COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMERCIAL DIVISION

2016/CLE/gen/01458

BETWEEN

SQUADRON HOLDINGS SPV0164HK, LTD

Plaintiff

-and-

(1) MR. D. SEAN NOTTAGE

First Defendant

(2) HONG KONG ZHONG QING DEVELOPMENT COMPANY LIMITED

Second Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mrs. Gail Lockhart-Charles and Mrs. Lisa Esfakis of Gail Lockhart-Charles & Co. for the Plaintiff
Mr. Christopher Jenkins with him Mr. Ra'Monne D. Gardiner of Lennox Paton for the Second Defendant

Hearing Date: 28 October 2019

Company Law - International Business Companies – Pre-incorporation contracts – Director signing agreements on behalf of company to be incorporated – When and how company bound - International Business Companies Act, section 70

The Second Defendant signed two documents – a Loan Agreement (executed on 7 May 2016) and a Control Agreement (executed on 11 May 2016) (together "the Loan Documentation") - which expressed the other party as the Plaintiff. The Loan Documentation was purportedly signed on the Plaintiff's behalf by the First Defendant, its President/Director. At the time of the signing, the Plaintiff had not yet been incorporated. Neither the First nor Second Defendant knew that the Plaintiff had not been incorporated and both believed it was an extant corporation. The First Defendant subsequently incorporated the Plaintiff and sought to use section 70 of the International Business Companies Act ("the IBC Act") to adopt and ratify the Loan Documentation as a contract of the Plaintiff.

Relying on a number of Canadian cases including **Westcom Radio Group Ltd. v. MacIsaac et al** (1989), 70 O.R. (2d) 591, 63 D.L.R. (4th) 433 (Div.Ct.) and **1394918 Ontario Ltd. v 1310210 Ontario Inc. et al** 57 O.R. (3d) 607; [2002] O.J. No. 18, the Second Defendant contends that a proper interpretation of section 70 restricts the Plaintiff from ratifying and adopting the Loan Documentation.

The Plaintiff challenges the Second Defendant's interpretation of section 70 and says that it does not represent the state of the law subsequent to the legislation.

HELD:

1. Pursuant to section 70 of the International Business Companies Act, the Plaintiff was entitled to and did ratify and adopt the Loan Documentation which was executed before the Company was incorporated: **Rolle Family and Company Limited v Rolle** (2017) UKPC 35 and **Victor International Corporation et al v Spanish Town Development Company Limited & Ors** (Claim No. BVIHCV 2007/0293 [unreported] relied upon.

2. Section 70 of the International Business Companies Act must be construed literally. There is no need to give it a purposive meaning.

3. The Canadian case of **Westcom Radio Group Ltd. v. MacIsaac et al** (1989), 70 O.R. (2d) 591, 63 D.L.R. (4th) 433 (Div.Ct.) is distinguishable since it represented the state of the law before the enactment of statute. The case of **1394918 Ontario Ltd. v 1310210 Ontario Inc. et al** 57 O.R. (3d) 607; [2002] O.J. No. 18 replaced the common law approach regarding pre-incorporation contracts and rejected the two-stage approach formulated in **Weston.**

RULING

Charles J:

Introduction

[1] By a Consent Order dated 22 February 2018, the parties agreed that the sole substantive issue (other than costs) to be determined between them is:

> **"[W]hether or not Squadron Holdings SPV0164HK Ltd was entitled to and did ratify and adopt the Loan and Control Agreements executed on 7th and 11th May 2016 respectively between Hong Kong Zhong Qing Development Company Ltd and Sean D Nottage (for and on behalf of Squadron Holdings SPV0164HK) under s. 70 of the International Business Companies Act."**

Brief undisputed facts

[2] The Second Defendant, Hong Kong Zhong, signed two documents namely a Loan Agreement (executed on 7 May 2016) and a Control Agreement (executed on 11 May 2016) ("together "the Loan Documentation"), which expressed the other party to be the Plaintiff. The Loan Documentation was purportedly signed by the First Defendant, Mr. Nottage on behalf of the Plaintiff, Squadron. Mr. Nottage is the President and Director of Squadron. At the time of signing, Squadron had not yet been incorporated. Also, at the time of signing, neither Mr. Nottage nor Hong Kong Zhong knew that Squadron had not been incorporated and both believed that it was an extant corporation. Mr. Nottage subsequently incorporated Squadron and sought to use section 70 of the International Business Companies Act ("the IBC Act") to adopt and ratify the Loan Documentation as a contract of Squadron.

[3] Hong Kong Zhong contends that a proper interpretation of section 70 of the IBC Act restricts Squadron from ratifying and adopting the Loan Documentation and thus, it is void.

[4] The primary question to be determined by the Court relates to the proper interpretation of Section 70 of the IBC Act.

Section 70 of the IBC Act

[5] Section 70 of the IBC Act provides as follows:

> **"70. (1) A person who enters into a written contract in the name of or on behalf of a company *before* the company comes into existence, shall be personally bound by the contract and is entitled to the benefits of the contract, except where -**
>
> **(a) the contract specifically provides otherwise; or**
>
> **(b) subject to any provisions of the contract to the contrary, the company adopts the contract, under subsection (2).**
>
> **(2) Within a period of 90 days after a company comes into existence, the company may, by any action or conduct signifying its intention to be bound thereby, adopt a written contract entered into in its name or on its behalf before it came into existence.**
>
> **(3) When a company adopts a contract under subsection (2) —**
>
> **(a) the company shall be bound by, and entitled to the benefits of, the contract as if the company had been in existence at the date of the contract and had been a party to it; and**
>
> **(b) subject to any provisions of the contract to the contrary, the person who acted in the name of or on behalf of the company ceases to be bound by or entitled to the benefits of the contract."** [Emphasis added]

Discussion

[6] Learned Counsel Mr. Jenkins who appeared for Hong Kong Zhong submits that with respect to the substantive issue, there are two sub-questions which arise with regard to the interpretation of section 70. In what follows the common theme is the question of liability when a company ("A") contracts (or purports to contract) with a non-existent company ("B"), through the medium of another person who signs on B's behalf ("the Agent"); the terms "A", "B" and "the Agent" being used for convenience throughout his submissions.

[7] According to Mr. Jenkins, the two sub-questions are these:

(i) Does section 70 extend to purported contracts which, at common law, would not be contracts at all or does section 70 preclude this, because only

"contracts" are caught i.e. validly-made contracts (at common law). He argues that if this is the case, this would exclude contracts between Hong Kong Zhong and Squadron (a non-existent party) because the supposed contracts were void at common law. He submits that the latter should be the case and only already valid contracts are caught ("the **Purported Contracts Question"**);

(ii) If, however, it does extend to otherwise invalid contracts, then obviously section 70 would catch purported contracts between A and B and would also bind the Agent, in circumstances where both A and the Agent were aware that B did not exist and was yet to be formed. According to him, this is only fair (if section 70 is engaged at all) and serves a clear purpose in allowing A and the Agent to commit to a future involving B;

(iii) However, the second sub-question is therefore whether section 70 should be interpreted as extending to cases where either A does not know (but the Agent does) that B has yet to be formed, or where both A and the Agent are unaware that B has not yet been formed. Mr. Jenkins submits that this (subject to sub-paragraph (i) above) is the key question for decision. Mr. Jenkins submits that section 70 should not be interpreted as extending beyond cases where all parties know the company has yet to be formed, and that where, as in the present case, both A (Hong Kong Zhong) and the Agent (Mr. Nottage) are unaware that B (Squadron) does not exist, its non-existence cannot and should not be permitted to be cured by the operation of section 70 ("the **Knowledge Question**").

The Purported Contracts Question

[8] In addressing this issue, learned Counsel Mr. Jenkins argues that the cases of **Rolle Family and Company Limited v Rolle** (2017) UKPC 35 and **Victor International Corporation et al v Spanish Town Development Company Limted & Ors.** (Claim No. BVIHCV2007/0293) (unreported) – Judgment of Hariprashad-Charles J delivered on 14 February 2008 have no applicability to the

issue at hand. He submits that the Purported Contracts Question was not raised or argued in **Rolle v Rolle** (supra) and therefore, any reliance upon it is plainly misconceived.

[9] With respect to **Victor International**, Mr. Jenkins submits that, even though the Court held that the equivalent section in the BVI applied to allow a contract by an unformed company to be ratified, no arguments which he seeks to advance particularly the Canadian cases of **Westcom Radio Group Ltd. v. MacIsaac** (1989), 70 O.R. (2d) 591, 63 D.L.R. (4th) 433 (Div.Ct.) and **1394918 Ontario Ltd. v 1310210 Ontario Inc. et al** 57 O.R. (3d) 607; [2002] O.J. No. 18 were raised before that Court and therefore, **Victor International** is not binding. Counsel implores the Court to consider the arguments afresh.

[10] According to learned Counsel Mr. Jenkins, the plain language of section 70 suggests that his arguments are cogent on the Purported Contracts Question. First and foremost, what is required is a written contract. A written contract must require not just a document in writing but a document which is a contract and not a document which in law is not a contract because it is void *ab initio* at common law. Counsel suggested that, in the present case, it is common ground that there is no valid contract unless and until section 70 is deemed to convert an invalid contract into a valid one, as Counsel for Squadron argues.

[11] Mr. Jenkins relies heavily on **Westcom** which held, at page 439, so far as is material, that:

> **"[26] In coming to any conclusion about the case at bar, the starting point must be to determine whether the plaintiff intended to contract with the nonexistent company exclusively. If so, then the purported "contract" is a nullity. Whether the defendant will be personally liable under the OBCA will depend upon the interpretation of the word "contract" in s. 21(1). It is probable that the intention of the legislators was to remedy the perceived unfairness of the Black principle but it is questionable whether the current wording of the Act clearly includes purported agreements which are in law nullities. While there is no explicit statement in any of the Canadian cases to the effect that the OBCA or the CBCA has "obliterated" the Kelner-Black distinction, such reasoning seems implicit.**

[27] One other point should be addressed. The learned trial judge questioned whether the OBCA had any application to the facts of this case because the purported company was never incorporated. The three Canadian cases noted above each involved a situation where a company was later incorporated. In Phonogram, the English Court of Appeal applied the relevant statute to circumstances in which there was no later incorporation.

[28] In my view, one should begin by determining whether the arrangement, when considered as a whole, indicates an intention to look to the defendant personally or solely to the company. The learned trial judge found that the evidence indicated that the plaintiff was looking solely to the company. On the basis of the Black principle, the plaintiff's action must fail at common law.

[29] Having said that, one must question the appropriateness of applying that decision to the present circumstances. The court in Black followed Newborne, but in Newborne, the plaintiff was the "agent" and he was suing to compel performance of the "contract". In the present case, and in the majority of the reported cases on this question, the plaintiff is the other "contracting" party. In these cases, both parties are "innocent", but the party in the better position to control or know about incorporation is the defendant. In these cases, as in the present case, the plaintiff has performed its side of the bargain and the "agent" has had the benefit of that performance. Is it just in such circumstances that the "agent" should escape responsibility and the performing party go unpaid? Because the "agent" is in the better position to know the facts about incorporation and because he or she has usually had the benefit of performance, as a matter of policy, he or she should be found responsible.

[30] The OBCA arguably provides a complete codification of the law concerning personal liability for preincorporation contracts. While the intent of the legislature may have been to obliterate the seemingly unfair distinctions adopted in Black, the literal wording of the statute does not apply to a classic Black scenario.

[31] In the present case, application of the common law leads to the conclusion that no contract ever existed. That being the situation, there is nothing to which s. 21(1) of the OBCA can apply.

[32] I conclude, therefore, that the learned trial judge was correct in the conclusions at which he arrived. The appeal is therefore dismissed, but in the circumstances, without costs."

[12] Mr. Jenkins accepts that **Westcom** has been the subject of some debate in Canada but, on this point, it was not expressly overruled or rejected. He also relies

on **1394918 Ontario Ltd.** [supra] and **Sherwood Design Services Inc. v 872935 Ontario Ltd.** [1998] O.J. No. 1611; (1998), 109 O.A.C. 77 to fortify his arguments.

[13] He next submits that Squadron would no doubt argue that applying the **Westcom** logic would rob section 70 of its meaning and thus should be interpreted other than in accordance with its own terms. According to him, this is not correct for the following reasons:

a. there have always been cases in which the Agent does become liable: if he acts as a true agent rather than simply signing "for" the Company he would always have been liable at common law: **Newborne v Sensolid** [1953] 1 QB 45. As such, there would be a valid contract upon which section 70 could bite and which could be the subject of ratification under section 70;

b. as was said in **Westcom** itself, "*while the intent of the legislature may have been to obliterate the seemingly unfair distinctions …, the literal wording of the statute does not apply*". In other words, one cannot make a statute mean what it does not say; and

c. there are multiple other remedies available to injured parties if section 70 is held not to apply: the Agent could be sued for negligent misrepresentation (to the effect that B exists); the Agent could sue for money had and received if the contract is a nullity; the Agent may - if B's identity were irrelevant to A – simply treat himself as acting as principal: see **Braymist Ltd and others v The Wise Finance Co Ltd** [2002] Ch. 273 at paras 59-63: where the identity of B is of no moment to A, the Agent may as a rule step in and take the benefit of the contract. In other words, even if section 70 were deprived of any effect it would not rob deserving plaintiffs of a remedy.

[14] Learned Counsel Mr. Jenkins further submits that it is very important to note, on this point, other cases in other jurisdictions, particularly England, are *not* of any assistance. According to him, this point has never been argued in England but there is a good reason for that: the relevant English section (for convenience we

will use section 36C(1) of the Companies Act 1985 has been superseded by section 51 of the Companies Act 2006 but that is in identical terms) provides as follows:

> **"A contract *which purports to be made* by or on behalf of a company at a time when the company has not been formed has effect, subject to any agreement to the contrary, as one made with the person purporting to act for the company or as agent for it, and he is personally liable on the contract accordingly."** [Emphasis added]

[15] Mr. Jenkins submits that the English section makes very clear that it is intended to cover "purported" contracts i.e. those which are not valid contracts at common law. For that reason, the **Westcom** ratio would plainly not apply. However, section 70 is not couched in terms of "purported", so the **Westcom** ratio should be adopted.

[16] Mr. Jenkins makes what he considers to be an important observation namely that section 70 of the IBC Act dates from 2000. He says that, by then, **Westcom** had been decided for 11 years. The Bahamian legislature had a choice of what language to use in section 70 and a number of examples from other jurisdictions on which to draw. It chose to use language which did not – like the English version – refer to "purported" contracts. As such, its application must have been intended to be tighter, *and to have been intended to* ***exclude*** *purported contracts*. If that is so, then – whatever the position in Canada and what its legislature intended – Bahamian law has *chosen* to exclude purported contracts which means only valid contracts are caught. According to him, the present contracts were not valid. Thus, they are not caught by section 70. He submits that section 70 can have no application and the substantive issue should therefore be answered in the negative.

The Knowledge Question

[17] Learned Counsel Mr. Jenkins submits that the Knowledge Question only arises if he is wrong on the Purported Contracts Question. He observes that Counsel for Squadron has not even address this question since she impetuously relies on

Rolle v Rolle in which the question did not arise and was certainly not argued thus oversimplifying what is a complicated area of law which needs scrupulous analysis.

[18] Mr. Jenkins next submits that their basic proposition is that, even if section 70 can be said to catch some otherwise invalid contracts, it should be given limited application and should only apply where both A and the Agent are aware that B has not yet been incorporated. The reasons for this are a combination of:

1. The language of section 70;
2. Guidance from other jurisdictions; and
3. Policy considerations, which may of course be different from jurisdiction to jurisdiction depending upon the framing of their relevant sections and other local circumstances.

Language of section 70

[19] Mr. Jenkins contends that, with regards to the language of section 70 firstly, the phrase "*enters into a written contract in the name or on behalf of a company before the company comes into existence*" connotes, entry into the document on the very basis that the company has not come into existence: i.e. knowledge on the part of the counterparty (A) as well as of the "person" (i.e. the Agent). To put it another way, and in the absence of any reference to purported contracts, the suggestion within section 70 is that what is needed is a contract which is, on the face of it, with a company which has not come into existence (and is therefore referred to as such). At the very least that is a permissible reading of it. Put differently, the section envisages a contract along the lines of "B (a company yet to be formed) will pay A the sum of $1m)".

[20] Mr. Jenkins argues that such a construction is supported, once again, by the absence in section 70, of any reference to the word "purported". In England, the argument that the section was only aimed at cases of mutual knowledge would probably fail (and it has not been run) because the language ("A contract *which purports to be made* by or on behalf of a company at a time when the company

has not been formed") does clearly suggest an application to an Agent *purporting* to make a contract on behalf of B with A, i.e. doing so without A's knowledge of the non-existence of B. According to him, the language in the Bahamian legislation is very different, and the difference once again suggests that a different purpose is to be discerned: the purpose, he submits, is to limit the section to contracts intended *by all* to relate to a non-existent company.

Guidance from other jurisdictions

[21] Mr. Jenkins contends that his interpretation of section 70 is supported by guidance derived from other jurisdictions. First, there is no relevant guidance from England and according to him, this is for good reasons: the language of section 36C(1) and the extent of the remedies it provides renders the argument irrelevant. Second, there is no assistance to be derived from **Victor International** simply because that was a case in which there was mutual knowledge that the company had yet to be formed.

[22] Once again, he relies very heavily on Canadian authorities. He says that, in Canada, however, even the cases which might be said to cast some doubt on the **Westcom** logic as to the Purported Contracts Question, provide very strong support for an argument that the section is only intended to apply where parties are both aware that the company has not yet been formed. Thus, in **1394918 Ontario Ltd.** (supra), Carthy J.A. said at para 6:

> **"The section is clearly directed at meeting the needs of a party who wishes, and has negotiated for, liability to be assumed by an as-yet-unincorporated corporation."**

[23] In **1394918 Ontario Ltd.**, both A and the Agent were well aware that B had not been formed, and it is clear from the quotation above that that was an essential part of the conclusion: what is required is to meet the needs of A who wishes and has negotiated for liability upon an as-yet-unincorporated B. In other words, the section is designed to cover cases of mutual knowledge. Counsel also cites the case of **Sherwood Design Services** (supra). At para. 14, Abella J.A. said:

> **"These statutory provisions have a very practical purpose in contract negotiations and should be interpreted in light of the realities of what occurs on a day-to-day basis. Individuals may negotiate an agreement in which one or the other, or both, do not wish to incur personal liability. Importantly, one side agrees to forgo security and deal with a shell company. The corporate vehicle to replace the parties may not be immediately available, but it is agreed that once it is in place and adopts the agreement, the individuals on that side of the agreement will have no remaining liability. There is, in those circumstances, no reliance on the individual's covenant, except in the interim. It is not a case of assignment or replacement of a covenant by that of a fresh entity requiring scrutiny. That is why a simple notification of intent is all that is required. It is known from the outset that a shell company will be on the other side of the closing and a minimum of formality is required, sufficient in essence to permit the parties to prepare for closing with certain knowledge of who the vendor and purchaser will be, and who will be responsible for a failure to close."** [Emphasis added]

[24] At para. 22, Carthy J.A. added:

> **"As I see it the real purpose is to enable individuals who are negotiating a transaction, and do not intend to assume personal liability, to have an expeditious means of inserting a corporation into that transaction without having to wait for the creation of the corporate body before striking a deal and without having to rewrite the contract after the corporate body comes into existence. The fact that s. 21 does not require formal adoption of the contract is strongly supportive of a purpose related to business efficiency."**

[25] Mr. Jenkins submits that, once again, that was a case of mutual knowledge and the Court emphasized that the section concerned parties who *both* knew and agreed that there was a company yet to be incorporated. It was *not* about cases where A had no idea that B did not even exist. Therefore, the only relevant guidance from jurisdictions with sections akin to section 70 (in that they have (1) no reference to "purported" (2) provisions conferring benefits on the Agent and (3) provisions entitling B to take over the contract) place the knowledge of A (and the Agent) that B has not yet been formed front and centre. That entirely accords with Hong Kong Zhong's position on the interpretation under the Knowledge Question.

Policy Considerations

[26] Mr. Jenkins asserts that there are overwhelming policy considerations that support Hong Kong Zhong's interpretation that section 70 should only apply when A is fully aware that B has yet to be incorporated.

[27] First, he says, there is no harm or injustice in holding A to a contract with B or the Agent if A is fully cognizant that B has not yet been formed and that it may never be formed and he will then (under section 70) fall under obligations to, and have rights against, the Agent instead (because of course A will be deemed to have knowledge of the law and section 70 in particular). If however, he is wrong on the Purported Contracts Question, then he would accept that section 70 goes this far.

[28] However, where A is completely unaware that his supposed counterparty does not even exist, it seems wrong, indeed perverse, that the Agent should be able to correct that – *but only if the Agent feels like doing so* (because of course the Agent is not obliged to do so and cannot be forced to do so). The Agent could instead choose to enforce the contract in his own name, notwithstanding that A had no possible reason to think that the Agent had any rights at all. That, he says, is a wholly bizarre and unjust result, which the Court should not countenance.

[29] Learned Counsel further submits that those are, presumably, the sorts of considerations which led the Canadian Judges to stress the purpose of the legislation; that it was to allow parties *knowingly* to agree to a deal with something yet to be formed. Impliedly, at the least, it was *not* to allow an Agent to have his pick as to whether to assert the existence of a corporation which does not in fact exist and then later decide whether to incorporate and adopt, or to keep the contract for himself.

[30] Mr. Jenkins also submits that to allow the section to be used in this way would allow unscrupulous individuals to cherry pick whether they (or indeed their stooges depending on who they might cause to sign on behalf of B) or a new corporation would take the liabilities/benefits of any particular contract. So, if the contract were

going well, they could take the upsides into a newly formed company; if badly leave it with their stooges (against whom any remedy on the part of A might be meaningless).

[31] Further, an unscrupulous individual would, in fact, be able to see how a contract is performing and then decide *where* in the world to incorporate a company (assuming, of course, such jurisdiction had the equivalent of section 70) in order best either to take the benefits or avoid the downsides. It would allow forum shopping of the worst possible kind.

[32] In his comprehensive submissions, learned Counsel Mr. Jenkins contends that the proper interpretation of section 70 should restrict it to cases in which all parties involved are fully cognizant that the Company has yet to be formed and so, the Court is invited to answer the question posed in the Consent Order of 22 February 2018 in the negative, with the result that the Loan Documentation is void.

[33] In her terse submissions, Mrs. Lockhart-Charles submits that the question posed is straightforward and the answer is self-evident. If any doubt existed as to the answer to this question, such doubt was eradicated by the Judgment of the Privy Council in **Rolle v Rolle** which dealt with the issue of the adoption of pre-incorporation contracts under Bahamian law.

[34] Mrs. Lockhart-Charles is correct that **Rolle v Rolle** has clarified the law in this jurisdiction. By definitively finding that the effect of the statutory provisions for the adoption of pre-incorporation contracts is that "*an instrument which purports to be an agreement but is void because there is no counterparty in existence, is nonetheless deemed to be an agreement*", the Privy Council has made it unnecessary and irrelevant for our courts to consider case law from foreign jurisdictions which may take or have taken the position that a void or non-existent transaction cannot be ratified.

[35] Adoption of pre-incorporation contracts is dealt with in section 22 of the Companies Act in the case of regular Bahamian companies and section 70 of the IBC Act in the case of International Business Companies such as Squadron. Sections 22 and 70, so far as relevant, are in identical terms save that section 22 requires the adoption to take place within a reasonable period of time, whereas section 70 requires the adoption to take place within 90 days. The Privy Council said at paras. 10 - 11 of the Judgment:

> **"22.(1) Except as provided in this section, a person who enters into a written contract in the name of or on behalf of a company before it is incorporated is personally bound by the contract and is entitled to the benefits of the contract.**
>
> **(2) Within a reasonable time after the company is incorporated, it may, by any action or conduct signifying its intention to be bound thereby, adopt a written contract entered into in its name or on its behalf before it was incorporated.**
>
> **(3) When a company adopts a contract under subsection (2) -**
>
> **(a) the company is bound by the contract and is entitled to the benefits thereof as if the company had been in existence at the date of the contract and been a party to it; and**
>
> **(b) a person who purported to act in the name of the company or on its behalf ceases, except as provided in subsection (4), to be bound by or entitled to the benefits of the contract."**
>
> **11. The effect of these provisions is that an instrument which purports to be an agreement but is void because there is no counterparty in existence, is nonetheless deemed to be an agreement for the purpose of binding (i) the person who purported to make it on behalf of the company, and (ii) the company itself if it adopts the transaction in accordance with subsection (2) in place of that person."**

[36] To grasp the full meaning of section 70, the Court only needs to apply the analysis found in **Rolle v Rolle** at paras 12-14 which state:

> **"12. <u>The first condition which calls for attention on this appeal is that the instrument should purport to be a "written contract".</u> It is unnecessary to decide whether any deed is to be regarded as a contract for the purpose of the section. The Board is satisfied that the**

> **deeds in question on this appeal purported to be written contracts….In the Board's opinion, the transaction effected by the deed was a bilateral transaction involving mutual obligations. In other words it was a contract.**
>
> **13. <u>The next condition is that the company should have adopted the contract after its incorporation by some "action or conduct signifying its intention to be bound thereby.</u>" It was submitted that this formulation means that there must be some executor obligation by which the company would be bound upon adopting the transaction... But the Board would reject the submission in principle as regards both instruments, because the suggested limitation on the right to adopt a pre-incorporation contract would serve no purpose that can be related to the object of section 22 or sensibly be attributed to the legislature… In the Board's opinion, the words quoted are simply intended to ensure that the company consents to being party to the transaction so as to assume whatever burden there may be, and not just the benefit. It does not imply anything about the incidence or extent of that burden.**
>
> **14. The main difficulty, as the trial judge perceived, lies in the third condition, that the transaction should be adopted "within a reasonable time after the company is incorporated." What is a reasonable time for the purpose of a statutory provision like this must depend on what falls to be done in that time. In the case of section 22, it means a reasonable time for the company to decide whether to adopt the transaction and to take the necessary steps to do so. There are practical reasons why the delay should be as short as is consistent with that object. The temporal limitation is not there for the benefit of the company. It is there for the benefit of third parties dealing with it. The decision whether to adopt a pre-incorporation contract affects the company's assets and liabilities, and thus the transactions which it is in a position to enter into with third parties. It affects the person who purported to enter into the transaction before the company's incorporation, who needs to know whether he is to remain personally liable and entitled under the contract or to have his rights and liabilities transferred to the company."**[Emphasis added]

Applying Rolle v Rolle

[37] Mrs. Lockhart-Charles submits that the first question to be asked is whether the instrument in question purports to be a "written contract"? In the present case, the instruments in question are the Loan Agreement (executed on 7 May 2016) and the Control Agreement (executed on 11 May 2016) ("the Loan Documentation"). The Loan Documentation identified "Squadron" as the Lender and "Hong Kong Zhong" as the Borrower and, among other things, sets out the terms upon which

funds would be advanced and repaid as between borrower and lender. Self-evidently the Loan Documentation purports to be a written contract.

[38] The second question to be asked is: did the company adopt the contract after its incorporation by some "action or conduct signifying its intention to be bound thereby"? On 17 August 2016, Mr. Nottage executed a written consent of directors in lieu of a meeting resolving, among other things, that Squadron had adopted and ratified the Loan Documentation. Self-evidently, this written consent amounts to action or conduct on the part of Squadron signifying its intention to be bound by the Loan Documentation.

[39] The next question is whether the transaction was adopted within 90 days of Squadron's incorporation? The chronology establishes that the transaction was adopted as soon as Squadron was incorporated, indeed it was adopted on the very same day that Squadron was incorporated. Therefore, there is no difficulty with respect to the third requirement – in the case of section 70 that the transaction be adopted within 90 days.

[40] Indeed, the succinct submissions advanced by Mrs. Lockhart-Charles are more compelling than those of Mr. Jenkins who, in essence, invites the Court to give a purposive meaning to a section of the law which is plain and simple. Furthermore, the Canadian case of **Westcom** represented the state of the law before the enactment of statute. In fact, the case of **1394918 Ontario Ltd** (supra); relied upon by Mr. Jenkins, held that section 21 of the Business Corporations Act, R.S.O. 1990 (equivalent to section 70 of the IBC) replaced the common law regarding pre-incorporation contracts and should be read on its own terms and in an interpretative context of the purpose it was intended to fulfil.

[41] At paragraph 10 of the judgment, Carthy JA stated:

> **"The appellants argue that prior to adoption the s. 21(4) contract is a revocable offer, citing the British Columbia Court of Appeal holding in Heinhuis v Blacksheep Charters Ltd. (1987), 46 D.L.R. (4th) 67 at p. 72, 19 B.C.L.R. (2d) 239 (C.A.). That is a common law decision and, as**

> **indicated above, should, in my view, be resisted in giving meaning to this self-contained legislation, which seeks to move beyond the common law. Revocable offers are well known to the common law and any analogy to them would not explain the retroactive enforceability of this statutory "contract". Szecket, supra, established that common law contract principles should not be reintroduced into the analysis of s. 21 and rejected the two-stage approach in Westcom Radio Group Ltd. v MacIsaac (1989), 70 O.R. (2d) 591, 63 D.L.R. (4th) 433 (Div. Ct.), whereby the court first established that there was a valid contract at common law and only then applied the statutory rules."**

Conclusion

[42] As is made clear at paragraph 11 in **Rolle v Rolle**, the effect of the statutory provisions for adoption of pre-incorporation contracts is that the Loan Documentation, which purports to be an agreement but was void because Squadron was not in existence, is nonetheless deemed to be an agreement for the purpose of binding Squadron, as Squadron adopted the transaction in accordance with section 70 of the IBC Act.

[43] Answering the question posed as the substantive issue to be determined is indeed a matter of construing section 70. The terms of the Act are clear and **Rolle v Rolle** is binding authority for the construction and application of section 70.

[44] Further support can be gleaned from **Victor International** (supra), a case which analyzed section 104 of the BVI Business Companies Act, 2004 (which deals with contracts entered into before the company is incorporated). At para 24 of the Judgment, Hariprashad-Charles J. stated the following:

> **"…The present state of the law is plain: it is no longer the law that a contract entered into by an individual on behalf of a company before it is incorporated is a nullity. A company can adopt or ratify this contract within a specified time as provided for in the contract or within a reasonable time after it has been incorporated."**

[45] Applying **Rolle v Rolle** and **Victor International**, the answer to the substantive issue is irrefutably "yes": Squadron was entitled to and did ratify and adopt the Loan Documentation between Hong Kong Zhong and Mr. Nottage (for and on behalf of Squadron) under section 70 of the IBC Act.

Costs

[46] Squadron, being the successful party in these proceedings, is entitled to its costs which were summarily assessed at $80,000 from 1 January 2017 to the date of this Ruling.

Dated this 12th day of December, A.D., 2019

Indra H. Charles
Justice