to be inconsistent with the second of the two resolutions of the BTIB mentioned above (which appears to assume that the status quo would be maintained while the litigation was being addressed). The submission is also inconsistent with the supplementary submissions made on behalf of the BTIB discussed below.

The laying of the Informations

[16] In late 2010, and then again in May 2011, the BTIB swore a large number of Informations in relation to the two defendants as well as other parties. I do not have full details of all of the Informations, but I am advised that those brought in relation to other named defendants have since been withdrawn. I have read the Minute of Nicholson J dated 18 July 2011 where, at [4], he lists the names of other persons originally charged.

[17] There are now 17 current Informations (13 in relation to the company and 4 in relation to Mr McElhinney), a number of which are alternatives.

[18] All of the current Informations (except for CRN 632/10 and 262/11) proceed on the assumption that the registration of the company was revoked by way of a resolution of BTIB and that thereafter the company was unregistered.

[19] The Informations allege a variety of offences. It is convenient to discuss the detail of that below.

Was the revocation of registration effective?

[20] During the course of argument, an issue arose as to whether the resolution of 11 March 2004 complied with the statutory scheme, particularly that set out in reg 6 of the Development Investment Regulations 1996. This issue had not been ventilated in the written submissions and I reserved leave to counsel to file further written submissions which I have now received and considered. The defendants' further submissions were filed on 16 September 2011. The Crown submissions in response were filed on 23 September. For various reasons, a copy of the Crown submissions were not forwarded to me until December and, consequent upon receipt of these, I have been able to finalise this Judgment. I regret the delay in doing so which has occasioned by the Registry's omission to forward these submissions to me.

[21] The starting point of the argument is s 22 of the Act which is in the following terms:

> **22 Revocation of registration**
>
> (1) The Board may revoke the registration of an enterprise of a foreign enterprise either wholly or in respect of any approved activity where a foreign enterprise has:
>
> a) contravened any law in force in the Cook Islands (including this Act); or
>
> c) failed to comply with any term or condition of its registration as a foreign enterprise.
>
> (2) The procedure by which the Board may revoke the registration of a foreign enterprise under subsection (1) shall be prescribed by regulation.
>
> (3) The revocation of the registration of a foreign enterprise pursuant to subsection (1) shall not in any way affect any liability of that foreign enterprise to its creditors or to any person interested in the affairs of the foreign enterprise, or the rights of such creditors or persons, whether or not the liability or right shall have arisen before or after the date that the revocation shall take effect. (emphasis added)

[22] It is not clear to me why there is no s 22(1)(b). I proceed on the assumption that this is simply a numbering error.

[23] Regulation 6, made in terms of s 22(2) as set out above, is in the following terms:

> 6 **Revocation of registration –**
>
> (1) Where a foreign enterprise has –
>
> (a) contravened any law of the Cook Islands (including the Act and these Regulations); or
>
> (b) failed to comply with any term or condition of its registration as a foreign enterprise,
>
> and the Directors, having regard to the nature of the contravention or failure as the case may be, consider that it is undesirable that the enterprise should continue to be registered under this Act, or registered in respect of a particular activity, the directors shall notify the foreign enterprise of their opinion and of their reasons for such opinion, and shall invite the foreign enterprise to make representations within a period specified by the directors, being in any event not less than 21 days, as to why registration of the enterprise as a foreign enterprise under the Act should not be revoked, either wholly or in respect of any particular activity.
>
> (2) Upon receipt of any representations made under subclause (1), and after due consideration of those representations or, on expiry of the specified period if no such representations are made, the Directors may revoke the registration of the foreign enterprise either –
>
> (a) wholly; or
>
> (b) in respect of any particular activity.
>
> (3) Where the registration of a foreign enterprise is revoked pursuant to subsection (2), either wholly or in respect of any particular activity, the Directors shall give notice to the Minister and to the foreign enterprise of their decision and of the reasons for such decision.
>
> (4) The revocation of the registration of a foreign enterprise pursuant to subclause (2) shall not in any way affect any liability of that foreign enterprise to its creditors or to any person interested in the affairs of the foreign enterprise, or the rights of such creditors or persons, whether or not the liability or right shall have arisen before or after the date that the revocation shall take effect. (Emphasis added).

[24] The statute and the regulation make it clear that the procedure set out above is to be followed in the case of the Board revoking the registration of a foreign enterprise. Equally, it seems clear that that procedure was not strictly followed in the present case. It is now necessary to address the consequence of that.

[25] Taakoka's supplementary submissions emphasise the wording of the resolution dated 11 March 2004 and the subsequent correspondence. Taakoka submits that revocation plainly was intended to occur by way of the resolution dated 11 March 2004. It argued that the requirements of reg 6 had not been met.

[26] The Crown's supplementary submissions raise a number of matters in response. First, it is said that there had been no prior challenge on the part of Taakoka to the revocation of registration. Reference is made to the Limitation Act. It is also said that no application for judicial review has been made. I cannot see how any of that is relevant. If the revocation was unlawful then that is a decision I can reach in this Judgment. It does not require Taakoka to have taken any prior steps within any particular time.

[27] Secondly, the Crown emphasises the second letter written by Mr Henry dated 12 March 2004 as complying with reg 6.

[28] Thirdly, and contrary to its earlier submissions, the Crown now argues that the notice of revocation was effective from 4 April 2004. It is not clear to me why that date has been selected as opposed to 8 April 2004 when the further resolution of the Board was passed.

[29] The Crown's supplementary submissions, which evidence a significant change of direction on its part from how it previously presented the case, do not address the fundamental problem which is that the Board, on 11 March 2004, passed a resolution purporting to revoke Taakoka's registration. That is what the resolution says and what Mr Mark Brown says in his witness statement. The subsequent resolution of 8 April and Mr Brown's letter of 16 May are both consistent with that reading of events. At its heart, the Crown now appears to be arguing that there was compliance with reg 6 in substance but not in form. Assuming that that is actually its argument, I reject it.

[30] The purpose of the regulation is to give the foreign enterprise notice of the Board's opinion and then to enable it to make submissions. The Board, by contrast, made its decision revoking registration and then invited submissions. As it saw it, the purpose of those resolutions was to persuade it to reverse its earlier decision. There is a difference between the two approaches. The second approach (that taken by the Board) is not consistent with the regulatory scheme to ensure natural justice for the foreign enterprise. If I am to uphold the Board's argument I must disregard the wording in the regulation and also the evident intent to accord natural justice to the foreign enterprise. I cannot discern any legislative intent to justify such an approach to the otherwise clear wording of the regulation. I see the letter of 12 March as a ham-fisted attempt to comply with the regulation after the event but it cannot be relied upon to regularise the previous day's resolution. And, notwithstanding the letter of 12 March, the Board's subsequent actions are consistent with its resolution passed on 11 March 2004. It is too late now to argue that the relevant resolution is that of 8 April 2004. On its face it purported to confirm the earlier resolution. It did not obviously claim to have any independent standing.

[31] In all the circumstances, I do not believe that the Board complied with the procedure set out in the statute and regulation. I believe the purported revocation of the registration was unlawful and I so declare it. On that basis, all of the charges which proceed on the assumption that the registration of the company was revoked and that the company was then unregistered must fail. The exceptions are the charges in CRN 632/10 and 262/11. In relation to all of the other charges I direct that there be no arraignment on the charges. The company and Mr McElhinney are hereby discharged.

[32] That finding means there is no proper basis for the Informations because, as noted above, the Informations (except CRN 632/10 and 262/11) proceed on the basis that the revocation was lawful and effective. I now address the remaining arguments in case I am wrong as to that.

The Development Investment Act 1995/1996

[33] I now set out relevant provision from the Act.

[34] The long title to the Act is:

> An Act to promote trade, investment and business in the Cook Islands, promote and monitor foreign investment in the Cook Islands, and to encourage the participation of Cook Islanders in trade, investment and business by the establishment of a Development Investment Board.

[35] A number of relevant provisions are defined in s 2 as follows:

> "**Activity**" means an undertaking of whatever nature engaged in by an enterprise and includes each and every other undertaking that is associated with or incidental to that undertaking.
>
> "**Carry on business**" means to be engaged in an activity for the principal purpose of deriving a gain from that activity whether such gain is pecuniary or otherwise, but does not include –
>
> a) an isolated transaction, not being one of a number of similar transactions repeated from time to time;
>
> b) maintaining a bank account in the Cook Islands, the principal purpose of which is other than investment for pecuniary gain;
>
> c) taking security for or collecting any debt or enforcing any rights relating to security;
>
> d) the letting and renting of residential premises where the principal object is not pecuniary gain;
>
> e) the gathering of any information or undertaking a feasibility study.
>
> "**Enterprise**" means any person carrying on any activity as defined herein or proposing to carry on business.

[36] The expression *"foreign enterprise"* is defined in detail. It is common ground that the company was a foreign enterprise at all material times.

[37] Parts I, II and III are not directly relevant here. Equally, the objectives and functions of the Board which are set out in detail in Part IV do not appear to be directly relevant to the matters before me.

[38] That takes me to Part V which contains ss 17 and 23 which are relevant (s 22 has already been addressed above).

[39] Section 17 provides:

> **17 Restriction on carrying on business by foreign enterprise –**
>
> (1) No foreign enterprise shall carry on business in the Cook Islands in any activity unless that foreign enterprise is registered pursuant to this Act to carry on business in respect of that activity.
>
> (2) Every person who does any act in contravention of subsection (1) commits an offence and shall be liable on conviction to a fine not exceeding $25,000 and to a further fine of $1,000 for every day or part of a day during which the offence continues.

[40] Section 23 provides:

> **23 Continuation of business where registration revoked –**
>
> No foreign enterprise shall carry on business in the Cook Islands in any activity after revocation of registration in respect of that activity has taken effect, except insofar as is necessary for the enterprise to wind up its affairs in relation to that activity, but in any event not exceeding 3 months, or such extended time as the Board may allow.

[41] An issue has arisen as to the meaning of s 23 and whether it creates an offence in addition to that set out in s 17. I address that shortly.

[42] In Part VI, the main provision is s 24. The BTIB relies upon ss 24(1) and 24(2) and these are now set out:

> **24 Transfer of shares or interest –**
>
> (1) No person shall transfer any of the legal or equitable interest in shares or any proprietary interest in –
>
> (a) an enterprise where that transfer has the effect of the enterprise becoming a foreign enterprise; or

(b) a foreign enterprise where that transfer has the effect of increasing the foreign interest in an enterprise; or

(c) an enterprise which is in receipt of an incentive or concession granted pursuant to Part VII,

unless the approval of the Board to such transfer or interest has first been obtained.

(2) No person shall increase the share capital or any proprietary interest of –

(a) an enterprise where the increase shall have the effect of the enterprise becoming a foreign enterprise; or

(b) a foreign enterprise where that increase has the effect of increasing the foreign interest in an enterprise; or

(c) an enterprise which is in receipt of an incentive or concession granted pursuant to Part VII,

unless the approval of the Board to such increase has first been obtained.

Provided that this subsection shall not apply to any case where the increase of capital or proprietary interest in the enterprise is to all existing shareholders or owners in the same proportions as and upon the same terms and conditions as their existing shareholding or proprietary interest.

[43] Finally, for the purposes of this review, I refer to Part X which contains ss 37 and 38 as follows:

37 General offences and penalty –

Every person who does or omits to do any act in contravention of this Act or Regulations made hereunder for which no offence is provided for elsewhere in this Act commits an offence and shall be liable on conviction to a fine not exceeding $2,000.

38 Offences by corporations –

Where a body corporate has committed an offence against this Act, every person who at the time of the commission of the offence was a director, general manager, secretary, or other similar officer of such body corporate, or was acting or purporting to act in any such capacity, shall also be guilty of such offence and shall be punishable accordingly unless that person proves that such offence was committed without his consent or knowledge and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions in such capacity and in all the circumstances.

The meaning of s 23

[44] As identified above, an issue arises in relation to the interpretation of s 23 and whether it creates a separate offence in addition to that set out in s 17. The issue lies behind the alternative charges brought by the BTIB. For example, CR 263/11 (based on s 23) is an alternative to CRN 469/11 (based on s 17).

[45] On careful reflection, it seems highly unlikely that s 23 was intended to create an offence in addition to that set out in s 17. There are a number of reasons for this view.

[46] First, because there is no specific penalty contained within s 23 it would be necessary to read that section in conjunction with s 37. This provides for a maximum fine of $2,000. This can be contrasted with the substantial penalties under s 17. There is no obvious policy reason why the penalty for breaching s 23 (assuming it created an offence) would be so insignificant compared to that arising out of a breach of s 17.

[47] Secondly, there is no sensible way of determining the point at which s 23 would cease to be the basis for an offence following the revocation of registration. Once the three month grace period has expired, could it sensibly have been intended that s 23 would continue to govern the activity of a formerly-registered enterprise? And, if so, for how long? There are no obvious answers to these questions.

[48] I believe the better reading of s 23 is that it provides a safe harbour whereby a foreign enterprise, which loses its registration, then has three months to wind down its activities (or within such extended time as the Board may allow).

[49] Consequently, I do not believe there is any proper basis to bring charges based upon s 23. As a consequence, and should my primary conclusion be in error, I direct that the company should not be arraigned in relation to those charges in CRN 699/10, 190/11, 263/11, 264/11 and 265/11. It is discharged accordingly. The same applies to those charges in CRN 369/11 and 361/11 laid against Mr McElhinney. He is discharged in relation to those charges.

The depositions lodged by the BTIB

[50] Section 111, Criminal Procedure Act, requires the Court to determine the matter on the basis of any depositions as tendered and other relevant documentary evidence.

[51] The BTIB has disclosed some nine witness statements (from eight witnesses) which I have read. These, in turn, refer to various exhibits which I have also considered.

[52] Ms Rokoika in her submissions set out some detail as to each of the proposed witnesses and I have also drawn on that in preparing the following short summary of witnesses:

(a) **Robert Coote**

Mr Coote undertook various works in relation to the villas in August 2007. His evidence is relied upon in support of the charges based upon the undertaking of maintenance.

(b) **Arohanui Ropata**

Ms Ropata rented one of the apartments in 2009.

(c) **John Beasley**

Mr Beasley rented one of the villas in 2010, and his partner's parents occupied the next door villa in March 2010. He undertook some repairs.

(d) **Teanini Raumea (two depositions)**

Mr Raunea is employed by the BTIB and gives evidence in relation to the company's accounts.

(e) **Teheu Kamana**

Mr Kamana undertook work in relation to the villas in December 2009.

(f) **Maine Brown**

Ms Brown gives evidence as to the registration of the company in 1987.

(g) **Mark Brown**

Mr Brown was Chairman of the BTIB in March 2004 and gives evidence as to revocation which he says occurred on 11 March 2004.

(h) **Alexander Henry**

Mr Henry wrote a number of the letters which have already been mentioned above.

[53] It is fair to say that the proposed evidence is brief indeed. In fact, I think it could be described as scanty.

Categories of charges

[54] There are four categories of charges which I must consider. There is then a fifth (CRN 262/11) which is concerned with an alleged failure to file annual returns. That charge is not the subject of the current challenge and I put it to one side.

[55] The four categories of charges which are under challenge can be summarised:

(a) one charge concerned with the alleged transfer of shares;

(b) one charge concerned with the carrying on of business by making repairs;

(c) charges concerned with the carrying on of business by way of renting the villas, and

(d) charges concerned with the investing of share capital.

[56] I now address each of these four categories under the following headings:

Transfer of shares

[57] This charge is set out in CRN 632/10. The BTIB alleges that the company:

> On 27 November 2000 in Rarotonga
>
> Being a registered foreign enterprise did transfer shares from Ruta Tereora Tupangaia and Maui Te Pua to Taakoka Island Villas Trust thereby increasing its foreign interest without prior approval.

[58] There are two particular problems with this charge. First, the charge is concerned with the transfer of shares held by two Cook Islanders, Mrs Tupangaiia and Mr Te Pua, to a trust associated with the overseas shareholders of the company. This transaction was never consummated and the shares are still held in the names of Mrs Tupangaiia and Mr Te Pua. I asked Ms Evans whether there were any provisions which would cover an attempted breach or similar. She advised me there is nothing. The charge alleges a breach of s 24(1)(b) but, in the absence of any transfer of shares, it is impossible to establish a breach.

[59] The second problem with the charge is that, as I interpret s 24(1)(b), it does not provide a basis to charge the company. The prohibition in s 24(1) is upon the transferor. I cannot see any basis to charge the foreign enterprise whose shares are the subject of the alleged contravention.

[60] For these two reasons I direct that there be no arraignment on the charge. The company is discharged.

Carrying on business by making repairs

[61] This charge can be found in CRN 696/10. The BTIB alleges that the company:

> Between 1 August 2007 and 31 August 2007
>
> Being an unregistered foreign enterprise is carrying on business in the Cook Islands by undertaking repair and maintenance works on its villas.

[62] The Informant sought leave to make some amendments to this charge but, in light of my conclusions, I do not need to address that application.

[63] This charge is based primarily upon Mr Coote's evidence which addresses the August 2007 period (see [52] above). The charge focuses upon s 17(1) of the Act. The legal issue is whether the company was carrying on business in the Cook Islands in August 2007 in carrying out repairs to the premises. For the reasons which follow, I do not believe it was. There are two critical portions to the definition of *"carrying on business"* in s 2. The first is that it focuses upon *"the principal purpose"* of the foreign enterprise. Secondly, that principal purpose must be to derive a gain from the relevant activity.

[64] In her written submissions, Ms Evans argued that liability under the Act was strict. However, during the course of making her submissions, she resiled from that, appreciating that the definition of *"carrying on business"* required the Court to assess the purpose of the foreign enterprise. That is, in order to succeed in a charge that a foreign enterprise was *"carrying on business"*, it is necessary for the prosecution either to give direct evidence of that purpose or provide an appropriate foundation for an inference to be drawn.

[65] By August 2007 the litigation mentioned earlier was well advanced. Such materials as are before the Court clearly suggest that the company's principal objective at that time was to protect its interests in relation to that litigation and, so far as it could, to maintain the status quo in relation to its other assets. BTIB did not dispute that. Rather, BTIB argued that in protecting the assets, the company was carrying on business.

[66] In this regard, I note the dicta of Grice J in earlier litigation concerning the company (Judgment dated 23 July 2008, paragraphs [24], [27] and [28]). This, of course, is not directly in point but does, I think, fairly reflect the objective of the company at the time.

[67] Ms Evans argued that a company, whose registration had been revoked, had two options. First, it could wind down its business and dispose of it within the three month period. In order to achieve this goal, the company would need to have disposed of the lease. In the present case, though, that would have been a logical impossibility because of the litigation then underway concerning the validity of the lease.

[68] The second option advanced by Ms Evans was to apply for limited registration. That option, however, was not consistent with the second of the two resolutions passed by the Board and set out above. That second resolution contemplated that the company would fight the litigation and then be in a position to re-apply for registration. It does seem to be implicit within the resolution that the company would maintain the lease in the meantime.

[69] It is common ground that the lease required the company to maintain the premises in order to avoid foreclosure.

[70] Ms Evans, for the BTIB, referred to two cases under the 1977 legislation which she said were of assistance to the Court. During the course of her submissions she referred to the definition under the previous Act which was lengthy in detail but subject to a general statement as follows:

> "carrying on business" means carrying on an economic activity pursuant to the objects of the enterprise...

[71] Ms Evans argued that this was a narrower definition than the definition appearing in the current Act. I do not accept this. The introductory words in the previous definition were extremely wide. This was recognised by the Court of

Appeal in *Preston v Tierney*,[2] and in the High Court in the *Market Reach Pty Ltd v Henry & Associates.*[3] With respect, I do not derive a great deal of assistance from these cases because they concerned a different definition and were focussed on the operation of the Illegal Contracts Act, a matter not currently before me. I also note that part of the report in *Preston v Tierney* is missing at what appears to be a critical part of the reasoning. In one respect, I do derive assistance from the second of the two cases mentioned, *Market Reach Pty Ltd v Henry & Associates*, and I return to that below.

[72] I do not believe there is a case to answer that the company was carrying on business as charged and I direct that there be no arraignment on the charge. The company is discharged.

Carrying on business by renting out villas

[73] The charges concerning the carrying on of business by receiving rental payments can be found in CRN 700/10 and 189/11. These charges are in similar terms (although they refer to different periods) and I now set out the allegations made by BITB in CRN 700/10 (that set out in CRN 189/11 is slightly garbled):

> Between 2 February 2010 and 19 May 2010 in Rarotonga
>
> Taakoka Island Villas Limited
>
> A Corporate Body whose registered office is at Trends Limited, Avarua, Rarotonga
>
> Being an unregistered foreign enterprise is carrying on business in the Cook Islands by renting out villas.

[74] The evidence of Beasley and Ropata is the primary evidence which supports these allegations.

[75] Ms Evans argued that by receiving rental, the company was carrying out business because its primary purpose was pecuniary gain. She referred to

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2 *Preston v Tierney* [1992] CICA 2.
3 *Market Reatch Pty Ltd v Henry & Associates* [2002] CKHK 2.

Market Reach Pty Ltd v Henry & Associates.[4] Williams J referred to *"pecuniary gain"* as a synonym for various expressions such as *"pertaining to or of money"*, gaining a *"financial benefit"*, gaining a *"reward"*.

[76] Ms Rokoika argued that the rental payments received were simply a means to preserve the assets. That is, there was no actual gain. I reject the argument. She is focussing upon how the funds, once received, were applied by the company. I think there is little doubt that a jury, properly directed, could convict in relation to such a charge. Of course, I am not saying that is the inevitable outcome, but that is not a matter to be addressed by me in this judgment.

[77] In the absence of my conclusion (above) in relation to reg 6, I would have allowed the two charges to proceed to trial.

Increase in share capital

[78] These charges can be found in CRN 467/11, 468/11 and 469/11. A sample charge (CRN 469/11) is set out:

> Between 1 January 2007 and 31 December 2007
>
> Taakoka Island Villas Limited
>
> Being an unregistered foreign enterprise is carrying on business in the Cook Islands by increasing its share capital through advances from Roger William Lyon of $64,643.00 having the effect of increasing the foreign interest in the enterprise without approval.

[79] All of these charges relate to advances made by shareholders in New Zealand to the company.

[80] There seem to be two significant problems facing the prosecution. First, there is the problem of proof. The only proof that the prosecution can provide arises out of accounts prepared by the New Zealand accountants who are not compellable witnesses. The accounts themselves are not certified in any formal way and in the

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4 Ibid at [43]–[50].

circumstances can be no more than hearsay in relation to the advances which may be recorded in the documents.

[81] I have been referred to various provisions in the Evidence Act including ss 3 and 22. Section 3 can be shortly stated:

> **3 Discretionary power of admitting evidence –**
>
> Subject to the provisions of this Act, a Court may in any proceeding admit and receive such evidence as it thinks fit, and accept and act on such evidence as it thinks sufficient, whether such evidence is or is not admissible or sufficient at common law.

[82] Section 22 is more lengthy and deals with the admissibility of documentary evidence which tends to establish a fact. It is possible that the accounts may be admissible by reference to this section. However, all that the accounts show is an indebtedness by the company to various shareholders. I do not believe this would amount to proof that advances were made as alleged.

[83] The second problem concerns s 24(2)(b) which is relied upon in each case. Section 24(2)(b) relates to share capital. The making of advances does not fall within the terms of such provision.

[84] Ms Evans sought to meet this problem by submitting that advances by shareholders were captured by s 17. There are some objections to this change of approach. First, that it is inconsistent with the current wording of the Informations. Secondly, and as I understand it, that it is inconsistent with the current practice of the BTIB which does not require individual advances by approved foreign shareholders each to be subject to approval.

[85] I do not believe there is a case to be answered. I direct that there be no arraignment on the three charges. The company is discharged.

McElhinney charges: carrying on business by renting out

[86] Originally there were four charges against Mr McElhinney but as a result of my finding in relation to s 23, only two remain (assuming I am wrong in relation to reg 6 as above). They are CRN 360/11 and 362/11. Both are mirror-image allegations to those made against the company for similar offences. In other words, the prosecution intends to proceed against both the company and its Cook Islands agent (who is not an officer of the company) for exactly the same offences.

[87] I fail to see how Mr McElhinney, who is a resident of the Cook Islands, can be said to fall within the proscription of s 17 of the Act. Section 17 is concerned with a foreign enterprise and not its agent in the Cook Islands. It appears the BTIB intends to argue, by reference to s 38, that Mr McElhinney was an officer of the company. However, that is plainly not the case. An agent of the company is not per se an officer and there has been no attempt to argue that in some way Mr McElhinney could be regarded as an officer of the company.

[88] I direct that there be no arraignment on the two charges remaining. Mr McElhinney is discharged.

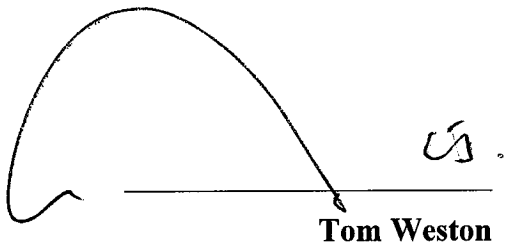
Conclusion

[89] For the reasons set out above I have concluded that all of the charges which proceed on the assumption that the registration of the company was revoked by way of a lawful resolution must fail. The test in *ACC v Jenkins* is not met. That leaves only CRN 632/10 and 262/11 as surviving. I direct that there be no arraignment on all other charges and the company and Mr McElhinney are hereby discharged in relation to those charges.

[90] I have, out of an abundance of caution, proceeded to review the charges should I be mistaken in the above conclusion. CRN 262/11 would survive this analysis as well. So, too, would the charges in CRN 700/10 and 819/11. But CRN 632/10 would not survive. In addition to CRN 632/10, I would have found against all of the remaining charges and would have directed that there be no arraignment on the charges and would have discharged the company and Mr Elhinney.

[91] The upshot of my reasoning is that all charges other than that contained in CRN 262/11 fail because there is no case to be answered. I direct there shall be no arraignment on those charges and both the company and Mr McElhinney are discharged in relation to them.

[92] I anticipate I will need to deal with the question of costs. I reserve leave to both parties to make any necessary application consequential upon my decision as above.



Tom Weston

Chief Justice