



Carey Olsen successful in first ever derivative claim brought on behalf of a Liberian company in the British Virgin Islands

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Date / [May 2021](#)

The Eastern Caribbean High Court recently handed down its written judgment in *Kathryn Ma Wai Fong v Incredible Power Limited and ors BVIHCM 2015/0047*, the first ever derivative action brought on behalf of a Liberian company in the BVI, determining that the Claimant, the executrix of the estate, who is a one-third shareholder of a Liberian company, had the requisite standing to do so and that substantial funds were misappropriated from the company and diverted to two other companies incorporated in the BVI. Carey Olsen acted for the successful Claimant.

Background

The 'WTK Group', which was founded by Datuk Wong Tuong Kwong ("WTK"), is a diversified group dealing primarily with forestry, timber logging, oil palm production and construction. Although headquartered in Malaysia, the business expanded to include companies in offshore jurisdictions, including but not limited to the Fourth Defendant, Rayley Company Limited ("Rayley") (a Liberian company), the First Defendant, Incredible Power Limited ("Incredible Power"), and the Fifth Defendant, Esben Finance Limited ("Esben"). The First and Fifth Defendants are BVI companies.

The Claimant ("Ms Ma") is the widow of the late Wong Kie Nai ("WKN"), one of WTK's sons. The Second and Third Defendants in the claim ("WKY" and "WKC") are the brothers of WKN and brothers-in-law of Ms Ma. Over the years, the three brothers were put in charge of various parts of the family business and held equal interests in Rayley, Incredible Power and Esben.

WKN passed away in March 2013. In April and July 2013, WKY and WKC caused substantial funds owing to Rayley to be transferred to Incredible Power and to Esben, from where the

funds were alleged to have disappeared to the detriment of Rayley.

Ms Ma, who together with her children, were the ultimate beneficiaries of WKN's estate, obtained probate of WKN's Will in Liberia in October 2013. The three brothers' interests in Rayley and Incredible Power, which were initially held by a nominee, were also transferred to WKY, WKC, and Ms Ma qua Executrix. Ms Ma accordingly brought this claim on her own behalf as the Executrix of the Estate of WKN and derivatively on behalf of Rayley against the Defendants.

Decision

The Court was tasked with determining whether Ms Ma had standing as a matter of Liberian law to bring the claim on behalf of Rayley in the BVI and was presented with competing expert evidence on this issue. Despite the substantive Defendants (i.e. excluding Rayley) being estopped from raising this objection due to their previous conduct, the Court held that Ms Ma nonetheless had the requisite standing.

The Court reached this conclusion on three grounds:

1. Ms Ma had standing as a matter of Liberian law qua Executrix in respect of the Estate's beneficial interest in Rayley. The fact that Ms Ma qua Executrix also had a legal interest in Rayley following the transfer of legal title in Rayley from the nominee did not have any adverse impact on her standing.
2. Ms Ma was not required to attempt to secure the initiation of the action by the board of Rayley (as was suggested by the Defendants). If the language of a Liberian statute is clear and unambiguous, there is no need for the process of construction to find its meaning. However, if one does

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embark on a construction exercise, then the statute must be construed with reference to the intended objective of the legislation and the same rule of plain language also applies. Reference to other laws (such as English or US laws) would also not be appropriate as a statement of Liberian law when there is existing Liberian statute or case law on the same subject.

3. Ultimately, WKN's beneficial interest in Rayley continued in the shape of his Estate. Considering that the overall policy of Liberian law is to preserve that beneficial interest, it would be surprising if the heirs or beneficiaries of a testator were left powerless with no remedy.

The Court also concluded in favour of Ms Ma's contentions that:

1. WKY and WKC were de facto directors of Rayley and Incredible Power, noting in particular that there were no other individuals who could possibly have been candidates to fulfil the role of *de jure* directors;
2. The diversion and transfers of monies from Rayley to Incredible Power and Esben were not in Rayley's best interests; and
3. WKY and WKC had breached their duties to act in the best interests of Rayley and for a proper purpose as required under Sections 120 and 121 of the Business Companies Act.

The substantive Defendants' assertions that the misappropriations were to satisfy alleged inter-company debts, as well as that the diversion of monies to Incredible Power had been ratified, were rejected by His Lordship the Honourable Mr Justice Gerhard Wallbank, who held, amongst other things, that the defence was largely fabricated.

Significance

This decision will be welcomed not just by shareholders of foreign companies but also by any individual responsible for administering an estate which holds shares in foreign companies, when considering whether to seek recourse from the BVI Courts. It helpfully illustrates the Court's approach for determining the standing of the party bringing the derivative claim, which is generally governed by the law of the country where the company is incorporated, and underscores the importance of expert evidence on this issue.

Further, while it now appears that an executor (or executrix) of an estate owning shares in a Liberian company would likely have standing to bring a derivative claim in the BVI, it remains to be seen how the jurisprudence will develop in relation to other foreign-incorporated companies and to other forms of beneficial interests in those foreign entities.

The Carey Olsen team was led by partner James Noble who was assisted by counsel Kate Lan and associates Amelia Tan, Monique Hansen, Joni Khoo and Vivian Siah.

[Click here to view the full judgment.](#)



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