Trinity Term
[2019] UKPC 25
Privy Council Appeal No 0060 of 2017

JUDGMENT

Bermuda Bar Council (Respondent) *v* Walkers (Bermuda) Ltd (Appellant) (Bermuda)

From the Court of Appeal for Bermuda

before

Lord Reed
Lord Kerr
Lord Hodge
Lord Briggs
Lady Arden

JUDGMENT GIVEN ON

10 June 2019

Heard on 29 January 2019

Appellant	*Respondent*
Michael Todd QC	Lord Pannick QC
Kevin Taylor	Delroy Duncan
Philip Gillyon	Paul Luckhurst
(Instructed by BDB Pitmans LLP)	(Instructed by Harcus Sinclair LLP)

LORD HODGE: (with whom Lord Reed, Lord Kerr and Lord Briggs agree)

1. Bermuda has sought by legislation and regulation to promote and preserve local control over its economic life. The Companies Act 1981 ("the 1981 Act") draws a distinction between local companies incorporated in Bermuda and controlled by Bermudians, which may carry on business in Bermuda, and other companies, which, unless exempted, must be licensed by the Minister of Finance to carry on such business. The principal question in this appeal is the nature of foreign control over a local company which would prevent it from being "controlled by Bermudians" and thus require it to be licensed by the Minister.

2. In the past, legal services in Bermuda were provided exclusively by sole practitioners or partnerships with few partners. Since 2009 Bermudian lawyers have been able to offer professional services in Bermuda through the medium of limited liability companies ("professional companies") under Part IVA of the Bermuda Bar Act 1974 ("the 1974 Act" (Part IVA having been inserted by section 10 of the Bermuda Bar Amendment Act 2009)). The shares in such professional companies must be legally and beneficially owned by one or more barristers who have valid practising certificates and, as a general rule, all the directors of the professional company must be barristers with such certificates. Section 16C of the 1974 Act empowers the Bermuda Bar Council ("the Bar Council") to issue a certificate of recognition to a professional company and to cause a list of the names of recognised professional companies to be published in the Gazette.

3. In May 2015 Walkers Global ("WG"), a partnership established under the laws of and based in the Cayman Islands which has developed an international offshore law business in several jurisdictions, announced that it would expand its business by opening an office in Bermuda and that it would be "the first major international offshore firm to enter the Bermuda market". Thereafter, in October 2015 Walkers (Bermuda) Ltd ("WBL") was incorporated as a local company. All of the shares of WBL have been and are held by Bermudian barristers with valid practising certificates. Mr Kevin Taylor, who is the sole director of WBL, holds 99 of the 100 shares. His wife, Rachael Barritt, held the other share. In November 2016 she transferred her one share to Mr Jonathan Betts.

4. The proposed business relationship between WG, WBL and Mr Taylor does not involve WG having any legal control over or beneficial interest in the shares of WBL. Two draft agreements, a Licensing and Services Agreement ("LSA") and a Loan Agreement ("LA") will, if executed, govern the relationship. The LA provides for WG to lend up to US$5m to fund the start-up and operation of WBL's business. The LSA authorises WBL to provide professional services in and from Bermuda under "the

Walkers brand" in consideration of a licence fee and enables WBL to draw on extensive services procured by WG, including those of operational management, compliance, finance support, human resources, marketing, information technology, training and project management. Kawaley CJ in his judgment dated 12 January 2017 summarised the proposed contractual arrangements in the following terms at para 16 (and his summary has not been challenged):

> "The main elements of the proposed contractual arrangements are as follows:
>
> a) Walkers Global will retain ownership [of] the global brand name 'Walkers' and license its exclusive use by [WBL] in Bermuda for a fixed quarterly fee with either party having the right to terminate the contract on 12 months' notice;
>
> b) Walkers Global will supply [WBL] with a comprehensive suite of administrative/managerial support services at rates comparable to those charged to other licensees elsewhere;
>
> c) Walkers Global will provide substantial financial support on terms which reflect a symbiotic relationship between licensor and licensee with Walkers Global in a dominant position."

The Chief Justice went on to state that the proposed arrangements "clearly propose to confer on Walkers Global a considerable amount of commercial influence over [WBL]" (para 17).

5. Mr Taylor applied to the Bar Council for a certificate of recognition of WBL as a professional company under section 16C of the 1974 Act. The Bar Council, after corresponding with Mr Taylor, decided on 10 June 2016 to refuse to grant the certificate on the grounds that the terms on which WBL proposed to operate in Bermuda in relationship with WG would contravene section 114 of the 1981 Act which requires local companies which carry on business in Bermuda to be controlled by Bermudians.

6. WBL appealed by Notice of Originating Motion against the Bar Council's decision. The Chief Justice allowed WBL's appeal, holding that the proposed arrangements regulating the operation of WBL as a professional company were not contrary to section 114 of the 1981 Act or contrary to public policy. In essence, the

Chief Justice interpreted section 114 of the 1981 Act when read with Part I of the Third Schedule as prohibiting a local company from carrying on business in Bermuda without a permit from the Minister (a) if there was foreign ownership (legal and/or beneficial) of more than 40% of its shares, (b) if there was foreign control over the voting power of the shares of the majority Bermudian shareholders or (c) if less than 60% of the board were Bermudian directors. He stated (para 51), "local companies … must be in substance as well as in form at least 60% owned and controlled by Bermudians". He held that the commercial control which the proposed arrangements gave WG over WBL did not infringe section 114 and as a result the Bar Council had erred in its decision.

7. The Court of Appeal for Bermuda ("Court of Appeal") (Baker, President, and Bell and Clarke JJA) disagreed. The court interpreted the relevant provisions of the 1981 Act as extending beyond control over the voting power of shareholders to include the substance and reality of commercial control. As a result the court found that a company owned and directed by Bermudians may be controlled (directly or indirectly) by non-Bermudians by means of commercial arrangements which that company has with another party. In reaching this view, the Court of Appeal stated that the Chief Justice had misread the 1981 Act and the judgment of the Board in *Bermuda Cablevision Ltd v Colica Trust Co Ltd* [1998] AC 198 ("*Bermuda Cablevision*").

Discussion

8. The Board is persuaded that, subject to one qualification in para 31 below, the Chief Justice was correct in his interpretation of the 1981 Act and that the Court of Appeal erred in overturning his ruling. As the appeal turns on a question of statutory interpretation, it is necessary to set out the relevant provisions.

9. Under the 1981 Act there are three types of company: the local company, the exempted company and the overseas company. This appeal is not concerned with the exempted company, which is defined in section 127 of the 1981 Act, or with the overseas company, which is defined in section 2 of the Act as "any body corporate incorporated outside Bermuda other than a non-resident insurance undertaking". Section 2 defines a local company as "any company incorporated in Bermuda other than an exempted company".

10. Part IX of the 1981 Act, which begins at section 113, contains provisions relating to local companies. Section 114 of the 1981 Act (as amended by section 13 of the Companies Amendment Act 1996) sets out the circumstances in which a local company may carry on business in Bermuda and, so far as relevant, provides:

> "(1) No local company shall carry on business of any sort in Bermuda unless -

(a) it is a company which, at the relevant time, complies with Part I of the Third Schedule or is a wholly-owned subsidiary of such a company; …" (Emphasis added)

It is sufficient to note at this stage that subsection (1)(a) sets out two options: the local company must comply with Part I of the Third Schedule or it must be a wholly-owned subsidiary of a company which so complies.

11. Part I of the Third Schedule contains provisions with which a local company carrying on business in Bermuda must comply, unless it is otherwise authorised to do so under section 114. It provides:

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

(2) Without prejudice to the generality of sub-paragraph (1), at least 60 per centum of the total voting rights in the company shall be exercisable by Bermudians.

2(1) The percentage of Bermudian directors, and the percentage of shares beneficially owned by Bermudians, in the company shall not be less than 60 per centum in each case:

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

(2) The company shall act in accordance with this subparagraph if the percentage of shares beneficially owned by Bermudians in it falls below 60 per centum by virtue of factors which are beyond its control and it gives notice in writing to the person who is not Bermudian and whose ownership of shares results in the percentage so falling, as soon as the directors become aware of that fact, that -

(a) he must divest himself of his interest in those shares as soon as may be and, in any event, not later than three years from the date upon which he receives the notice; and

(b) he must not exercise any voting rights attaching to such shares from the date upon which he receives the notice.

> and the three years calculated in accordance with paragraph (a) have not elapsed:
>
> Provided that the Minister, may in any particular case, for good cause, extend the period of three years for a further period not exceeding one year. …"

12. The Board notes that paragraph 1(1) of the Third Schedule does not seek to limit what it means by "controlled" and that the requirement in paragraph 1(2) that Bermudians are able to exercise at least 60% of the total voting rights in the company is expressly without prejudice to the generality of paragraph 1(1). One cannot therefore infer from Part I of the Third Schedule, read on its own, that the relevant control is confined to control over the shares of the company and thereby over the directors. But it is also noteworthy that the legislature has provided in paragraph 2, which imposes the requirement that 60% of the directors are Bermudian and that 60% of the shares are beneficially owned by Bermudians, for the company to rectify any failure to maintain the requisite Bermudian ownership of shares as a result of circumstances beyond its control, for example when a shareholder dies and his or her shares pass to a non-Bermudian. The company can do this by giving notice requiring the non-Bermudian shareholder to divest himself or herself of the relevant shares as paragraph 2 provides. This escape provision may enable the company to avoid committing an offence and exposing itself to a daily fine under section 114(2) of the 1981 Act.

13. It is necessary also to consider the terms of section 113, so far as relevant, as it contains provisions for the interpretation of Part IX and the Third Schedule. Subsection (1) (as amended by section 12 of the Companies Amendment Act 1996 and section 3 of the Companies Amendment Act 2012) provides:

> "In this Part and in the Third Schedule the following shall be deemed to be 'Bermudian' -
>
> (a) the Government …
>
> (b) any person who has Bermudian status by virtue of the law relating to immigration from time to time in force;
>
> (c) a local company in which the percentage of shares beneficially owned by Bermudians is not less than 80% of the total issued share capital of that company; …

(d) a local company - … (ii) licensed under section 114B; …

(e) a wholly owned subsidiary of a local company where such subsidiary was incorporated on or prior to 31 July 1996 so far, and for so long as, that local company is complying with the Third Schedule and for so long as it abides by all the obligations of its parent company and does nothing in Bermuda that its parent company is unable lawfully to do; …"

Subsection (2) provides:

"For the purposes of subsection (1), a company shall be deemed to be a wholly owned subsidiary of another company if the latter company enjoys the beneficial interest in all the shares of the former company through beneficial ownership or as beneficiary under a trust, express or implied, or through a nominee shareholder, to the exclusion of any other person, and control in the former company cannot, by means of any arrangement, artifice or device, be exercised either directly or indirectly by persons who are not Bermudians." (Emphasis added)

Subsection (3) provides:

"No share shall be deemed to be beneficially owned by a Bermudian if -

(a) that Bermudian is in any way under any obligation to exercise any right attaching to that share at the instance of, or for the benefit of, any person who is not Bermudian; or

(b) that share is held jointly or severally with any person who is not Bermudian; or

(c) that share is owned by a subsidiary company of the company concerned."

14. The Board notes that subsections (1) and (2) of section 113 are concerned with the definition of "Bermudian" which is relevant to the interpretation of both paragraphs of Part I of the Third Schedule. Subsection (3), which delimits the concept of the beneficial ownership of shares by Bermudians, is relevant to the interpretation of paragraph 2 of Part I of the Third Schedule: subsection (3)(a) means that a shareholding is not to be treated as beneficially owned by a Bermudian if that person is under a legal obligation of whatever nature to exercise any right attaching to those shares at the instance of or for the benefit of a non-Bermudian. The Board observes that the relevant subsections of section 113 are concerned with control of a company through the exercise of a shareholder's rights. This suggests that the control which the legislature had in mind was control through the exercise of the voting rights of shareholders and through the decisions of the directors, whom the shareholders appointed, rather than an amorphous control by another entity solely by means of its commercial bargaining power. This is consistent with the focus of paragraphs 1(2) and 2 of Part I of the Third Schedule.

15. In any event, the definitions in section 113 do not affect the interpretation of the critically important section 114(1)(a), except in so far as it engages Part I of the Third Schedule. It is important to recall that section 114 is the section which brings into effect the Third Schedule and that under section 114(1)(a) a local company can carry on business in Bermuda not only if it complies with Part I of that Schedule but also if it is the wholly-owned subsidiary of a company which so complies. If the legislature had intended to exclude from carrying on business in Bermuda a local company which was subject to commercial control through its contractual relationships with other commercial entities, it is very unlikely that it would have enacted section 114(1)(a) as it has done. This is because the second option in section 114(1)(a) allows any wholly-owned subsidiary of a company controlled by Bermudians to carry on business in Bermuda: section 113(2) does not apply to such a subsidiary as it applies only for the purposes of section 113(1), ie to determine who or what is a Bermudian. The definition of subsidiary which is relevant to section 114(1)(a) is the general definition contained in section 86 of the 1981 Act, which looks to the ownership of the shares of the company and the power of the votes attached to such shares to elect the directors of the company. A regime outlawing commercial control by non-Bermudians could therefore be wholly circumvented by procuring the creation of a Bermudian-controlled parent company and a wholly-owned trading subsidiary and by allowing the latter to enter into commercial arrangements with third parties which ceded commercial control over its affairs to them. In the Board's view, this points strongly against the interpretation favoured by the Court of Appeal.

16. There is another equally powerful consideration. If it were sufficient to establish non-Bermudian control by commercial control alone, a local company might face intolerable uncertainty as to whether it was carrying on business legally or was committing an offence. For example, if a primary producer in Bermuda were to enter into an exclusive supply agreement with an overseas buyer which made it dependent on the commercial decisions of the buyer, the latter would have considerable influence over the supplier's commercial decisions and in one sense have the potential to control

the quantity and quality of the supplier's products. If such control by itself sufficed, the legality of the supplier's business would depend on the way in which the overseas buyer chose to exercise its commercial influence. Similarly, a local company, which had borrowed large sums from an overseas lender, might get into financial difficulty such that it had to act in accordance with the wishes of its lender. There would be great uncertainty as to what actions of, or advice by, the lender would amount to control thereby causing the local company to commit an offence. In each case the local company would not have any escape route such as paragraph 2(2) of Part I of the Third Schedule provides (para 11 above). The Board is persuaded that the legislature did not intend the concept of control of a local company in the 1981 Act to extend so far.

17. Other provisions which are consistent with the Chief Justice's interpretation of the 1981 Act include section 118(1), which prohibits the officers of a local company from allotting shares to persons who are not Bermudians so as to exceed the limits in the Third Schedule, unless they obtain the prior written consent of the Minister. Further, section 119(1), which empowers the Minister to give notice in writing requiring the officers of a local company to provide him with information about the officers of and shareholdings in the local company, points in the same direction.

18. Lord Pannick QC, who appeared for the Bar Council, pointed out that under section 119(2) the Minister's notice could require the officers to set out in writing also "the facts in relation to … other matters relating to the control of the company which the officers contend establishes that the local company is Bermudian controlled …". This, he submitted, confirmed that it is not only the identity of the officers and the shareholdings of the local company which are relevant to "control" under the 1981 Act, and that the Act adopted a wider concept of commercial control. The Board is not so persuaded as the subsection continues: "and such facts shall specify the extent to which the control of any corporate body holding shares in the local company is vested in Bermudians". The provision, which is consistent with section 113(3)(a), discussed in paras 13 and 14 above, thus allows the Minister to require information concerning the control of a corporate shareholder of the local company. Again, the provision appears to be addressing corporate control of the local company through the voting power of directors and shareholders.

19. In the course of argument, reference was also made to section 114B of the 1981 Act, as inserted by section 30 of the Companies Amendment Act 1982, which empowers the Minister to grant or revoke a licence under section 114 authorising a local company, which is not otherwise so entitled, to carry on business in Bermuda. Among the matters to which the Minister may have regard in deciding whether to grant a licence are the nature and previous conduct of persons having an interest in the company (section 114B(3)(b)) and the desirability of retaining in the control of Bermudians the economic resources of Bermuda (section 114B(3)(d)).

20. In the Board's view, the provisions of section 114B provide no material support for a broad interpretation of the concept of control in the 1981 Act. The matters which the Minister has to consider in deciding whether to grant a licence go well beyond the control of a local company. They include the economic situation in Bermuda and any advantage or disadvantage which might result from the company carrying on business in Bermuda. Further, a licence is required only if the other exceptions to the prohibition in section 114 (including that in section 114(1)(a)) do not apply. The broad policy aims of the legislation are an uncertain guide to the scope of the means which the legislature has enacted to achieve those aims.

21. Mention was also made of the legislative history of company legislation in Bermuda. In section 2(2) of the predecessor legislation, the Companies Act 1969, it was provided that a company be deemed to be Bermudian controlled if the member of the Executive Council responsible for finance was satisfied that persons who were not Bermudians did not have "effective control" over the company. The phrase was again used in section 2(4) of the 1969 Act. The expression "effective control" is used in the 1981 Act only in section 115(3), which empowers the Minister to revoke the licence of a hotel company which is the subsidiary of a corporation incorporated outside Bermuda in the event of a transfer of effective control of the corporation to persons who are not Bermudians, and in section 139, which empowers the Minister to revoke the permit of an overseas company if "(f) there is a substantial change in the effective control of the company".

22. The Board is not assisted by the legislative history. It is neutral in its effect as the phrase "effective control" is preserved in the 1981 Act for some purposes but not others and it is not clear whether the phrase is intended to have a different meaning from the word "controlled" in paragraph 1(1) of Part I of the Third Schedule.

23. In the Board's view, subsequent legislation, while not relevant to the interpretation of the provisions affecting this appeal, is also consistent with the view that de facto control by commercial arrangements which may influence the policy of the decision-making organs of a local company but not impose a legal obligation on the decision-makers to vote in a particular manner is not the target of the legislation. Part VIA of the 1981 Act was introduced by amendment of the Act in 2017 and took effect on 23 March 2018, after the events with which this appeal is concerned: see section 4 of the Companies and Limited Liability Company (Beneficial Ownership) Amendment Act 2017. Those provisions allow in certain circumstances for control other than by means of ownership of an interest to be equated with beneficial ownership but that is only in the absence of a prior form of beneficial ownership as defined in section 98E. That section, which Lady Arden quotes in para 69 of her concurring judgment, sets out a definition of "beneficial owner" and thereby "beneficial ownership" for the purpose of Part VIA. It is striking that the structure of section 98E(1) is such that any individual or individuals who own or control more than 25% of the shares or voting rights etc in the company through direct or indirect ownership are beneficial owners (in subsection

(1)(a)) to the exclusion of those individuals defined in subsections (1)(b) and (1)(c). The provisions can give little support for a nebulous concept of control. They clearly do not support the contention that commercial control over a local company, for example though a franchise arrangement, is to be equated with beneficial ownership and therefore disclosed to the Bermuda Monetary Authority under section 98L. This militates against any assertion that commercial control is to be equated with beneficial ownership where Bermudians hold the required proportions of the share capital of a local company, as they do in this case, and are under no legal obligation to exercise their voting power as shareholders or directors in a particular way.

24. Lord Pannick founded on certain passages in the advice of the Board in *Bermuda Cablevision* (above). In that case a Bermudian company ("Cablevision") obtained finance to operate a cable TV station in Bermuda from two United States citizens (the "McDonalds") through non-Bermudian corporate entities which they controlled. Over 60% of the issued share capital in Cablevision was held by Bermudians and the US investors had only a minority shareholding in the company. But Cablevision's byelaws were altered (a) to enable the non-Bermudian investors to control the board of directors by a casting vote and (b) to give those investors negative control over the company by introducing a list of significant matters which could be decided only by special resolution passed by a majority of at least 80% at a general meeting of shareholders. In addition to those alterations to the constitution of the company, the US investors obtained an entitlement to a sum equal to 60% of the annual profits of Cablevision through a separate consulting agreement between Cablevision and one of the US investors' corporate vehicles, Atlantic Communications Ltd, which provided for a consultancy fee calculated on that basis.

25. In delivering the advice of the Board Lord Steyn stated (p 207) that terms such as "control" and "controlling interest" take their colour from the context in which they appear. He stated (p 208F-G):

> "their Lordships are satisfied that there is nothing in the present contextual scene which justifies any restriction on the natural width of the expression 'controlled by Bermudians'. Indeed, if one has regard to the purpose of the legislation this conclusion is reinforced. The purpose of the requirement is plainly to ensure that Bermudian resources remain Bermudian. And it must have been intended to make an effective provision to that end."

The Board rejected the restrictive interpretation which the appellants advanced and stated (p 208G-H):

> "it is perfectly plain that the McDonald interests controlled Cablevision by the scheme constituted by the amended byelaws and the consulting agreement. They controlled the board of directors through a casting vote and they controlled general meetings through the special resolution procedure. And they entrenched their entitlement to receive 60% of the profits of Cablevision by the provision that the consulting agreement cannot be terminated without their consent. In every relevant sense the McDonald interests had and have control of Cablevision."

26. The Board accepts, as Lord Pannick submitted, that in the *Cablevision* appeal it took account of the commercial arrangements in the consulting agreement as well as the constitutional arrangements in Cablevision's byelaws in determining that there was non-Bermudian control. But the Board is satisfied that *Bermuda Cablevision* is not an authority which contradicts the conclusion to which it has come in this appeal. The Board in *Bermuda Cablevision* was addressing an argument by the company, in its application to strike out a petition by a minority shareholder to wind it up on the ground that it was carrying on business unlawfully, that Cablevision was not controlled by the McDonald interests because they controlled less than 50% of the votes which could be cast at a general meeting. In addressing and rejecting that argument the Board did not have to consider the submissions which have been advanced in this case or to analyse in any detail all the relevant statutory provisions in response to those submissions. Those provisions point to a narrower view of the concept of control which is directed to the legal means by which Bermudian shareholders or directors are obliged to exercise their voting power at the instance of or for the benefit of a non-Bermudian, or by which a non-Bermudian minority can control the decisions of the local company's decision-making organs.

27. In the Board's view the outcome of the appeal in *Bermuda Cablevision* is clearly correct as the non-Bermudian interests had control over both the board of directors and the general meetings of shareholders under the company's constitution. *Bermuda Cablevision* is not authority for the proposition that commercial influence by a non-Bermudian entity over the decision-making of a local company is sufficient by itself to prevent that company from carrying on business of any sort in Bermuda without a licence from the Minister. The contractual entitlement in the consulting agreement to a sum equalling 60% of the profits of Cablevision was not by itself control over the decision-making organs of the company. That entitlement reflected the sharing of profits in an arrangement which was in commercial reality a form of joint venture and by itself contravened no provision of the 1981 Act. It was the combination of contractual and constitutional controls that demonstrated to the Board the control of the McDonald interests.

28. The Board also observes that the alterations to the company's byelaws which the McDonald interests obtained in *Bermuda Cablevision* demonstrate the wisdom of the

legislature in preserving the scope of paragraph 1(1) of Part I of the Third Schedule beyond the specific requirements of paragraphs 1(2) and 2(1). But the relevant control over decision-making does not have to be exercised through the medium of the company's byelaws in order to infringe the prohibitions of the 1981 Act. The Board interprets paragraph 1(1) of Part I of the Third Schedule as preventing agreements or arrangements which confer voting control or constrain the effectiveness of majority votes in the board of directors or in general meetings. The measures which were put in place in *Bermuda Cablevision* were only some of the many ways in which such control or constraints on the effect of the votes of directors or shareholders could be imposed while otherwise complying with the requirements of Part I of the Third Schedule.

29. Section 113(2) (quoted in para 13 above), which applies to subsidiaries incorporated before 31 July 1996, uses the composite phrase, "arrangement, artifice or device". This phrase in context appears to address structures or arrangements designed to negate or render illusory the legal control which flows from 100% or majority share ownership rather than ordinary commercial arrangements. Such arrangements, artifices or devices would include weighted voting arrangements as in *Bermuda Cablevision* and arrangements outside the byelaws of the company by which shareholders or directors of a local company bind themselves to vote on the instructions of a non-Bermudian. But, in the Board's view, commercial arrangements which would give non-Bermudians influence over the decisions which shareholders would take in their own interests on matters relating to the local company or directors would take in the interests of that company would not fall within the phrase or amount to control of a local company.

30. The Board also observes that there is nothing in the Companies (Forms) Rules 1982 to support the view that commercial influence, for example through a franchise agreement or a commercial loan facility, is seen as a form of beneficial ownership and relevant to the concept of control in paragraph 1(1) of Part I of the Third Schedule.

31. There is one matter on which the Board finds itself in disagreement with the Chief Justice. That is in para 46 of his judgment in which he said that the requirement that the company be controlled by Bermudians "speaks to the ability to exercise the sort of power and/or receive the sort of economic benefits equivalent to holding more than 40% of a local company's shares". The Board does not accept the second alternative flows from the Board's advice in *Bermuda Cablevision*. There is no requirement in the 1981 Act, either expressly stated or arising by necessary implication, that a local company must pay or attribute a minimum percentage of its profits to Bermudians in order for it to be controlled by Bermudians. It may be that Bermudian control would normally be expected to result in an allocation of resources predominantly to Bermudians, but that is not the same as a prohibition of another outcome. The focus is rather on what the Chief Justice (in para 47 of his judgment) referred to as "beneficial ownership and corporate control", in the sense of a prohibition of controlling, whether through the company's byelaws or through some other arrangement, the decisions which the Bermudian majority shareholders or directors could make, so that those

persons were not free collectively to make independent judgements as to their own or the company's interests. In advising on this appeal, the Board therefore prefers to say, as it has in para 29 above, that commercial arrangements which would give non-Bermudians influence over the decisions which Bermudian shareholders would take in their own interests on matters relating to a local company or Bermudian directors would take in the interests of that company do not amount to control of a local company for the purpose of Part IX of the 1981 Act.

32. Like the Chief Justice, the Board has sympathy for the predicament of the Bar Council when faced with a proposal which, despite the robust protestations to the contrary by Mr Taylor and on behalf of WBL, appears to amount to a franchise arrangement by which WG seeks to extend the provision of legal services under its brand into Bermuda. The Board sees no reason to disagree with Clarke JA's conclusions in para 46 of his judgment that there is a prospect that almost everything other than local legal work will be carried out by WG offshore and that the financial obligations on WBL under the LSA and the LA are likely to confer very substantial power on WG over the conduct of WBL. But, agreeing with the Chief Justice, the Board concludes that the proposed arrangements regulating the operation of WBL as a professional company under the 1974 Act are not contrary to section 114 of and Part I of the Third Schedule to the 1981 Act. The Bar Council has therefore fallen into error in refusing to grant a certificate of recognition under section 16C of the 1974 Act.

Conclusion

33. The Board will humbly advise Her Majesty that the appeal should be allowed.

LADY ARDEN:

Reasons for this concurring judgment

34. I start by thanking the Board for their careful and illuminating analysis. I agree that the *level* at which "control" of a company has to be exercised by Bermudians for the purposes of Schedule 3, paragraph 1 ("the controlled by Bermudians requirement" - "the CBBR") is that of the board and of the company in general meeting. Mere influence of any kind on a company's operations does not constitute control in this sense. The general provision in Schedule 3, paragraph 1 has content, and section 113(2) informs its meaning. "Control" includes negative control (ie the power to veto or constrain decisions) as well as positive control.

35. The CBBR is crystallised in "the 60/40 rule" set out in Schedule 3, paragraphs 1(2) and 2(1). Under the normal operation of the 60/40 rule, each share in the company's

share capital is entitled to one independent vote on any matter put to a general meeting (including the appointment or removal of a director) and each director has one independent vote at any board meeting. In those circumstances, the 60/40 rule (allowing for a minimum of 60% Bermudian and a maximum of 40% foreign) assures Bermudian control of a company, entitling it to trade in Bermuda without a licence. As the Chief Justice explained at para 47, the reason for 60% in Schedule 3 was historical.

36. However, as to the *means* by which control at the level identified is exercised, I wish to make the point that the CBBR is not limited to the byelaws or to agreements or arrangements which confer voting control or constrain the effectiveness of the majority votes in the board of directors or in general meetings. It operates to prevent any arrangement or state of affairs which would result in a material departure from the normal operation of the 60/40 rule, assuring Bermudian control.

37. I would also, for the reasons set out below, embrace more fully than the Board the reasoning of the Board in *Bermuda Cablevision Ltd v Colica Trust Co Ltd* [1998] AC 198, and the reasoning of the Chief Justice derived from it, as described below. I also respectfully express the view that a wider approach has to be taken about the role of section 113(2) in relation to Schedule 3. In particular I express doubts as to the Board's conclusion that, because the Companies Act 1981, section 113(2) is not expressed to apply to section 114, a "wholly-owned subsidiary" for section 114 purposes is to be defined as a subsidiary for the purposes of section 86 of the Companies Act 1981. In the Appendix, I deal with other matters of interpretation on which I take a different view.

The statutory framework of the CBBR

38. Sections 113 and 114 appear in Part IX (Local Companies) of the Companies Act 1981, and the relevant parts of both sections are set out in paras 13 and 10 respectively of the Board's judgment. Section 114 incorporates Schedule 3 into the Act. Schedule 3, Part I contains the requirement that a local company be "controlled by Bermudians" (defined above as "the CBBR"). Schedule 3 is set out at para 11 of the Board's judgment, and so all I need to do is set out the CBBR and its immediate context. On this basis, the relevant provisions are as follows:

> "THIRD SCHEDULE
>
> (Section 114)
>
> PART I

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

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

(2) *Without prejudice to the generality of sub-paragraph (1)*, at least 60 per centum of the total voting rights in the company shall be exercisable by Bermudians.

2(1) The percentage of Bermudian directors, and the percentage of shares beneficially owned by Bermudians, in the company shall not be less than 60 per centum in each case:

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

(*italics added)*

Interpretation of the statutory framework by the Board in *Bermuda Cablevision*

39. *Bermuda Cablevision*, whose facts the Board has already summarised, establishes several important points.

40. First, the meaning of "control" is contextual, and "control" is not a term of art with a fixed meaning. The CBBR is a "broad general statutory requirement" (p 208) (and, it follows, paragraphs 1(2) and 2 are merely examples) and "control" is not to be restrictively interpreted. It covers not only who performs a particular act on behalf of the company but also who directs that person to perform that act.

41. Second, section 113(2) shows that the legislature was aware that persons dealing with companies might seek to avoid a rule based on the beneficial ownership of the majority of the voting rights and thus this provision formed part of the context for interpreting the CBBR. Section 113(2) provides:

"(2) For the purposes of subsection (1), a company shall be deemed to be a wholly owned subsidiary of another company if the latter company enjoys the beneficial interest in all the shares of the former company through beneficial ownership or as beneficiary

> under a trust, express or implied, or through a nominee shareholder, to the exclusion of any other person, and control in the former company cannot, by means of any arrangement, artifice or device, be exercised either directly or indirectly by persons who are not Bermudians."

42. From this point, it appears to me to follow that the point made in the final clause of section 113(2) (that "control in the former company … not Bermudians"), when treated as part of the context for interpreting the CBBR, applies generally and is not limited by its context within section 113(2).

43. These points appear from the Board's analysis in *Bermuda Cablevision* in a lengthy passage at pp 207-208 dealing with control which in my judgment is important to understanding the CBBR and which has not yet been set out. It forms the basis of the views of the Chief Justice and so I will set it out at this point:

> "*The control issue*
>
> The question is whether the arrangements put in place to protect the investment made by the McDonald interests have had the result that the company has been carrying on business in breach of paragraph 1(1) of Part I of Schedule 3 which requires that the company 'shall be controlled by Bermudians'. Counsel for the appellants submitted that the authorities establish that the natural meaning to be given to the word 'controlled' in paragraph 1(1) is control by virtue of a simple majority of the votes entitled to be cast at general meetings of the company. For this proposition counsel cited several tax cases which included three decisions of the House of Lords, namely *British American Tobacco Co Ltd v Inland Revenue Comrs* [1943] AC 335; *Inland Revenue Comrs v J Bibby & Sons Ltd* [1945] 1 All ER 667; and *Barclays Bank Ltd v Inland Revenue Comrs* [1961] AC 509. The decisions cited do not assist. Indeed a study of the reasoning in those decisions shows that expressions such as 'control' and 'controlling interest' take their colour from the context in which they appear. There is no general rule as to what the word 'controlled' means. Contrary to the submissions of counsel for the appellants, the expression 'controlled by Bermudians' in paragraph 1(1) is not a term of art. The expression must be given the meaning which the context requires. Paragraph 1(1) is the general provision and paragraph 1(2) is a specific provision introduced by the words 'Without prejudice to the generality of sub-paragraph (1)'. Nothing in Part I of Schedule 3 warrants a restrictive interpretation of paragraph

1(1) to limit its scope to control by means of a vote at general meetings. Indeed paragraph 2(1), so far as it requires the percentage of Bermudian directors not to be less than 60%, shows that the legislature did not proceed on the myopic footing that control can be exercised only through a vote at general meetings. That the legislature was alive to the fact that businessmen might by 'arrangement, artifice or device' create the appearance of compliance with the legislation is made clear elsewhere: see section 113(2). This was the context in which the legislature adopted the broad general statutory requirement of control by Bermudians. The generality of the meaning of control in such a context is illustrated by the famous decision of the House of Lords in *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* [1916] 2 AC 307. Lord Parker of Waddington observed, at p 340:

> '… I think that the analogy is to be found in control, an idea which, if not very familiar in law, is of capital importance and is very well understood in commerce and finance. The acts of a company's organs, its directors, managers, secretary, and so forth, functioning within the scope of their authority, are the company's acts and may invest it definitively with enemy character. It seems to me that similarly the character of those who can make and unmake those officers, dictate their conduct mediately or immediately, prescribe their duties and call them to account, may also be material in a question of the enemy character of the company. If not definite and conclusive, it must at least be prima facie relevant, as raising a presumption that those who are purporting to act in the name of the company are, in fact, under the control of those whom it is their interest to satisfy.'

While those observations dealing with an issue of trading with the enemy cannot be treated as definitive in the present case they are illustrative of a possible wide general meaning of the concept of control in the context of companies."

44. In *Bermuda Cablevision*, the Board looked not simply at the terms of the byelaws and the consultancy agreement but also at the negotiations leading up to their adoption.

Analysis of the statutory framework by the Chief Justice

45. Having considered the decision of the Board in *Bermuda Cablevision*, the Chief Justice makes the point that paragraph 1(1) is linked to express voting rights in paragraph 1(2). He continues:

> "That makes it clear that corporate control lies at the heart of the construct of the 'controlled by Bermudians' requirement [the CBBR]. In paragraph 2(1) the beneficial ownership requirements are explicitly spelt out and may be seen as complementary to the control requirements." (para 39)

46. The Chief Justice then makes the point that the standard position is that resolutions of the company in general meeting are passed by a simple majority. While there can be special rights, the right to appoint directors is normally part of the voting rights attached to shares.

47. The Chief Justice emphasises the link between beneficial ownership and control, and concluded that this was manifest from section 113(2), on which the Board in *Bermuda Cablevision*, had relied, and also from section 113(3)(a). Section 113(2) is set out in para 13 of the Board's judgment. Section 113(3)(a) provides:

> "(3) No share shall be deemed to be beneficially owned by a Bermudian if - (a) that Bermudian is in any way under any obligation to exercise any right attaching to that share at the instance of, or for the benefit of, any person who is not Bermudian; …"

48. The Chief Justice concluded that the statutory context was that the key statutory criteria were voting control and real beneficial (or economic) ownership. Economic ownership referred to entitlement to profits, which might or might not be in line with beneficial or legal ownership. That would depend on what the parties agreed. What I understand the Chief Justice to be saying is that economic ownership may be evidence from which the exercise of control may be inferred, but I deal separately in paras 61, 66-67 and 71 below with the relevance of economic ownership. To return to the judgment of the Chief Justice, the criteria of voting control and ownership were overlapping (para 42 of his judgment).

49. On that basis the defining feature of control, as the Chief Justice explained it, was "broad practically viewed ownership or quasi-ownership control" (para 44). So,

control meant control flowing from the ownership of shares or the control of the voting rights which the beneficial owners would normally have.

50. The view of the Chief Justice was that the CBBR "speaks to the ability to exercise the sort of power and/or receive the sort of economic benefits equivalent to holding more than 40% of a local company's shares." (para 46 of his judgment). (I will not pause here to comment on his reference to economic benefits since I propose to deal with economic ownership separately below). He based his conclusion on his reading of *Bermuda Cablevision*, which he summarised in these terms, using the compendious expression "practical corporate control-focussed reasoning" to denote (as I read it) control of corporate decision-making in practice:

> "It is this practical corporate control-focussed reasoning that the Judicial Committee applied in the *Bermuda Cablevision* case in pivotally deciding that the ability of the minority shareholder to control key board decisions through its nominated directors combined with its contractual entitlement to a majority share of the company's profits evidenced that the company was not controlled by Bermudians in compliance with section 114 of the 1981 Act." (para 45 of the judgment of the Chief Justice)

The contrasting approach of the Court of Appeal

51. The Court of Appeal (Baker P, Bell and Clarke JJA) held that the Chief Justice's interpretation of the CBBR was inconsistent with *Bermuda Cablevision*, and that his interpretation would make the fact of commercial control irrelevant in all circumstances (para 24). Commercial control was defined as "the ability to control the business affairs or activities of the company and how it operates by reason of the commercial relationship between the company and the putative controller" (para 16). Clarke JA gave the leading judgment.

52. The Court of Appeal held that, since Lord Steyn rejected a submission that the meaning of the CBBR was control of the majority of voting rights entitled to be cast at a company meeting, the Board in that case reached the conclusion that the meaning of control was general and without restriction. It was impossible to regard the CBBR as limited to control by either the possession or control of a simple majority of votes at a general meeting or control of the Board (para 23). Therefore, Clarke JA continued:

> "24. In those circumstances the first two sentences of para 43 of the judgment of the Chief Justice *('the breadth of the concept of 'control' does not extend beyond the parameters of the statutory context, [which] is concerned with ensuring that the 60% voting*

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

53. The conclusion of the Court of Appeal was that control meant both control of the right to exercise voting rights at general meetings and also commercial control. As to commercial control, the court was concerned with "the substance and reality of the matter" (para 41(c)). The Court of Appeal went on to examine in detail how the conduct of WBL's business would be affected and influenced by WG if it entered into the proposed arrangements with WG.

My analysis of the statutory framework

54. In my judgment, what the Court of Appeal have done is to apply not a contextual meaning of "control" but one which is context-free. The position at one end of the scale is that the CBBR refers to what might be termed the legal control of voting rights and the right to appoint directors (see Schedule 3 paragraphs 1(2) and 2(1)). The position at the other end of the scale is that "control" means both legal control and commercial control, using that expression as the Court of Appeal defined it. This is presented as a binary choice: control is control of legal rights only or control of anything and everything without distinction. The Court of Appeal does not consider that in the context of the CBBR there is an intermediate position.

55. As I have said in my judgment, it is important to distinguish between the *level* of control and the *means* whereby control is being exercised. It is the level which has to be determined first.

56. In my judgment, the context, including such matters as section 113(2) and (3), points to an intermediate position. The courts have indeed to be aware on the one hand of the practical realities of the situation and astute to prevent business people from finding ways of conferring control, as they did in *Bermuda Cablevision*. On the other hand, practical control of this nature has to be analogous to that conferred by the majority of voting rights and thus operate at a similar level. Given that the drafter of Schedule 3 takes the ownership of the majority of the issued share capital and the voting rights to which shareholders are entitled and the majority in number of directors as his starting point, it is clear that the provision is intended to operate in the world of control at the level of corporate decision-making and thus that it is a key feature of control in this context that it is control over the policy and direction of the company or over the appointment (and so the actions) of directors or over the actions of the company in general meetings, whether by ordinary or special resolution. The structure of section 113(2) reinforces this conclusion because the clause dealing with arrangements, artifices and devices is clearly directed to finding an analogue to the type of control that comes from ownership of the share capital dealt with in the first part of the subsection.

57. So, in my judgment, and as I read it, that of the Chief Justice, control in the CBBR must be control of the corporate decision-making process, whether in general or board meetings. That would mean that it does not extend to everyday matters with which a board of directors would not conventionally be concerned, but with structural decisions relating to policy and direction in the management of the company's business. If that were not so, then any grant of management powers by the board, including those under (in this case) byelaw 20.1, even if subject to the board's overall supervision, could result in the loss of control. Adoption of an unrestricted meaning of control in this way is likely to lead to practical consequences that cannot have been intended. Since the Board expressly held in *Bermuda Cablevision* that the meaning of control was contextual, and the meaning which I have given it draws on the context which they identified, it seems to me that the Board cannot have thought that "control" extended to day-to-day matters.

58. It follows that, if a local company enters into a long-term contract with a supplier which is likely to shape the conduct of its affairs over a period of time, the supplier does not automatically become a controller of the company for the purposes of the Companies Act 1981, Schedule 3, paragraph 1.

59. The next part of the analysis is to determine the *means* by which control is being exercised. This question must be answered on the facts of the case. It is in that sense a factual approach to control. The CBBR does not require that control be exercisable by any particular means: there is simply a positive requirement that the company be controlled by Bermudians. It is, as the Chief Justice explained (in para 27 of his judgment) a "broad functional approach". The court is not constrained to find the means of control legitimated by the byelaws, such as for instance weighted voting rights. Arrangements outside the byelaws may be relevant: compare subsections (2) and (3) of

section 113, which speak of arrangements or obligations without restriction as to their derivation in the company's constitution. Nor is the reason for the control, for example that it emanates from a relationship with a supplier, determinative: it may stem from some other relationship such as a personal relationship.

60. The questions that arise in the context of determining the means by which control (at the requisite level) is being exercised could be complex. Section 113(2) contemplates that control may require factual inquiry by its reference to "any arrangement, artifice or device" since it is difficult to think that it would be easy to determine whether there was (say) an artifice without some factual investigation. The statutory test of control will not, therefore, always be clear and certain in its application.

61. The court may also have to draw inferences from the evidence in the usual way. The evidence may include evidence that the putative controller is taking a larger proportion of the profits than is justified by his position, for example, as a supplier, franchisor or provider of consultancy services. The court may consider it fit to draw inferences about control from that evidence, in the same way that, as the Board accepts (see para 26) the Board in *Bermuda Cablevision* did from the consultancy agreement in that case.

62. It may be suggested that the Board went no further in *Bermuda Cablevision* than take into account the terms of the parties' contract *dehors* the byelaws (though it appears that in *Bermuda Cablevision* it was to some extent embedded in them). The Board certainly considered the prior negotiations. However that may be, when it comes to investigating the means of control, it is not in my judgment necessary that there should be a contract or byelaw. Suppose the company has borrowed money on written terms which (unusually) stipulate that the lender is to have a single non-voting share in the borrower and that the lender is also to have the right by notice at any time to convert his debt into shares carrying a majority of the voting rights at general meetings. The lender in this case has no immediate legal right to control the company in the sense of controlling the decision-making process of the company, but does he in fact have the means of exercising that control in the period prior to that exercise?

63. In approaching this question, it is to be noted that section 113(2) informs the context of Schedule 3, paragraph 1, and, as I see it, that means that it applies generally and not just in the case of wholly-owned subsidiaries (see para 42 above). On that basis, immediate rights of control are not essential because that subsection (understandably) requires the absence of any arrangement, artifice or device under which control *can* be exercised directly or indirectly by non-Bermudians. So the court would have to take account of the conversion rights in my example. But matters may not stop there. It might be that the lender takes the view that his conversion rights are not exercisable save in the event of default which, on the evidence, was not likely. But the views expressed by the lender might be undermined by the fact that the directors saw the matter differently

and in practice accepted that his views on any important matter in the company's affairs would be determinative. In such a case, the court might well have to go beyond the "contractual and constitutional controls" in the company.

64. Moreover, if only contractual and constitutional controls were to be taken into account, that would rule out control which is exercised without any legally enforceable right. I would not rule out control on that basis since the legislative purpose is likely to have been to prevent control in fact by non-Bermudians even if it was not based on some legally enforceable right.

65. It is here that the citation by the Board in *Bermuda Cablevision* of the passage from Lord Parker becomes relevant. Lord Parker held that "the character of those who can make and unmake those officers, dictate their conduct mediately or immediately, prescribe their duties and call them to account, may also be material …": *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* [1916] 2 AC 307, 340. Although the Board did not express a final view, they clearly thought that it was possible that the "character" of the putative controller might (not must) lead to the conclusion as to where control lies in the analogous context of trading with the enemy. The "character" of the putative controller may give rise to complex issues of fact.

66. For these reasons the determination of the means of control may go further than simply looking at contractual and constitutional controls.

67. This point has a bearing on what I have said about economic ownership as the Chief Justice put it (paras 48 and 50 above). It must similarly follow that, as in *Bermuda Cablevision*, the fact that a third party has a contractual right to receive an amount which represents a large share of the profits (when compared with that of the other shareholders) may be part of the evidence which enables the court to draw the conclusion that in reality he controlled the decision-making process of the company. I fully accept of course that there is no rule that requires a shareholder to receive no more by way of profits than his capital at stake in proportion to that held by other shareholders.

68. Finally, when it comes to the means whereby control is exercised, the legislature contemplates an inquiry into the relevant type of control as a matter of substance, not form. The concluding words of section 113(2) (para 41 of this judgment) and the provisions of section 113(3)(a) (para 47 of this judgment) confirm that conclusion. Moreover, in *Bermuda Cablevision*, the Board held that nothing in Schedule 3, Part I warranted a restrictive interpretation of paragraph 1(1) to limit its scope to control by means of a vote in general meetings. Such a view was described as "myopic" (p 208). As already explained, the legislature was, in the opinion of the Board, "alive to the fact that businessmen might by 'arrangement, artifice or device' create the appearance of

compliance with the legislation" (p 208). This was apparent from other references in the Act, including section 113(2), section 113(3)(a) and also Schedule 3, paragraph 2(2) (giving relief where a company breaches the 60/40 rule but only through circumstances "beyond its control": see para 86 below). Thus section 113(2) informs the interpretation of Schedule 3, and I understand the Board to agree with the principle that section 113 affects the interpretation of Part I of Schedule 3 (see para 15 above, first sentence), although the Board has not sought to apply this principle.

69. Moreover, if further support were needed for the conclusion that the relevant arrangements or obligations may be found outside the byelaws and that the question of control is one of substance and not of form, it could be found elsewhere in the Companies Act 1981, *viz* from later amendments made to the Companies Act 1981. As we are concerned with the current application of the Act, it is appropriate to see the Act as it now stands as a living and harmonious whole, including any text inserted since its enactment (see generally *Boss Holdings Ltd v Grosvenor West End Properties Ltd* [2006] 1 WLR 2848, para 25). Part VIA (Beneficial Ownership) was inserted into the Act in 2018 and comprises sections 98C to 98U. Under section 98L, when a local company forms a subsidiary, it must disclose its beneficial ownership within the extended meaning of that term in section 98E. In the case of a wholly-owned subsidiary, this can in some circumstances include details of actual control arrangements. Beneficial ownership is defined in section 98E:

> "(1) In this Part - …
>
> 'beneficial owner' means -
>
> (a) any individual or individuals who own or control more than 25% of the shares, voting rights or interests in the company through direct or indirect ownership thereof;
>
> (b) if no such individual or individuals referred to in paragraph (a) exist or can be identified, any individual or individuals who control a company by other means;
>
> (c) if no such individual or individuals referred to in paragraphs (a) and (b) exist or can be identified, the individual who holds the position of senior manager of the company,

and ‘beneficial ownership’ shall be construed accordingly;

> ‘control by other means’ includes the right to appoint or remove a majority of the board of directors of a company and the exercise of control over a company by any means other than control by ownership of any interest.”

70. The framing of “control by other means” in terms of controlling appointments to the board and the conduct of the company’s affairs other than through a right conferred by ownership, however infrequently that type of control has to be applied, shows again, albeit in a different context, that the legislature is aware of the practical realities of business life that control can be vested in third parties through arrangements outside the voting rights vested in holders of securities under the byelaws.

71. In conclusion on this part of my judgment, the relevant *level* of control for CBBR purposes is that of the corporate decision-making process. What has to be shown is that the decisions that would normally be made at board level or by the company in general meeting are being controlled by the putative controller. In examining the *means* by which the putative controller exercises that control the court will have to consider all the relevant facts, which might include evidence as to any abnormal application of the company’s profits.

Ancillary interpretation issues

72. I will deal briefly with two ancillary issues of interpretation.

(1) Assistance to be derived from other indications in Part IX

73. I have set out in Part 1 of the Appendix to this judgment (and without intending any discourtesy) several relatively minor matters to which I would, for the reasons there explained, give less weight in the interpretation exercise than the Board. None of them in my view provides a searchlight leading to different conclusions from those expressed in this judgment as to the meaning of control. One of the points in Part 1 of the Appendix concerns the meaning of “wholly-owned subsidiary” of section 114. I come to the conclusion that its interpretation may not be as the Board suggests: see further para 82 below.

(2) Post-1981 amendments about wholly-owned subsidiaries: effect on the interpretation of control

74. The Board has given weight to the meaning of "wholly owned subsidiary" in section 113 and Schedule 3 and I have explained in Part 1 of the Appendix to this judgment at para 82 my doubts about that interpretation. However, even on the Board's view (and in anticipation of a point which might be made against my interpretation), for the reasons given in Part 2 of the Appendix to this judgment, it makes no difference to the weight which I consider should be given to *Bermuda Cablevision* that the relevant provisions about wholly-owned subsidiaries now to be found in sections 113 and 114 were the product of amendments made by the Companies Act 1996, and therefore subsequent to the decision in that case.

75. Moreover, when the legislature of Bermuda amended the Companies Act 1981 after 1996, for example by inserting Part VIA, it is to be assumed that it did so on the basis that *Bermuda Cablevision* represented the law. This is a further reason why there should be no departure from *Bermuda Cablevision*.

Application of my analysis to the Court of Appeal's decision

76. It follows from my analysis, building on that of the Chief Justice and of the Board in *Bermuda Cablevision*, that the Court of Appeal did not, when it applied the law to the facts, ask itself the right question. The Court of Appeal certainly considered the company's operations as they would be conducted on a day-to-day basis. A practical example may make my meaning clearer. One can well imagine that the global firm of WG may learn from its sources of information about new litigation filed against a Bermudian company in a US federal courthouse and pass that information to WBL with a view to WBL's principals approaching the Bermudian company and inviting it to instruct the Walkers group. There will be many instances where WG effectively guides the lawyers in WBL in a particular way which the principals of WBL will feel bound to follow.

77. However, the central question is not what happens in the day-to-day business of WBL but what happens if the directors of WBL wish to take a decision, for example, to take new offices or to find another provider of global services apart from WG. The question would then be whether WG could prevent WBL from making that decision by constraining the exercise to the directors' right to vote at board meetings.

78. From the way in which the matter was presented to us by Mr Michael Todd QC, for WBL, at the hearing of this appeal, it is understood that WBL's board and the company in general meeting would be free to make decisions independently of WG. As the Court of Appeal explained, the proposed licensing and services arrangement with

WG expressly provides that WBL is to make its own decision about acting on any advice provided by WG or its affiliates. In addition, WBL would (submitted Mr Todd) continue to own the goodwill attaching to the advice given by it in Bermuda even after the licence granted by WG came to an end. Mr Todd emphasised that WG would have no step-in rights under the loan arrangements. Moreover, Mr Todd also pointed out that WBL was protected from having to make loan repayments which might make it insolvent, which removes a scenario which might indicate control by WG as lender.

79. While, economically speaking, therefore, WG is likely to exercise an enormous influence on the future development and shape of WBL's business, it appears that the right to take decisions at board and general meeting level may not itself be constrained. The Court of Appeal scrutinised the facts in this case in great detail and with commendable realism. (Their judgments contain a fuller account of the proposed arrangements between WG and WBL than is to be found in the Chief Justice's judgment.) But the fact is that the Court of Appeal did not analyse control in terms of the effect on WBL's corporate decision-making process. They examined a different issue, namely the intensity of control resulting from a commercial relationship. So, the decision of the Court of Appeal must be set aside.

Conclusion

80. For these reasons, I too would humbly advise Her Majesty that this appeal should be allowed. Schedule 3, paragraph 1 is a general provision about control. The level of control to be considered is that of those organs of the company which decide the policy and direction of the company and those matters which the Companies Act 1981 or the company's byelaws consider sufficiently significant to require a resolution of the company in general meeting. It is not concerned with control of day-to-day matters in the running of the company's affairs. The 60/40 rule is not broken unless control in the sense of that level of control is vested in non-Bermudians. In this case, the Court of Appeal's scrutiny of control did not make this distinction and must be set aside.

APPENDIX

Part 1

My approach to certain of the assistance in interpretation derived by the Board from other provisions of the Companies Act 1981

81. The Board concludes (in para 15 above) that section 114(1)(a) allows any wholly-owned subsidiary of a local company to carry on business in Bermuda without a licence, that section 113(2) applies only for the purposes of section 113(1) and that there is nothing to prevent such a company from ceding what the Board describes as commercial control to a non-Bermudian third party. This need not lead to a loss of their status as subsidiaries under section 86 (described in para 15 of the Board's judgment), as, for example, where directors representing that third party have weighted voting rights at board meetings.

82. This raises the question whether such a wholly-owned subsidiary could confer on such third parties rights to control the corporate decision-making process and yet still constitute a wholly-owned subsidiary for the purposes of section 114. The expression "wholly-owned subsidiary" is not statutorily defined. In the light of *Bermuda Cablevision*, I would not rule out the possibility that the expression "wholly-owned subsidiary" has to be read in the context of sections 113 and 114 as subject to the requirement that the company has not entered into arrangements of the kind described in section 113(2), even though that provision applies only for the purposes of section 113(1). That would mean that the anomaly pointed out by the Board (and summarised in the first sentence of this paragraph) does not arise. It cannot have been intended by the legislature and no reason for this anomaly has been suggested in argument. This may also be one of those rare cases where the court has to apply a strained construction in order to prevent the obvious intention of the legislature from being circumvented (see, for example, *Luke v Inland Revenue Comrs* [1963] AC 557).

83. The Board makes the point that, if the facts have to be examined to see whether what it describes as commercial control exists, it may be uncertain whether it exists or not (para 16 above). I have already addressed the point that the facts may have to be determined in order to decide whether the CBBR has been breached. There is a further point. There is a fine of $100 a day for local companies which do not comply with the requirements of Schedule 3 (see section 114(2)), though we were not addressed on the issue whether some form of *mens rea* is required. The existence of a criminal offence does not as I see it contraindicate my construction. The legislature evidently did not consider that control was so uncertain that it could never be a touchstone for compliance with the Companies Act 1981 (see section 98E, para 69 above). It is also to be noted that the legislature has imposed criminal offences for breach of the new Part VIA.

84. The Board attaches weight to section 118 (para 17 of the Board's judgment). This imposes restrictions on the allotment and transfer of shares. There is no need for similar provisions about forms of relevant control not involving the issue of share capital.

85. The Board attaches weight to the limits on the Minister's information-seeking powers under section 119(2) (para 18 above). I respectfully do not consider that this provision necessarily excludes inquiry into control arrangements with a wholly-owned subsidiary. Whatever the meaning of section 119(2), however, section 276(1) is a general provision which gives the Minister and Director of Public Prosecutions power to obtain documentary evidence from the company when offences, including that of trading in contravention of section 114(1), are suspected:

> "Without prejudice to any other provision of law, where, on an application to the Minister by or on behalf of the Director of Public Prosecutions, it appears to the Minister that an offence under this Act may have been committed, and that evidence relating to the commission of such offence may be found in any books or papers of or under the control of the company, a direction in writing may be made by the Minister requiring the secretary to the company or such other officer or person as may be named in the direction to produce the said books or papers or any of them to a person named in the direction at a place and time so named."

86. The Board places weight on the provisions of Schedule 3, Part I, paragraph 2(2) (set out in para 11 of its judgment). These provisions are required because shares do not cease to exist when shareholders die or become bankrupt and control of them passes to others (who may be non-Bermudians). Such occurrences are "beyond [the] control" of the company so time is given to remedy them. Statutory provisions are not needed for changes in the percentage of voting rights or the number of directors, and no protection for these events is given. Nor does paragraph 2(2) address other situations which may affect the straightforward application of legal control, such as, for example, byelaws which give certain directors special voting rights at board meetings which override those of other directors. Hence, I would give paragraph 2(2) less weight than the Board has done. In short, the provisions of paragraph 2(2) are explicable, for the reasons I have given.

Part 2

Effect for interpretation purposes of the amendments made to the Companies Act 1981, Part IX concerning wholly-owned subsidiaries

87. Under the Companies Act 1981 as it stood prior to amendment by the Companies Act 1996, a wholly-owned subsidiary of a local company could not be Bermudian if it was controlled by any third party in the sense that that phrase is used in section 113(2). If it was not so controlled, then, before the 1996 Act came into force, it would be Bermudian but curiously it would need a licence to carry on business under section 114B. The 1996 Act removed that anomaly.

88. So, sections 113 and 114 were amended as follows by the Companies Amendment Act 1996, which provides:

> "Amends section 113 of principal Act
>
> > 12. Section 113 of the principal Act is amended in subsection (1)(e) by inserting next after the words 'local company' where they first appear the words 'where such subsidiary was incorporated on or prior to 31 July 1996'.
>
> Amends section 114 of the principal Act
>
> > 13. Section 114 of the principal Act is amended in subsection (1)(a) by inserting next after the word 'Schedule' the words 'or is a wholly-owned subsidiary of such a company'."

89. According to the Explanatory Memorandum accompanying the Companies Amendment Bill 1996, the purpose of the amendment was that henceforth new wholly-owned subsidiaries should not have Bermudian status but should be empowered to carry on business in Bermuda without a licence:

> "Clause 12 of the Bill amends section 113 of the Act. Currently a wholly-owned subsidiary of a 60/40 company cannot do business in Bermuda without a special licence under section 114. However, such a subsidiary is deemed to be Bermudian. This amendment will effectively do away with this provision. Wholly-owned

> subsidiaries which were in existence prior to the date that the Bill is enacted will not be affected."

90. If, in line with the Board's interpretation of the expression "wholly-owned subsidiary" in section 114, the further effect of the Companies Act 1981, Part IX, as amended by the 1996 Act was that a wholly-owned subsidiary could enter into agreements giving control to non-Bermudians without altering its status as a wholly-owned subsidiary, it is odd if the Explanatory Statement did not point that out since it would have been a significant change. I have expressed doubts as to whether, on the true interpretation of sections 113, 114 and Schedule 3, there was in fact any such change. If there was no such change, its disclosure was not conspicuous by its absence from the Explanatory Memorandum.