

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

PAUL A. FLYNN,)
)
 Plaintiff,)
)
 v.) Civil Action No. 976-N
)
 CIBC WORLD MARKETS CORP.,)
)
 Defendant.)

MEMORANDUM OPINION AND ORDER

Submitted: March 31, 2005

Decided: June 21, 2005

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LAMB, Vice Chancellor.

I.

Paul A. Flynn brings this action against CIBC World Markets Corp. (“World Markets Corp.”), a Delaware corporation, for summary adjudication, pursuant to Section 145(k) of the Delaware General Corporation Law,¹ of his alleged right to (i) advancement of legal fees incurred or to be incurred in other matters, and (ii) reimbursement of the legal fees he incurred in bringing this action.

Flynn was employed by Canadian Imperial Holdings, Inc. (“CIHI”) throughout the relevant period and had no formal employment relationship with World Markets Corp. Nevertheless, Flynn brought suit against World Markets Corp., which has a mandatory advancement provision in its by-laws, and not against CIHI, which does not.

After careful consideration of the factual and legal contentions of both parties, the court determines that, as an employee of CIHI and not World Markets Corp., Flynn is not entitled to relief against World Markets Corp. Therefore, the relief requested is denied and the action is dismissed.

¹ 8 *Del. C.* § 145(k).

II.

A. Corporate Structure of CIBC

CIBC is a financial and bank holding company incorporated and headquartered in Canada. It owns CIBC Delaware Holdings Inc., a holding company incorporated in Delaware, that owns several subsidiaries that operate in the United States. Included among these are CIHI and World Markets Corp., which are both Delaware corporations. World Markets Corp. is the broker-dealer arm of CIBC in the United States. CIHI is a holding company for various U.S. operating entities, including Rudy Capital USA, LLC and Hudson River Investments, LLC, of which Flynn was an officer. CIHI and World Markets Corp. are “sister” corporations, and neither is directly or indirectly owned by the other.

CIBC conducts a significant portion of its U.S. business activities under the group trade name of CIBC World Markets. CIHI and World Markets Corp. both conduct their operations as part of that group. CIBC World Markets is not an incorporated entity and, therefore, has neither a certificate of incorporation nor by-laws.

B. Flynn’s Employment History

Flynn began his career at CIBC, the Canadian parent company, in 1991 working in Canada as the Director of Foreign Exchange, Structured Products in the bank’s investment banking operations. In 1994, CIBC asked Flynn to move to the

United States to focus his business on U.S. instead of Canadian customers. At the end of 1994, Flynn transferred to the Equity Arbitrage Group within the CIBC World Markets group, and assumed the title of Managing Director and then Executive Director of the business. Flynn was employed by, and his salary paid by, CIHI, and not World Markets Corp. As Flynn did not have a U.S. securities trading license, he could not be employed by World Markets Corp., a registered broker-dealer. Beginning in 2002, Flynn also served as an officer of Rudy Capital and Hudson River.

In 2003, the New York Attorney General and the SEC began investigating certain hedge fund clients of CIBC in connection with late trading in mutual fund shares and other deceptive market practices. On December 4, 2003, the New York Attorney General contacted CIBC to question Flynn about financing transactions with these hedge funds. Flynn's employment was terminated the same day.

Between February and April of 2004, Flynn was named as defendant in five administrative, civil and criminal proceedings resulting from his activities while employed in the U.S. by one or more CIBC related entities.² He was also served a subpoena as a non-party in a sixth case in January 2005. As of the briefing date, he had incurred \$460,000 in expenses and fees in connection with his defense. Flynn

² The actions to which Flynn is a defendant party are as follows: *In the Matter of Paul A. Flynn*, S.E.C. Admin Proceeding File No. 3-11390; *People v. Grant Seeger*, N.Y.S. Indictment No. 74449/2003; *Christman v. CIBC, et al.*, S.D.N.Y. Case No. 04 CV 02741; *Bufkin v. CIBC, et al.*, S.D.N.Y. Case No. 04 CV 03054; and an investigation by the Chartered Accountants of Ontario, Canada into his conduct as alleged in the New York criminal proceeding.

requested that World Markets Corp. advance him these expenses pursuant to its by-laws. World Markets Corp. refused Flynn's request, leading to this action.

As a result of his alleged involvement in activities conducted under the CIBC World Markets group trade name and through dealings with employees of World Markets Corp., Flynn is suing World Markets Corp. for the advancement of fees that will be incurred in his defense.³ As required by 8 *Del. C.* § 145(e) of those seeking advancement of fees, Flynn has provided World Markets Corp. a written undertaking to repay any funds advanced by that entity should it be determined that Flynn is not entitled to indemnification by World Markets Corp.

III.

Section 145 of the Delaware General Corporation Law states the mandatory and permissive scope of indemnification by a Delaware corporation of the losses or expenses of an officer, director, employee or agent of the corporation incurred by reason of holding any such position.⁴ Among other things, Section 145 provides that "corporations may specify by bylaw or contract the terms and conditions upon

³ Flynn has sued for advancement of his legal fees, and not for indemnification. Whether he is or will be entitled to be indemnified (by any CIBC related entity) for legal fees incurred defending the actions is a separate legal question that is not now before the court. *See Advanced Mining Sys., Inc. v. Fricke*, 623 A.2d 82, 84 (Del. Ch. 1992) ("Whether it is in a corporation's interest to indemnify a director or officer for an expense, loss or liability covered by Section 145 (a) or (b) is fundamentally different from the question whether it is in the corporation's interest to advance arguably indemnifiable litigation expenses before the proceeding in which expenses are incurred has terminated.").

⁴ 8 *Del. C.* § 145(e); *see also Advanced Mining*, 623 A.2d at 83.

which employees and agents may receive advancement.”⁵ Therefore, the proper question before the court is whether the governing instruments of World Markets Corp. require that entity to advance Flynn his legal fees for the actions pending against him. In making this determination, “[t]he court will look to the plain meaning of the advancement provision of the [governing] agreement in determining whether to award advancement.”⁶

IV.

World Markets Corp.’s by-laws (the “By-Laws”), as permitted by Section 145(e), provide for mandatory advancement to present or former officers and directors of the corporation and discretionary advancement in other situations the board of directors deems appropriate. The determination of whether advancement is mandatory or discretionary is governed by Article IX(c) of the By-Laws:

The Corporation *shall* provide to such person . . . referred to in paragraph (a) of this Article IX and *may* provide upon authorization of the Board of Directors to such person . . . referred to in paragraph (b) . . . advances for expenses incurred in defending any such action⁷ (emphasis added).

⁵ *Reddy v. Elec. Data Sys. Corp.*, 2002 Del. Ch. LEXIS 69, at *12 (Del. Ch. June 18, 2002).

⁶ *Senior Tour Players 207 Mgmt. Co. LLC v. Golfown 207 Holding Co.*, 853 A.2d 124, 127 (Del. Ch. 2004).

⁷ In its entirety, Article IX(c) of the By-Laws states:

Corporation shall provide to such person (and the heirs and legal representatives of such person) referred to in paragraph (a) of this Article IX and may provide upon authorization or the Board of Directors to such person (and the heirs and legal representatives of such person referred to in paragraph (b) of this Article IX) advances for expenses incurred in defending any such action, suit or proceeding, upon receipt of an undertaking by or on behalf of such person (and the heirs and legal representatives of such person) to repay such advances unless it shall ultimately be determined that he is entitled to indemnification by the Corporation.

Article IX(a) of the By-Laws provides for mandatory advancement of expenses of the following persons:

Any person . . . made or threatened to be made a party to any . . . action . . . by reason of the fact that he is or was an officer with management supervisory functions or a director of the Corporation . . . or serves or served with another corporation . . . at the request of the Corporation⁸

Unlike the mandatory provision of Article IX(a), Article IX(b) only provides for *discretionary* advancement of others upon authorization of the board of directors, as follows:

any person . . . made or threatened to be made a party to any . . . action . . . by reason of the fact that he is or was an officer (although without management supervisory functions), employee or agent of the Corporation⁹

⁸ In its entirety, Article IX(a) of the By-Laws states:

The Corporation, to the full extent permitted by the laws of the State of Delaware as in effect at the adoption of this Article IX or as such laws may be amended from time to time, shall indemnify any person (and heirs and legal representatives of such person) made or threatened to be made a party to any threatened, pending, or completed action, suit or proceeding, whether civil, criminal, administrative or investigative by reason of the fact that he is or was an officer with management supervisory functions or a director of the Corporation or any constituent corporation absorbed in a consolidation or merger, or serves or served with another corporation, partnership, joint venture, trust or other enterprise at the request of the Corporation or any such constituent corporation.

⁹ In its entirety, Article IX(b) of the By-Laws states:

The Corporation may, upon authorization of the Board of Directors, and it shall, to the extent required by applicable law, indemnify any person (and the heirs and legal representatives of such person) made or threatened to be made a party to any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative by reason of the fact that he is or was an officer (although without management supervisory functions), employee or agent of the Corporation or any constituent corporation adsorbed in a consolidation or merger, or serves or served with another corporation, partnership, joint venture, trust or other enterprise at the request of the Corporation or any such constituent corporation.

In directly referring to Article IX(a) and (b) in Article IX(c), the By-Laws expressly differentiate between those who shall receive mandatory advancement and those for whom advancement is discretionary. Thus, the mandatory provision found in Article IX(a) is limited in its application to World Markets Corp.'s present or former (i) directors and (ii) officers with management supervisory functions. All other employees, agents and officers are subject to the discretion of the board in determining the advancement of fees pursuant to Article IX(b).

Flynn argues that the By-Laws require mandatory advancement to three classes of individuals: (i) those who serve or served as directors of World Markets Corp., (ii) those who serve or served as an "officer" of World Markets Corp. with "management supervisory functions," and (iii) those who serve or served with another corporation, etc. "at the request of" World Markets Corp.

Flynn does not argue that he qualifies as a director of CIBC World Markets Corp, only that he was an officer with management supervisory functions.¹⁰ Therefore, the court must decide whether Flynn was an officer of World Markets Corp.¹¹ or whether he served with another entity at the request of World Markets Corp.

¹⁰ Pl.'s Pre-Trial Br. at 15. In any case, as used in the By-Laws, "director" plainly refers to a statutory director elected by stockholders.

¹¹ The parties have stipulated that Flynn exercised "management supervisory functions" in connection with his job responsibilities. Flynn Dep. of Mar. 17, 2005 at 3.

A. Was Flynn An Officer Of World Markets Corp.?

Flynn was a Managing Director in the business group known as CIBC World Markets, which is not a corporate entity. Flynn was never elected to be an actual director on the board of directors of World Markets Corp. nor did the Board elect him to serve as an officer of that entity. Recognizing this problem, Flynn argues that the By-Laws draw a distinction between “executive officers,” who hold the formal officer positions and other individuals, including Flynn, who have officer titles in the business group and have the actual day-to-day supervisory responsibilities of employees of World Markets Corp. Flynn further argues that, despite the fact he was never elected to be an officer of World Markets Corp., he qualifies as a “Nominal Officer,” as that term is defined in the By-Laws. This is so, he claims, because “Flynn’s everyday responsibilities directly *implicated*” World Markets Corp.¹² For example, Flynn argues that he “participated in numerous transactions that, while perhaps booked through CIHI or financed through CIBC, nonetheless *involved* World Markets Corp.”¹³

In support of his position, Flynn cites two separate sections of the By-Laws. First, Article IV, Section 1 of the By-Laws provides that the corporation shall have “executive officers” who are appointed by the board. These will include the Chairman, the Vice Chairman, the Chief Financial Officer, the Secretary, and

¹² Pl.’s Pre-Trial Br. at 18 (emphasis added).

¹³ *Id.* (emphasis added).

“such other officers as the Board of Directors may determine.” This section also authorizes the board to appoint “Deputy Vice Chairmen,” “Managing Directors,” “Executive Directors,” “Assistant Secretaries,” “Assistant Treasurers,” a “General Counsel,” and a “Chief Compliance Officer.” Second, Article IV, Section 5 of the By-Laws describes “Nominal Officers” as “[a]ll other *employees* of the Corporation who have officers titles are, and shall be treated only as, departmental and divisional executives of the Corporation whose authority is limited and circumscribed to activities within their department or division and so designated by the President” (emphasis added). Flynn argues he meets the definition of Nominal Officer and, thus, was an “officer” within the meaning of Article IX(a).

While the By-Laws do seem to draw a distinction between Nominal and Executive Officers, the distinction does not support the conclusion that Flynn was ever an officer World Markets Corp. This is because Flynn was never an *employee* of that corporation, as is required by Article IV, Section V of the By-Laws to be a Nominal Officer. To avoid this clear reading of the By-laws, Flynn argues that World Markets Corp., CIHI, and possibly some other entities, all fall under the umbrella of the term “CIBC World Markets.” He points out that he was employed by one entity in that group and managed the affairs of employees of another entity, and for this reason he argues that he should be deemed an employee of World Markets Corp.

This argument, however, would require the court to ignore the separate corporate existence of World Markets Corp. For various reasons, including significant regulatory requirements, CIBC used an array of corporate entities to conduct its business. While business reality and corporate structure do not always dovetail, “a corporate entity must be regarded as more than a mere formality.”¹⁴ In Delaware law, corporate structure provides the binding force of corporate liability regardless of business reality.¹⁵ Absent fraud, the court will not disregard the corporate form.¹⁶

The evidence adduced by the parties establishes that Flynn was an employee of CIHI, and *not* World Markets Corp. Flynn makes much of the fact that several employees of World Markets Corp. reported to him. However, it is not uncommon for the employee of one company to report to the employee of another, at least when the two companies are both subsidiaries of the same ultimate parent company and operate in the same business group, as is the case here. Also, while Flynn points to an email by Patricia Bourdan, a corporate secretary of CIBC, stating that Flynn’s “title is with CIBC World Markets Corp.,” she testified by

¹⁴ *Pauley Petroleum, Inc. v. Cont’l Oil Co.*, 231 A.2d 450, 454 (Del. Ch. 1967).

¹⁵ *See, e.g., In Re Sunstates Corp. S’holders Litig.*, 789 A.2d 530, 534 (Del. Ch. 2001) (“[T]he act of one corporation is not regarded as the act of another merely because the first corporation is a subsidiary of the other, or because the two may be treated as part of a single economic enterprise for some other purpose.”).

¹⁶ *See, e.g., Stauffer v. Standard Brands Inc.*, 178 A.2d 311, 316 (Del. Ch. 1962); *aff’d*, 187 A.2d 78 (Del. 1962) (“In the absence of fraud, the separate entity of a corporation is to be recognized. This principle has been enunciated by all of the courts of this state.”).

deposition that she was mistaken when she wrote the email, and there is no evidence to the contrary.

Furthermore, even this slight evidence that Flynn was an employee of World Markets Corp. is contradicted by the fact that Flynn was on the payroll of CIHI, and not World Markets Corp. In fact, he could not have been on the payroll of World Markets Corp. because he did not have the necessary U.S. securities trading license. Therefore, for all of the above reasons, Flynn has failed to establish that he was an officer of World Markets Corp. within the meaning of Article IX(a) of the By-Laws.

B. Did Flynn Serve With Another Entity At The Request Of World Markets Corp.?

Flynn additionally claims that he served with other entities at the request of World Markets Corp. Flynn argues that the primary reason he was employed by CIHI rather than World Markets Corp. was that he did not hold a U.S. securities trading license. He testified that World Markets Corp. “didn’t want unregulated people being paid by the brokerage entity.”¹⁷ He also claims that he served as an officer of Rudy Capital and Hudson River, at the request of World Markets Corp.

There is no evidence in the record, however, that Flynn served CIHI, Rudy Capital, or Hudson River “at the request” of World Markets Corp. With respect to CIHI, the most that Flynn has even alleged is that he served at CIHI at the request

¹⁷ Flynn Dep. at 35.

of the parent CIBC, not World Markets Corp. There is no evidence that anyone at World Markets Corp. asked Flynn to work at CIHI. Rather, Flynn testified that, prior to working at CIHI, he worked in Canada for CIBC. He transferred to CIHI at the request of his supervisors at CIBC, *not* anyone at World Markets Corp.

There is likewise no evidence that Flynn served as an officer of Rudy Capital and Hudson River at the request of World Markets Corp. To the contrary, the evidence in the record establishes that these entities were established at Flynn's request, and not World Markets Corp.,¹⁸ and that they were subsidiaries of CIHI, and not World Markets Corp.¹⁹

Flynn's main argument seems to be that the court should disregard the corporate form and attribute the actions of his former superiors at CIBC to World Markets Corp. However, as discussed *supra*, the court cannot disregard the corporate form in this way. Therefore, the court must conclude that Flynn did not serve with another entity at the request of World Markets Corp.

V.

For the above reasons, the court DENIES Flynn's request for advancement of fees and reimbursement of fees pursuing this action and DISMISSES the action. IT IS SO ORDERED.

¹⁸ *Id.* at 56-58.

¹⁹ *Id.* at 52-53, 57, 61.