

**IN THE SUPREME COURT OF BELIZE, A.D. 2020**

**CLAIM NO. 623 OF 2020**

**BETWEEN**

**BRENT BORLAND  
ALANA LATORRA BORLAND  
COPPER LEAF LLC**

**1st CLAIMANT  
2nd CLAIMANT  
3rd CLAIMANT**

**AND**

**MARCO CARUSO  
MICHELA BARDINI  
RICHARD DYKE ROGERS  
PLACENCIA ESTATES DEVELOPMENT LLC  
PANTHER PROPERTIES LP  
REGISTRAR OF LANDS**

**1st DEFENDANT  
2nd DEFENDANT  
3rd DEFENDANT  
4th DEFENDANT  
5th DEFENDANT  
INTERESTED PARTY**

**BEFORE THE HONOURABLE MADAM JUSTICE LISA SHOMAN**

**HEARING DATE : February 3, 2022**

**WRITTEN SUBMISSIONS**

**Defendants/Applicants: February 28, 2022 & March 11, 2022**

**Claimants/Respondents: March 1, 2022 & March 11, 2022**

**APPEARANCES**

**The Rt. Hon Dean O Barrow SC & Mr. Adler Waight for Defendants/Applicant**

**Mr. E. Andrew Marshalleck SC & Mr. Allister Jenkins for Claimants/Respondents**

## **RULING ON PRELIMINARY ISSUE**

1. By a consent order of the Parties herein, dated November 4<sup>th</sup>, 2021, the Court was asked by the Defendants/Applicants and the Claimants/Respondents to hear and determine the following preliminary issues:
  - a. The matter of the standing and capacity of Brent Borland and Alana LaTorra Borland to bring a claim on behalf of Placencia Estates Development LLC, which was struck off the Companies Register of St. Christopher and Nevis for non-payment of fees; and
  - b. Whether Copper Leaf, LLC, can properly maintain the claim against Placencia Estates Development LLC, which was struck off the Companies Register of St. Christopher and Nevis for non-payment of fees.
2. Both matters concern the legal capacity of the 4<sup>th</sup> Defendant, Placencia Estates Development Limited (“PED”), which is an overseas company incorporated in Nevis, on April 21<sup>st</sup>, 2008 under the Laws of St. Christopher and Nevis. PED has been struck off the Companies Register for non-payment of fees. Put simply, this Court is being asked to determine what is the current status of PED under the laws of Saint Christopher and Nevis.
3. The matter was heard on February 3<sup>rd</sup>, 2022, and both parties provided Expert Reports on the question of Nevis Law. The Court has the benefit of the Expert Reports of Mr. Jeffrey E. Nisbett (“Mr. Nisbett”) and Ms. Dahlia Joseph Rowe (“Ms. Rowe”). Both Experts also gave evidence at the hearing on February 3<sup>rd</sup>, 2022.
4. By consent, the party agree that the legal capacity of PED under the Laws of Nevis to sue and to be sued is a question of foreign law which this Court is being asked to resolve, in order to deal with the preliminary issues set out above.

5. I find that PED is not dead and that its legal personality is not extinguished, but has merely been suspended. The reasoning for this decision is contained in the paragraphs below.
6. Consequently, the matter of the standing and capacity of Brent Borland and Alana LaTorra Borland to bring a claim on behalf of Placencia Estates Development LLC, is answered in the affirmative. They do have the standing and capacity to bring this derivative claim.
7. Likewise, Copper Leaf, LLC can properly maintain the claim against Placencia Estates Development LLC.

## **THE PED BACKGROUND**

### **CORPORATE PED**

8. The 4<sup>th</sup> Defendant, PED, incorporated on April 21<sup>st</sup>, 2008, under the Laws of St. Christopher and Nevis, was registered at the Belize Companies and Corporate Affairs Registry as an overseas company doing business in Belize April 21<sup>st</sup>, 2009; and is engaged in the subdivision and sale of residential lots in Placencia, Stann Creek District, Belize.
9. PED's Directors/Managers are the 1<sup>st</sup> Defendant ("Marco") and the 2<sup>nd</sup> Defendant ("Michela"), and its members are Marco, Michela, and the 1<sup>st</sup> Claimant ("Brent"); and the 2<sup>nd</sup> Claimant ("Alana"). At all material times, Brent and Alana were members resident outside Belize, Marco and Michela were members and directors resident in Belize and in day to day control of PED's properties and assets.
10. The annual corporate fees for PED which were due and payable to the Companies Registry of St. Christopher and Nevis were not paid and as a result, PED was struck from the

Companies Register of St. Christopher and Nevis on the 1<sup>st</sup> May, 2013, for the non-payment of fees

11. Even though PED was struck off the register of St. Christopher and Nevis on the 1<sup>st</sup> May, 2013, PED was represented to the Belize Companies and Corporate Affairs Registry as being in good standing and Annual Returns were prepared and filed from 2014 to 2018 on behalf of PED, as an overseas company doing business in Belize.
12. PED has acknowledged service of the claim on December 11<sup>th</sup>, 2020 and filed and served a defence to the claim herein dated March 26<sup>th</sup>, 2021.

#### PED'S CURRENT STATUS

13. According to the Claimant's claim, a part of the claim is brought as a derivative action by Brent and Alana as members of PED<sup>1</sup>. They say that Marco and Michela concocted a "fraudulent scheme" to "divest PED of its assets, causing loss to PED and therefore to its members"<sup>2</sup>— which of course include Marco and Michela. What was the alleged scheme?
14. According to the Claimants on August 6<sup>th</sup>, 2018, "*Marco entered into a Memorandum of Understanding, purportedly on behalf of PED, with the 3<sup>rd</sup> Defendant ("Dyke"), who was said to represent an "Investor Group" of which he is a member, for the development of several projects, including the residential lots being developed by PED ("the Memorandum").*"<sup>3</sup>

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<sup>1</sup> Claimant's Written Submissions dated March 01, 2022, at paragraph 22

<sup>2</sup> Ibid, Paragraph 24

<sup>3</sup> Ibid, Paragraph 10

15. According to the Claimants, *“Marco dishonestly represented in the Memorandum that he owned PED and that he could fully transfer PED’s properties to a new entity, the 5<sup>th</sup> Defendant (“Panther Properties”) in which he and Dyke and the Investor Group would all be members”<sup>4</sup>; and that “Marco dishonestly represented in the Memorandum that he could take ownership of PED’s property via the new entity, which was owned by both the Dyke/Investor Group and Marco on a fifty-fifty basis.”<sup>5</sup>*
16. The Claimants say that *“Per the terms of the Memorandum, Marco agreed to have PED’s remaining property transferred to the new entity, in consideration of Dyke and the Investor Group agreeing to release Marco from any claims arising out of actions undertaken by Brent”<sup>6</sup> and that “Subsequent to entering into the Memorandum, Marco also entered into a Subscription Agreement which expressly recited that the Development Land which was to be transferred to Panther Properties was property owned by PED.”<sup>7</sup>*
17. The Claimants contend that *“Marco and Michela executed a Deed of Conveyance (Instrument No. LTU-201900318) purporting to transfer PED’s property being the 1,431.285 to Panther Properties, in consideration of a purported purchase price of BZ\$1,250,000.00 purportedly paid by Panther Properties. Panther Properties did not pay nor did PED receive any purchase price in the sum of BZ\$1,250,000.00”<sup>8</sup>.*
18. The Claimants argue that *“PED could not have procured in Belize registration of any instrument of transfer of the property to Panther Properties unless PED was in good standing at the time of execution and registration of the instrument of transfer”<sup>9</sup>.*

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<sup>4</sup> Ibid, Paragraph 11

<sup>5</sup> Ibid, Paragraph 12

<sup>6</sup> Ibid, Paragraph 13

<sup>7</sup> Ibid, Paragraph 14

<sup>8</sup> Ibid, Paragraph 15

<sup>9</sup> Ibid, Paragraph 16

19. The Claimants claim that “*Marco and Michela breached fiduciary duties owed to PED and its members, Brent and Alana, by purportedly conducting business on behalf of PED in the manner set out above.*”<sup>10</sup> They say that it is undisputed that these actions all took place at a time when PED had already been struck off the Companies’ Registry of St Christopher and Nevis on May 1<sup>st</sup>, 2013; that the actions are fraudulent and have caused PED, Brent and Alana to suffer loss and damage.
20. This is why the current status of PED is important.
21. If PED is struck off and cannot be resuscitated, then it cannot be a part of this claim as the 4<sup>th</sup> Defendant; and no derivative action may be taken on its behalf by anyone. If on the other hand, resurrection is possible, then it may be able to be continue as 4<sup>th</sup> Defendant and so may the derivative action.
22. The following is not in dispute between the parties in respect of PED’s status :
  - a. PED was incorporated under the Nevis Limited Liability Company Ordinance, (NLLC 1995), as it then stood, in 2008;
  - b. PED was struck-off the Register on May 1<sup>st</sup>, 2013, for the non-payment of annual fees;
  - c. PED was deemed dissolved on May 1<sup>st</sup>, 2016, under section 53(5) of NLLC 1995;
  - d. PED was ‘continued’ for a period of 3 years after the deemed dissolution under Section 54(1) of NLLC 1995, and has still not been restored to the Register; and
  - e. The Nevis Limited Liability Company Ordinance of 1995 was repealed and replaced by the Nevis Limited Liability Companies Ordinance 2017 (NLLC 2017).

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<sup>10</sup> Ibid, Paragraph 17

## THE LAW ON THE STATUS OF PED

23. The experts who have given reports and evidence in this claim, Mr. Nisbett and Mrs. Rowe, agree that the statute governing the status of PED status on removal from the Companies Register May 1<sup>st</sup>, 2013 is the Nevis Limited Liability Company Ordinance, Cap. 7.04(N)(“the Ordinance”), and that section 53 is key.<sup>11</sup>
24. They both agree that because PED wasn’t restored to the register within three years from the date of removal from the Register for non-payment of fees, it was deemed to have commenced winding up and dissolution as at the 1<sup>st</sup> May, 2016; and that Section 54 of the Ordinance applies to PED after three years have expired from May 1<sup>st</sup>, 2013<sup>12</sup>.

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<sup>11</sup> Section 53 states that

*“(1) On the failure of a limited liability company to pay the annual registration fee or maintain a registered agent for a period of one year the Registrar shall remove the limited liability company from the register.*

*(2) A limited liability company which is removed from the register pursuant to subsection (1) may be restored to the register within three years of the date of removal upon payment to the Registrar of Companies of the prescribed fee.*

*(3) A limited liability company shall be restored to the register retroactive to the date of its removal.*

*(4) Every limited liability company shall pay a fee for restoration to the register.*

*(5) A limited liability company which is not restored to the register within three years of the date of removal shall be deemed to have commenced to wind up and dissolve in accordance with this part.”*

<sup>12</sup> *“54 (1) All limited liability companies whether they expire by their own limitations or are otherwise dissolved, shall nevertheless be continued for the term of three years from such expiration or dissolution for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, to discharge their liabilities, and to distribute to the members any remaining assets, but not for the purpose of continuing the business for which the limited liability company was organized.*

*(2) With respect to any action, suit, or proceeding begun by or against the limited liability company either prior to or within three years after the date of its expiration or dissolution, and not concluded within such period, the limited liability company shall be continued beyond that period for the purpose of concluding such action, suit or proceeding and until any judgment, order, or decree therein shall be fully executed.*

*(3) Upon the dissolution of any limited liability company, the managers shall be trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey the property, real and personal, as may be required by the laws of the jurisdiction where situated, prosecute and defend all such suits as may be necessary or proper for the purposes aforesaid, distribute the money and other property among the members after paying or adequately providing for payment of its liabilities and obligations, and do all other acts which might be done by the limited liability company, before dissolution, that may be necessary for the final settlement of the unfinished business of the limited liability company.”*

25. It is the effect of what happens next, pursuant to the governing statute that the parties differ on. The evidence of both Mr. Nisbett and Ms. Rowe is that the continuation period for PED commenced on the 1<sup>st</sup> May, 2016, when dissolution was by the provisions of section 53 of the Ordinance deemed to have commenced.
26. The terms of Section 53(5) of the Ordinance provides that if a company is not restored within three years from being struck off the register, then that company is “*deemed to have commenced to wind up and dissolve in accordance with this part*”.
27. What the Claimants say, in their submissions is that in fact, PED never began dissolution proceedings – “*but it is doubtful that dissolution was in fact achieved given the continued existence of assets in the name of PED and that PED continued business as usual thereafter, so that the continuation period may not have even commenced.*”<sup>13</sup>
28. They contend that the deeming provision creates only a rebuttable presumption that a company that has been struck off for a period of three continuous years is dissolved. The Defendants say that that the deeming provision is clear and unambiguous.
29. The Defendants argue<sup>14</sup> that the evidence of their expert, Mr. Nisbett is that by its own terms the 2017 Act applied only to companies validly registered, which PED was not. According to the Defendants, “*A company struck off, as PED was, is deemed dissolved if not restored to the register within a period of 3 years. Though dissolved, the company is continued for a period of three years for “the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, to discharge their liabilities, and to distribute to the members any remaining assets, but not for the purpose of continuing business” (Continuation Period). If no action has been brought within the Continuation Period, the*

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<sup>13</sup> Claimant’s Written Submissions dated March 01, 2022, at paragraph 33

<sup>14</sup> Defendant’s Written Submissions dated February 28, 2022



*Continuation Period expires, and the company becomes extinct. If an action brought within the Continuation Period is not concluded within that period, the company is continued only for the purposes of the suit.”<sup>15</sup>*

30. Thus, Mr. Nisbett concludes that no party can bring any action against PED after the Continuation Period has ended. It has now expired.
  
31. The Defendants’ contend that although Ms Rowe is of the opinion “that PED was continued under Section 111 of NLLC 2017 as in her opinion, PED was “validly registered” under the NLLC 1995”; she could not “explain the inconsistency between that conclusion and the admission that PED was deemed to be dissolved as of May 2016”<sup>16</sup>. They say that “*Ms. Rowe had no answer to the question how the 2017 statute could apply to PED, which was not then a validly registered company and which had ceased to exist except for certain limited purposes.*”<sup>17</sup>
  
32. According to the Defendants, “...the position is clear<sup>18</sup>. The conclusion reached by Ms. Rowe would stand the provision of section 54 of the NLLC 1995 on its head. A company cannot be dissolved and at the same time validly registered”. They refer to her position that “... a suit brought after PED became extinct may nevertheless be entertained on the basis that the suit involves allegations of fraud” as being an “... aspirational position.”<sup>19</sup>
  
33. The Claimants’ position is however, that the distinction between the two contentions is between being dead, or mostly dead, as per the immortal words of Billy Crystal as Miracle Max in the movie adaptation of William Golding’s “The Princess Bride” : ***“There’s a big***

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<sup>15</sup> Ibid, Paragraphs 28 to 30

<sup>16</sup> Ibid, Paragraph 22

<sup>17</sup> Ibid

<sup>18</sup> Ibid Paragraph 23

<sup>19</sup> Ibid, Paragraph 33

*difference between mostly dead and all dead. Mostly dead is slightly alive. With all dead, well, with all dead there's usually only one thing you can do”.*

34. The Claimants believe that PED is slightly alive. The Defendants say that PED is all dead: “...dissolved, without legal existence and susceptible to no action brought after the end of the Continuation Period.”<sup>20</sup>
35. In the written submissions provided by the Claimants, they propose a generous and purposive interpretation of the words in Section 53 (5) which says that a limited liability company which is not restored to the register within three years of the date of removal **“shall be deemed to have commenced to wind up and dissolve in accordance with this part”**. ( Emphasis added)
36. The Claimants’ concede that PED was deemed to have **commenced dissolution** on the 1<sup>st</sup> May, 2016, but say “...it is doubtful that dissolution was in fact achieved given the continued existence of assets in the name of PED and that PED continued business as usual thereafter, **so that the continuation period may not have even commenced**”.<sup>21</sup> (Emphasis added)
37. The Claimants now argue that “it is unknown when the continuation period commences given that it commences only after the company is dissolved and all outward appearances are that PED was never in fact dissolved notwithstanding having been deemed to have **commenced** winding up or dissolution.”<sup>22</sup> (Emphasis added)

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<sup>20</sup> Ibid, paragraph 34.

<sup>21</sup> Claimants’ Written Submissions dated March 01, 2022 at paragraph 33

<sup>22</sup> Ibid, paragraph 34

38. While the Claimants also concede that *“the testimony of both expert witnesses proceeded on the basis that the continuation period commenced on the 1<sup>st</sup> May, 2016, when dissolution was by the provisions of section 53 of the Ordinance deemed to have commenced”*; they argue with admirable Miracle Max logic that *“If it is that time is allowed for the dissolution process to itself be performed, as is implicit from the use of the word ‘commence’ in section 53 of the Ordinance, then it cannot be correct to treat the date of commencement of winding up or dissolution as the date of dissolution.”*<sup>23</sup>
39. The contention is not that PED is barely alive, but that it was never mostly dead at all. According to the Claimants’ submissions *“the deeming is not conclusive that the dissolution has in fact commenced and gives rise only to a rebuttable presumption that dissolution commenced, and that there is indeed a significant issue as to whether PED ever commenced any winding up or dissolution in fact.”*<sup>24</sup>
40. The Claimants posit that since the language of section 53 of the Ordinance “is that PED was “deemed to have commenced to wind up and dissolve”; that the deeming itself is not conclusive that actual dissolution in fact commenced and gives rise only to a rebuttable presumption that dissolution commenced. The Claimants argue that presumption is “readily rebutted in this case.”, and that the effect of the use of the word “deemed” in that section is to create a legal fiction “rebuttable by evidence to the contrary”.<sup>25</sup>
41. The Claimants cite the Cayman Islands case of **Campillo v. Registrar of Companies**<sup>26</sup>, involving an application for restoration of a company which still held title to land, even after a certificate was issued by the Registrar of Companies that the company had been

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<sup>23</sup> Ibid, Paragraph 36

<sup>24</sup> Ibid, Paragraph 37

<sup>25</sup> Ibid, Paragraph 38

<sup>26</sup> [2001] CILR 547]

deemed to be dissolved. The relevant language used in the Cayman Companies Act is that the company was “deemed to be dissolved” rather than “shall be dissolved.”

42. The court in the **Campillo** case considered whether the deeming of dissolution is inevitable or whether it is a rebuttable presumption. Admittedly while the Court did not deal with the specific issue of whether a claim can be brought against a company that has been deemed to have commenced winding up and dissolution; the Claimants say it is instructive, and clearly establishes that the word “deemed” when used in certain contexts. They say that such a context may be found in section 53(5) of the Ordinance, “which raises only a presumption which can be rebutted by evidence”.<sup>27</sup>
42. What then is that evidence? The Claimants provide the following to show that the presumption (of being deemed to have commenced winding up and dissolution) is rebutted:
- (1) “Despite being struck off the register and after the 1<sup>st</sup> May, 2016, PED effected transfers of its assets;
  - (2) Annual returns and certificate of good standing was filed at the Belize Corporate and Companies Affairs registry between 2016 and 2018 for PED;
  - (3) PED continued its business of selling property, as admitted in the affidavit evidence of the Defendants.”<sup>28</sup>
43. They also point out that “...*PED continued its regular business after May 2013 and did not commence to dissolve and wind up*”, and that “...*no steps were taken with a view to wind up and distribute assets in accordance with sections 56, 57, and 58 of the Ordinance*” They say additionally that “*PED in fact instructed Counsel and not only acknowledged service of this claim but also filed a defence herein*”<sup>29</sup>.

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<sup>27</sup> Claimants’ Written Submissions dated March 01, 2022 at paragraph 40

<sup>28</sup> Ibid paragraph 41

<sup>29</sup> Ibid, paragraph 42

44. It is noteworthy that Counsel for the Defendants filed the Defence on PED's behalf.
45. I accept that the provisions of section 54(2) of the Ordinance that indeed even a company which has been struck and dissolved, can nevertheless be sued during the period of continuation and can continue to litigate proceedings commenced during that period even beyond that period, even if I do not accept (and I don't) that the "true start date for the continuation period has not arrived."
46. The Defendants of course, vigorously and vehemently contest any suggestion that PED is alive in any way, and yet, they themselves did put in a defence for PED. When this claim was filed, all Parties believed and acted as if PED was still alive. When the application for the leave to bring a derivative claim was made, they believed it was alive. When it was served, acknowledgement for service was entered for PED.
47. I find guidance in the Caribbean Court of Justice case of **Blairmont Rice Investment Inc v Kayman Sankar Investments Ltd and others**<sup>30</sup> where the CCJ considered whether the appellant, which had been struck off the register of companies, had standing or legal capacity to pursue an appeal. The CCJ found that the legal personality of the company that was struck off the register was not extinguished but merely suspended; and that this did not affect the standing of the company to pursue the appeal therein.
48. The CCJ held, moreover that striking off and dissolution were disparate concepts, and that  
"*... in the absence of a provision in the Companies Act similar to s 273 of The Bahamas*

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<sup>30</sup> [2021] CCJ 7 (AJ) GY

*Companies Act, striking off the register does not dissolve a company and as such does not mean that the company has lost its legal personality.*"<sup>31</sup>

49. The CCJ therefore found that a struck off company could be a defendant in a claim against it to enforce its continuing liability, and by adopting a purposive interpretation of the Guyana's Companies Act, said that "*There is no prejudice caused by this interpretation, as it is in the public interest that the legitimate liabilities of companies be satisfied. Indeed, ascribing this meaning to the section is rational, reasonable, and has a consequence of upholding the values of fairness and justice, core values, in a democratic legal system.*"<sup>32</sup>
50. I prefer this interpretation in determining whether PED's legal personality has been extinguished when it was struck off the register and I take the guidance provided by the CCJ, in this claim. I agree with the Claimants that PED is not dead; it is in my view, merely suspended, and was therefore continued under the 2017 Ordinance when that came into effect, and had then, and has now, the necessary legal capacity to defend, as it did, this claim, while winding up its affairs.
51. I do not agree with the Defendants that PED was not validly registered when the 2017 Ordinance came into effect because it had already been struck from the register. I prefer the purposive construction of validly registered which means that PED had been validly entered on the Register, even though it had subsequently been removed, because its legal personality was not at the time extinguished, because I accept that it was suspended.
52. I hold that this is so, because to do otherwise would potentially result in PED being used as an instrument of fraud., and that the proper purposive construction of the 2017 Ordinance and in particular its section 111 does empower this Court to act in order to avoid

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<sup>31</sup> Ibid at Paragraph 93

<sup>32</sup> Ibid at paragraphs 98 and 99

any such potential result, especially after the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, Marco and Michela caused Annual Returns to be filed at the Companies' Registry in Belize from 2014 to 2018, and were able to obtain a Certificate of Good Standing for PED in 2019; since PED continued to trade, sell property, and conduct business for years after being struck off the Register in Nevis and up to the time of the filing of this claim; in addition to taking such actions as PED has taken to defend this claim.

### **THE STANDING AND CAPACITY OF THE CLAIMANTS**

53. I find, consequently that Brent and Alana do have standing to bring the derivative action against PED, and that Copper Leaf, LLC has standing to bring the claim against PED.
  
54. The preliminary issues entrusted to this Court are resolved in favour of the Claimants and costs shall be costs in the cause.

DATED JUNE 07, 2021

Lisa M Shoman

Justice of the Supreme Court of Belize