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WHEN IS A SHAREHOLDER A SHAREHOLDER, OR NOT?

The Importance of Side Notes in Statutory Interpretation

Giselle Romain

Case law and other jurisprudence have been at both ends of the spectrum regarding the importance of side notes as a tool to assist in statutory interpretation. Older jurists and legal practitioners tended to believe that side notes were not part of an Act and as such ought not to be considered in interpretation. Today, however, there is a more liberal view on side notes and the vital role they play in ascertaining the true meaning of written legislation. In this Article, we consider how the use of side notes has evolved and illustrate how, in some instances, the side note may be the only key to correctly interpreting the law.

With the 2013 Initial Public Offering (IPO) for shares in First Citizens Bank Limited and the upcoming IPO for shares in Trinidad and Tobago NGL Limited, there is increased activity and interest in investing in shares. Investors (whether seasoned or not) seek to purchase shares in publicly or privately held companies and expect to become 'shareholders'. However, the requirements to prove that a person is a shareholder may vary depending on the right that the person is seeking to enforce as a shareholder.

Two sections of the Companies Act (Chap: 88:01 of the laws of the Republic of Trinidad and Tobago) - the Act, address whether or when a shareholder will be considered or deemed to be a shareholder under the Act. Section 107 (1)(c) of the Act states inter alia:

"The following persons are shareholders in a company:…(c)a person in whose favour a transfer of shares has been executed and delivered but whose name has not been entered in the register of members of the company…."

The Act also provides that the provisions of Section 107(1) (c) shall take effect subject to the provisions of the company's articles or Bye-laws. Thus, subject to an alternative rule in the company's articles or Bye-Laws, a shareholder whose name is not on the Register of Shares in a company will still be deemed a shareholder once he can provide evidence that a transfer of shares has been executed and delivered in his favour.

In stark contrast is the wording of Section 195(4) of the Act which states inter alia:
"A company….is not bound or entitled to treat the transferee of shares…as the owner of them until the transfer to him has been registered or until the Court orders the registration of the transfer to him; and until the transfer is presented to the company for registration, the company is not to be treated as having notice of the transferee's interest thereunder or of the fact that the transfer has been made".

Section 195(5) clarifies that the above provisions apply notwithstanding anything contained in the articles or Bye-laws of the company, and notwithstanding anything contained in any contract or instrument. A literal interpretation would lead one to conclude that these two provisions contradict each other. On the one hand, a shareholder is a shareholder once a transfer of shares has been made in his favour and there is no need for registration. The company is thus duty bound to treat the person as a shareholder unless the Articles or Bye-laws provide otherwise. On the other hand, the Act provides that a transferee of shares is not entitled to be treated as the owner of such shares until such transfer has been registered. The company is neither bound nor entitled to treat such a person as a shareholder (or owner of shares) notwithstanding an instrument which may state the contrary.

Statutory Interpretation

In addressing such ambiguity or conflict, legal practitioners including the Courts would use the many rules of statutory interpretation which offer guidance as to how the wording of an Act should be read and what meaning is to be ascribed to the words. Some rules allow the interpreter to go outside or beyond the written enactment when the actual language of the Act offers little or no assistance in garnering the true

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"NOT BROKEN, JUST BENT" - FACILITATING FINANCIAL REHABILITATION VIA THE BANKRUPTCY AND INSOLVENCY ACT 2007 — Part II

Part I of this Article outlined the justification and purpose of the Bankruptcy and Insolvency Act 2007 (the Act) and described financial rehabilitation as the major change which the Act introduced into the country's bankruptcy landscape. In Part II, we discuss the roles of two main functionaries of the financial rehabilitation process: the Trustee, and the Supervisor of Insolvency; as well as the functions of the Court which assist both in carrying out their mandates.

As outlined in Part I, the Act introduced, among other things, a formal process for rehabilitation of debtors (which is time sensitive), as well as regulations governing insolvency practitioners. These two concepts are supported by various sections in the Act, in particular Part IX which addresses administrative officials, and Part X which addresses the Jurisdiction of the Court.

The Supervisor of Insolvency

The Supervisor of Insolvency (the Supervisor) is responsible for the general administration of the Act, receiving and adjudicating upon applications for licences to act as trustees, and supervision of the administration of all bankruptcy estates under the purview of the Act.

Upon approving an application to become a trustee, the Supervisor may request the trustee to deposit security for the accounting of all property received by the trustee and for the due and faithful performance of his duties in the administration of bankruptcy estates to which he is appointed. The Supervisor also has the authority to

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meaning. There is also an order of priority in applying the rules. If there is no resolution after the application of the 'first' rule, then another rule should be applied. This process continues until all rules have been exhausted, or at the very least, the ambiguity has been removed and the true (or least ambiguous) meaning of the law is ascertained. This order of priority among the rules has led to greater emphasis being placed on the substantive words of any given section in an Act. Additionally, this priority ranking has also led to a minimization of the importance of other parts of an Act such as the short title, the headings and the side or marginal notes.

In the above example on the definition of shareholder, it is clear that the substantive words in the sections offer little or no assistance in addressing or removing the apparent ambiguity. Therefore, one might consider the side notes to each section. The side note for Section 107 reads **"Shareholders and their meetings"** while the one for Section 195 reads **"Transfer of shares".** The clear difference in the words of the side notes immediately allows for a different interpretation of each section even though they both relate to shareholders and who can be deemed to be a shareholder.

The Development of the Importance of Side Notes

Case law over the years has changed its view on the importance of side notes. In the case of *R v. Hare (1934),* Avory J claimed that side notes are not to be looked at because they were inserted after the Bill has become law and in *R v. Schildkamp (1971)* Lord Reid stated that a side note is a poor guide to the scope of a section for it can do no more than indicate the main subject with which the section deals. Finally, in Statutory Interpretation (3rd ed.) by Francis Bennion, the author noted that side notes may be considered in construing a section or any other provision of the Act provided due account is taken of the fact that its function is merely to serve as a brief, and therefore possibly inaccurate, guide to the content of the section.

This judicial view has, however, changed with many of the earlier dicta being superseded in case law and writing. Cross in Statutory Interpretation (2nd ed.) by Bell and Engle said of side notes that *"No judge can be expected to treat something which is before his eyes as though it were not there".* In *Chilcott v. IRC (1982)*, the Judge noted that the side note to the Act under consideration was a permissible and useful guide that threw light on the mischief at which the section was aimed. Finally, in *Stephens v. Cuckfield RDC (1960)* Upjohn LJ commented on the role of the side note:

> *"While the marginal note to a section cannot control the language used in the section, it is at least permissible to approach a consideration of its general purpose and the mischief at which it is aimed with the note in mind".*

Conclusion

If the above were to be applied to Sections 107 and 195 of the Act, it can reasonably be inferred that the entitlement to be defined or classified as a shareholder differs with respect to a shareholder's ability to attend meetings and a shareholder's ability to sell or transfer his shares. There appears to be a higher standard of proof required for share ownership where what is being considered is a transfer of such shares as compared to share ownership that would entitle a shareholder to attend a meeting. The words of the sections failed to make this clear. The side notes thus provided much needed support and guidance in removing the apparent ambiguity. Thus, the current and prevailing view is that side notes can be a very important tool for interpretation.

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access the bank accounts of a trustee in which estate funds may have been deposited. The books, records and deposit accounts of a trustee may also be examined by the Supervisor when there are reasonable grounds to believe that the property or funds of a bankruptcy estate have not been properly disclosed or dealt with. Where a trustee is removed or dies or fails to perform his duty regarding the estate, the Supervisor has the power to direct persons (though unlicensed) to deal with the property of the estate including the preservation of books and records.

The Supervisor must keep a public record of all proposals, bankruptcies and licences issued to trustees and all notices from receivers under Sec. 14 of the Act. Finally the Supervisor has the authority to conduct investigations surrounding suspected offences that may have been committed by debtors, creditors or even trustees under the Act or any other law, once such suspected offence is connected to an estate or matter to which the Act applies.

Trustees under the Act

An individual applying to the Supervisor to be licensed as a trustee must be a member of a professional body prescribed by the Minister and permitted to act as trustee by the rules of that professional body. The trustee must pay the required fee for the licence which will usually be valid for a period of one year. Trustees may have their licence declared invalid if they fail to pay the annual fees or if they become bankrupt. A licence may be suspended or cancelled by the Supervisor if the trustee is convicted of an indictable offence or if the trustee has failed to comply with any conditions to which the licence is subject. The licence may also be suspended if the trustee has ceased to act as trustee or if the trustee so requests.

There are a number of circumstances which preclude a trustee from acting for an insolvent or bankrupt. Some examples include where the trustee was a director of the debtor during the two year period prior to the bankruptcy or insolvency and where the trustee is related to the debtor or any director or officer of the debtor. Additionally, if the trustee was an employer or employee of the debtor, or the auditor, accountant or attorney-at-law of the debtor, he would not be able to act for the debtor. Corporate bodies may also hold a licence as trustee, but a majority of its directors and a majority of its officers must also hold licenses as trustees, since the duties and powers of a trustee may only be performed through a director or officer of the body corporate that holds the licence.

Duties and Powers of a Trustee

Sections 200 to 220 of the Act clearly outline the duties and powers of a trustee. Generally, trustees are charged with the administration of estates in bankruptcy and as such are required to accept all proposals filed and oversee the implementation of such proposals by working with both the debtor and creditors involved. They also have a duty to examine the acts and behaviour of the debtor. Of note, is the duty of the trustee to give security to the Supervisor as stated above and the making of an inventory of the bankrupt's property and verification of the bankrupt's statement of affairs. Other duties and powers include the power to initiate criminal proceedings, the power to permit authorised persons to inspect books and records of the bankrupt and the duty to keep insured all insurable property of the bankrupt.

While the duties previously referred to are all mandatory, some duties and powers can be exercised at the trustee's discretion. Most notably is the option to carry on the business of the bankrupt so far as is necessary for the beneficial administration of the estate of the bankrupt. The trustee also has the discretion to sell property, lease any real property, and incur obligations or borrow money.

The remuneration of the trustee is determined by the creditors via an ordinary resolution, or, in the absence of such, by court order. Once a trustee has completed the duties required of him he must apply to the Court for a discharge. Once discharged, the trustee is free from all liability in respect of any act done or default made by him in administering the property of the bankrupt and in relation to his conduct as a trustee. The discharge of a trustee leads to an automatic release of the security provided by the trustee upon his appointment.

Powers and Duties of the Court

The Court is yet another important arm in the implementation and management of the insolvency/ bankruptcy process. The Court has full power to decide all questions of priorities (among creditors of the bankrupt) and all other questions that may arise in any case of insolvency coming before the Court. Under the Act, the powers and functions of the Court include:

- Deciding all questions of priorities and all other questions of law or fact that may arise in an insolvency before the Court;
- Reviewing and/or rescinding orders made by it in an insolvency;
- Seizure of the property of the bankrupt;
- Appointing and/or substituting trustees; and
- Review and approval of trustees' fees.

Ultimately, the Court has a duty to ensure procedural fairness amongst all creditors, and must balance the interests of all persons involved in the rehabilitation or bankruptcy process. It is believed that Court oversight and supervision bring transparency, full disclosure and relief to prejudiced creditors since there is certainty of outcome.

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