RENDERED: SEPTEMBER 28, 2023
TO BE PUBLISHED

Supreme Court of Kentucky

2022-SC-0561-MR

S.I.A. LIMITED, INCORPORATED IN GIBRALTAR UNDER THE CORPORATE ACT OF THE LAWSON MAY 2, 2000, HAVING VOLUNTARILY DISSOLVED AS A COMPANY ON MARCH 16, 2022 — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
NO. 2022-CA-0980
FRANKLIN CIRCUIT COURT NO. 10-CI-00505

HONORABLE THOMAS D. WINGATE, JUDGE, FRANKLIN CIRCUIT COURT — APPELLEE

AND

COMMONWEALTH OF KENTUCKY, EX REL. JOHN HICKS, SECRETARY OF GOVERNOR'S EXECUTIVE CABINET — REAL PARTY IN INTEREST/ APPELLEE

OPINION OF THE COURT BY JUSTICE THOMPSON

AFFIRMING

S.I.A. Limited (SIA) appeals as a matter of right from the Court of Appeal's denial of a writ of prohibition against the Franklin Circuit Court. Ky. Const. § 115. SIA argues the circuit court lacks jurisdiction over it after SIA voluntarily dissolved. We disagree and affirm.

The Court of Appeals did not abuse its discretion in denying the writ because the circuit court has subject matter jurisdiction over the underlying

matter and, therefore, was not proceeding outside of its jurisdiction. Additionally, under the circumstances, the circuit court is not acting erroneously within its jurisdiction, there is an adequate remedy by appeal and no great injustice or irreparable injury will result if the petition is not granted. Equitable relief would also be inappropriate if, as it appears, SIA has unclean hands.

It would work a great injustice on our residents if this petition were granted. There is a strong appearance of fraud in the manner in which the dissolution was carried out. The law does not allow a foreign corporation, which engaged in organized criminal activities expressly forbidden by our statutes, to use our Courts to further its criminal schemes and escape justice. SIA should not be permitted to hide behind a dissolution carried out solely for the apparent purpose of thwarting pending litigation. Whether or not this civil action will ultimately result in liability against SIA and force disgorgement of its ill-gotten profits, the Commonwealth is entitled to conduct discovery to investigate whether the corporate veil may be pierced, if there was any prior transfer of assets to avoid forfeiture or liability which may result in a constructive trust of such assets, whether there are any successors in interest and to conduct other discovery. Under these circumstances, it is appropriate that the suit be permitted to proceed.

I. FACTUAL AND PROCEDURAL BACKGROUND

SIA, a foreign Gibraltar[1] corporation, is alleged to be an online gambling syndicate directed by Tina McComber.[2] SIA allegedly engaged in illegal gambling activities involving Kentucky residents. *See* Kentucky Revised Statutes (KRS) Chapter 528 (containing laws relating to gambling crimes). SIA allegedly profited illegally from Kentucky citizens by taking a percentage of the funds gambled (a "rake") on its website, www.sportsinteraction.com.

In 2010, the Attorney General of the Commonwealth sought redress against foreign entities engaging in illegal gambling practices with our residents by filing an *in rem* action seeking forfeiture of internet domain names. *Commonwealth v. 141 Internet Domain Names*, Franklin Circuit Court, No. 08-CI-01409.[3] To avoid forfeiture of their domain names, the entities which owned them had to appear in the action. On May 21, 2012, SIA entered an appearance in the *141 Internet Domain Names* litigation, asserting ownership of the domain name sportsinteraction.com.

---

[1] Gibraltar is a British Overseas Territory with an area of only about 4.2 square miles and a population of about 32,000 people; it is located at the southern tip of the Iberian Peninsula. H.M. Government of Gibraltar, *Gibraltar Fact Sheet* (Jun. 30, 2023, 2:24 PM), https://www.gibraltar.gov.gi/press/gibraltar-fact-sheets. The government encourages the operation of remote gambling from its shores and as of March 1, 2023, had forty-six licensed operators. H.M. Government of Gibraltar, *Remote Gambling* (Jun. 30, 2023, 2:17 PM), https://www.gibraltar.gov.gi/finance-gaming-and-regulations/remote-gambling.

[2] McComber is alleged to have been SIA's sole director from its inception.

[3] That case resulted in the following: *Commonwealth ex rel. Brown v. Interactive Media Ent. & Gaming Ass'n, Inc.*, 306 S.W.3d 32, 34 (Ky. 2010); *Interactive Media Ent. & Gaming Ass'n, Inc. v. Wingate*, 320 S.W.3d 692, 693 (Ky. 2010); *Interactive Gaming Council v. Commonwealth ex rel. Brown*, 425 S.W.3d 107, 109 (Ky. App. 2014).

Based on the initial information learned in *141 Internet Domain Names*, the Commonwealth could have pursued criminal charges against the responsible entities, including: promoting gambling in the first or second degree, KRS 528.020-.030; conspiracy to promote gambling, KRS 528.040; possession of gambling records in the first or second degree, KRS 528.050-.060; permitting gambling, KRS 528.070; possession of a gambling device, KRS 528.080; and engaging in organized crime as a criminal gang syndicate to promote gambling, KRS 506.120(4)(d). The Commonwealth chose instead to file a civil action under the Loss Recovery Act, KRS Chapter 372, to seek damages from entities that received illegal gambling winnings from Commonwealth residents. *Justice and Public Safety Cabinet v. Pocket Kings, Ltd.*, Franklin Circuit Court, Action No. 10-CI-00505.

Pocket Kings was the named lead defendant, and the circuit court approved the Commonwealth filing amended complaints to add additional defendants as they became known. Included among these defendants was Stars Interactive Holdings, the entity that operates PokerStars.

SIA was joined as a party in the *Pocket Kings* litigation on July 12, 2012. SIA appeared, answered, and filed counterclaims which were subsequently dismissed.

On March 17, 2014, the Commonwealth served its first set of interrogatories and first set of requests for production on SIA (the discovery requests). On May 6, 2014, SIA filed objections, including that it had a privilege against self-incrimination. On June 1, 2015, the Commonwealth sent SIA a

letter requesting it comply with the outstanding discovery requests. SIA declined to respond to discovery before receiving a ruling on this matter.

In commencing the *Pocket Kings* litigation, the Commonwealth was in certain respects treading on uncertain ground; while the Loss Recovery Act was not new, the Commonwealth initiating such an action to seek recovery against gambling websites was a new approach. KRS 372.020 generally provides that persons losing in illegal gambling operations (the "losers") can recover their funds from the winner. Pursuant to KRS 372.040, the losers have the exclusive right to pursue such recovery for six months. After that, KRS 372.040 allows for a third-party cause of action to be brought by "any other" person and the recovery of treble damages.

This litigation was complex in that it involved many different entities domiciled around the world. Additionally, portions of the *Pocket Kings* litigation were essentially put on hold while Stars Interactive Holdings/PokerStars challenged whether the Loss Recovery Act allowed the Commonwealth to sue as "any other person" to seek treble damages and whether the entities' "rake" of a portion of the funds gambled on their site could be considered "winnings." Those questions were resolved in *Commonwealth ex rel. Brown v. Stars Interactive Holdings (IOM) Ltd.*, 617 S.W.3d 792 (Ky. 2020), with our Court holding that the Commonwealth had standing and that the "rake" qualified as winnings.

On September 22, 2021, it was publicly reported that Kentucky had reached a sizeable settlement with PokerStars.[4] This concluded the Stars Interactive Holdings/PokerStars's portion of the *Pocket Kings* litigation, but the *Pocket Kings* litigation continued against SIA and other parties.

On September 24, 2021, pursuant to the requirements of Gibraltar's Companies Act of 2014,[5] McComber resolved that SIA be placed in liquidation and scheduled a meeting, required under Gibraltar law, to carry out such resolution for October 1, 2021. On September 27, 2021, pursuant to the Companies Act § 362, McComber provided a statutory declaration of solvency to Gibraltar's Registry of Companies, declaring that SIA had no outstanding debts.[6] On October 1, 2021, McComber formally voted that SIA be placed into

[4] This news was carried by conventional news sources but also posted on a variety of gambling websites. *See, e.g.*, Steven Bitbender, *Kentucky Gets $300M from Flutter as PokerStars Lawsuit Finally Settled*, Casino.com (Jul. 10, 2023, 8:50 AM), https://www.casino.org/news/kentucky-gets-300m-as-pokerstars-lawsuit-settled-after-10-years/.

[5] *See* HM Government of Gibraltar, Laws of Gibraltar, Companies Act 2014, https://www.gibraltarlaws.gov.gi/legislations/companies-act-2014-3106 (providing access to the Companies Act of 2014 via 2014-19(01-01-22).pdf) (Companies Act).

[6] McComber's declaration was problematic as she had actual knowledge that the Commonwealth was a creditor with a substantial pending claim against SIA. A false declaration of solvency could subject her to criminal liability. Companies Act § 362(4). Had McComber instead made a declaration of insolvency, this would require that a meeting of creditors be called, and the dissolution be carried out, as specified in the Companies Act §§ 367-69, pursuant to the Insolvency Act of 2011. *See* HM Government of Gibraltar, Laws of Gibraltar, Insolvency Act 2011, https://www.gibraltarlaws.gov.gi/legislations/insolvency-act-2011-3738 (providing access to the Insolvency Act of 2011 via 2011-26(29-05-20).pdf) (Insolvency Act). Galliano's affidavit suggests that SIA was almost completely devoid of assets at the time of its dissolution, so even a small recovery by the Commonwealth would have caused insolvency.

liquidation and Derek Galliano be appointed liquidator.[7] No notice of any of these actions was provided to the Commonwealth, the trial court or even SIA's Kentucky counsel.

On January 7, 2022, the Commonwealth sent SIA a letter noting the finality of the *Stars Interactive* case and requesting SIA reevaluate its prior objections considering this ruling and provide substantive responses by February 15, 2022. On February 2, 2022, SIA requested an extension until March 17, 2022, to provide discovery and the Commonwealth consented to SIA's request.

However, SIA never responded to these outstanding discovery requests. Instead, on April 4, 2022, SIA filed a notice of its liquidation before the circuit court. The notice stated that SIA was dissolved effective March 16, 2022, and SIA attached the affidavit of Galliano in support.[8] Galliano claimed to have complied with all the requirements of Gibraltar law. This included his posting of prior notice of the voluntary dissolution to creditors in a newspaper there.

---

[7] These facts were set out in the Affidavit of Galliano and the Commonwealth does not dispute them. The record does not contain copies of the pertinent Gibraltar documents.

[8] Galliano stated he is a registered insolvency practitioner in Gibraltar. He affirmed that in acting as SIA's liquidator, he complied with Gibraltar's Companies Act by issuing notice to the Registrar of Companies and providing notice to creditors of the voluntary liquidation and a general meeting to wind up of the company as advertised in the Gibraltar Gazette on October 1, 2021, and October 28, 2021, respectively. He stated that SIA was deemed to be dissolved effective March 16, 2022. Galliano opined "[i]n the absence of a Court application to restore the Company to the register, the Company no longer exists and it simply cannot participate in the legal process." He also provided reasons, as communicated to him by McComber, why discovery could not and should not take place, including that SIA lacked any responsive records as of the discovery request in 2014, having purged its records of all gaming activity prior to 2009 by that time, and McComber not holding any of SIA's records.

However, glaringly missing was any prior notice being provided to the Commonwealth as a known creditor[9] of SIA so that the Commonwealth could exercise its rights and object to the dissolution.

Galliano denied knowing about the proceedings in Kentucky or the pending discovery requests when the general meeting took place or when the final accounting was approved. McComber neglected to inform him about it.[10]

On May 3, 2022, the Commonwealth filed a motion to compel SIA to answer its discovery requests and an order compelling the remote depositions of McComber and Galliano. The Commonwealth argued that SIA's objections were either moot or had no merit. The Commonwealth disagreed that SIA as a company could claim a privilege to refuse to answer pursuant to a right against self-incrimination. On May 27, 2020, SIA filed a response opposing this motion and, in a single paragraph, also argued that the circuit court no longer had jurisdiction over it as it had dissolved.

On June 6, 2022, the circuit court granted the Commonwealth's motion to compel and to take the remote depositions of McComber and Galliano.

---

[9] Pursuant to the Companies Act § 359(1), the definition of creditor is the same as that contained in the Insolvency Act. Under the Insolvency Act § 9(1), the Commonwealth is a creditor as it has provable tort debt pursuant to § 7(3).

[10] The Companies Act specifically provides criminal penalties under § 398(d) for a company's director concealing debt from the liquidator and under § 398(d) for omitting to disclose "any document affecting or relating to the property of the company" of which legal documents relating to the pending litigation would certainly qualify. As a voluntary liquidator, pursuant to § 377, Galliano had authorization under Schedule 23 to defend on behalf of SIA in these legal proceedings, call meetings of creditors, and potentially (depending upon the powers granted to him) settle its debts. He could not perform these duties without being informed about the pending suit in Kentucky.

On June 10, 2022, SIA filed a motion to reconsider and a motion to dismiss. SIA requested that the circuit court apply the law of Gibraltar to determine that the case must be dismissed because SIA is no longer a legal entity capable of being sued.

In opposing this motion, the Commonwealth argued that public policy disfavored the application of Gibraltar law to allow SIA to avoid liability "through fraudulent corporate maneuvers" and argued that SIA's knowing concealment of its pending dissolution was designed to "perpetuate a fraud" against the Commonwealth. The Commonwealth noted that McComber executed a declaration of solvency for SIA to initiate its dissolution just days after the Commonwealth's settlement with PokerStars was announced, knowing such declaration was patently false given her awareness of this pending lawsuit and SIA's potential liability. The Commonwealth also denied that McComber could unilaterally terminate the pending litigation by dissolving SIA, arguing that under Kentucky law it should continue as a corporation to wind up this outstanding matter. The Commonwealth argued that "[d]iscovery remains necessary both to ascertain the scope of SIA's liability and to ascertain whether the Commonwealth has claims against SIA's principals and related third parties, including but not limited to fraudulent transfers, veil piercing theories and/or successor liability."

On July 6, 2022, the circuit court, agreeing with the Commonwealth, denied SIA's motion to reconsider and motion to dismiss. The circuit court ruled that discovery should continue as "it would grossly offend Kentucky

public policy to permit S.I.A. to fraudulently dissolve under Gibraltar law to avoid this litigation" and, therefore, "[p]ublic policy demands that Kentucky law govern this action and Kentucky law permits this action to continue."

SIA subsequently filed a petition for a writ of prohibition before the Court of Appeals,[11] primarily arguing it was entitled to a writ of the first class because the circuit court no longer had jurisdiction over a company that had been dissolved. The Court of Appeals disagreed, explaining that the circuit court had subject matter jurisdiction to hear this kind of case.

The Court of Appeals also disagreed that SIA met the prerequisites of a second-class writ explaining:

> [I]f SIA is truly defunct and insolvent, it is difficult to divine what harm could befall it in the absence of relief. SIA argues that it could be subject to contempt sanctions if it does not produce witnesses consistent with the orders of the trial court. Yet, there has been no finding of contempt and a writ is not available to prevent the mere possibility of a contempt finding.

Additionally, the Court of Appeals also explained that SIA had an adequate remedy in that it could raise these issues on appeal.

II. LEGAL ISSUES

In this action, SIA seeks extraordinary relief pursuant to CR 81, having filed a petition for a writ of prohibition. SIA argues the Court of Appeals erred in denying its petition because: (1) the circuit court lacks jurisdiction, both personal and subject-matter, when there is no entity over which the court may

[11] SIA brought this original action under Kentucky Rules of Civil Procedure (CR) 76.36. Subsequently, CR 76.36 was deleted by Supreme Court Order 2022-49, effective 1-1-23, and replaced by CR 81: "Relief heretofore available by common law writs."

execute control; and (2) even if the circuit court is acting within its jurisdiction, it is acting erroneously and causing irreparable injury for which there is no adequate remedy at law.

A. Standards Regarding Writs of Prohibition

"A writ of prohibition is . . . a drastic and extraordinary form of equitable remedy exercised by a court of higher authority against an inferior court where that court is acting without jurisdiction, or within jurisdiction but erroneously such that irreparable injury will result." *Commonwealth v. Mountain Truckers Ass'n, Inc.*, 683 S.W.2d 260, 263 (Ky. App. 1984)(citing *Jones v. Tartar*, 215 S.W.2d 955 (Ky.1948)).

> The issuance of a writ of prohibition is "disfavored by our jurisprudence" due to the extraordinary nature of the relief it provides. Thus, this Court employs a "cautious and conservative [approach] both in entertaining petitions for and in granting such relief." We review any factual findings or legal conclusions of the Court of Appeals under the traditional standards (clear error and de novo review respectively). The ultimate decision, however, of whether to issue a writ is discretionary. We therefore review this decision for an abuse of that discretion, considering whether it was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles."

Jewish Hosp. v. Perry, 626 S.W.3d 509, 512 (Ky. 2021) (footnote citations omitted).

> A writ of prohibition *may* be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.

Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004).

1. SIA has Failed to Establish the Requirements of a First-Class Writ, that the Circuit Court was Proceeding Outside of its Jurisdiction.

SIA argues "[w]ith no existing defendant, there is no case or controversy, and therefore no subject-matter jurisdiction for the court to act[.]" SIA reasons that as it was created under the laws of Gibraltar, its "death" is also governed by those laws, and in the absence of any proceedings in Gibraltar to question its dissolution or have it declared void, no further proceedings against it can take place as Gibraltar does not recognize a lawsuit against a former corporation post-dissolution. SIA argues there is no "justiciable cause" when there is no defendant, and in continuing this suit the circuit court was acting outside of its power.

The Commonwealth argues "[t]he Franklin Circuit Court's subject matter jurisdiction is not and cannot be in question." We agree.

"The first class of writs refers to subject-matter jurisdiction; that is, the lower court's core authority to hear the case at all." *Appalachian Racing, LLC. v. Commonwealth*, 504 S.W.3d 1, 4 (Ky. 2016). Subject-matter jurisdiction provides courts with "the authority not simply to hear 'this case[,] but *this kind of case.*'" *Davis v. Wingate*, 437 S.W.3d 720, 725 (Ky. 2014) (quoting *Daugherty v. Telek,* 366 S.W.3d 463, 466 (Ky. 2012)).

> Subject-matter jurisdiction must be determined without resort to particular-case factual inquiries. The parties' actions in the litigation cannot confer subject-matter jurisdiction or take it away once it has been properly established. Subject-matter jurisdiction either exists or it does not. "Once a court has acquired subject

> matter and personal jurisdiction, challenges to its subsequent rulings and judgment are questions incident to the exercise of jurisdiction rather than to the *existence* of jurisdiction."

Basin Energy Co. v. Howard, 447 S.W.3d 179, 184 (Ky. App. 2014) (footnote and citations omitted).

No question exists but that the circuit court had subject matter jurisdiction at the inception of this litigation. SIA cannot deprive our courts of subject matter jurisdiction by dissolving, and even if it had been dissolved prior to this case being initiated, subject matter jurisdiction would still exist for the circuit court to decide this case.

A case from one of our sister courts is on point. In *Northwest Medical Imaging, Inc. v. State, Department of Revenue*, 151 P.3d 434, 438 (Alaska 2006), a foreign corporation which had previously been dissolved in its home state, appealed from tax liability imposed on it after it had been dissolved, specifically arguing there was no subject matter jurisdiction over it "because the corporation did not exist for the time period during which the department seeks to tax it." The Alaska Supreme Court specifically rejected this argument, explaining that subject matter jurisdiction is the legal authority to hear and decide a particular kind of case and "[t]hus, where the legislature has authorized a court to enter a judgment in a particular class of cases, the court properly has subject matter jurisdiction." *Id.* Therefore, it concluded its lower court had subject matter jurisdiction and denied the dissolved corporation's jurisdictional challenge. *Id.* at 439.

2. SIA has Failed to Establish All Three Requirements for Granting a Second-Class Writ, that the Circuit Court is: (a) Acting Erroneously within its Jurisdiction; (b) There Exists No Adequate Remedy by Appeal; and (c) Great Injustice and Irreparable Injury will Result if the Petition is Not Granted.

SIA argues it cannot answer discovery "where there is no entity to speak" and that there can be no adequate remedy on appeal for "a non-existing defendant who could not defend itself." SIA opines that it is simply beyond Kentucky Courts' power to declare that extinct foreign corporations still exist for the purposes of litigation and that "public policy cannot . . . resurrect the dead."

SIA argues "[e]xtinct corporations do not have an adequate remedy on appeal if they are sued, ordered to respond to discovery, and sanctioned with default judgment." SIA argues there is "no being with authority to continue the defense of SIA or initiate an appeal" and it has no adequate remedy at law.

The Commonwealth responds that the timing of the dissolution is highly suspect, the dissolution was fraudulent and not in accordance with Gibraltar law, Kentucky should disfavor the application of Gibraltar law where it is offensive to the public policy of the Commonwealth, and SIA has an appropriate remedy on appeal to an alleged error and cannot show great and irreparable injury.

a. The Circuit Court is Not Acting Erroneously within its Jurisdiction.

The Commonwealth insists that we can simply supplant Gibraltar's statutes with our own as a matter of public policy to continue this lawsuit.

While we do not adopt this approach, at a minimum, the continuation of this lawsuit to allow further discovery is not in error.

It is well established that corporations are created by the jurisdiction in which they were formed and similarly are dissolved by that same jurisdiction's laws. "[A] private corporation in this country can exist only under the express law of the state or sovereignty by which it was created." *Chicago Title & Tr. Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120, 124-25 (1937).

> How long and upon what terms a state-created corporation may continue to exist is a matter exclusively of state power. The circumstances under which the power shall be exercised and the extent to which it shall be carried are matters of state policy, to be decided by the state Legislature. There is nothing in the Federal Constitution which operates to restrain a state from terminating absolutely and unconditionally the existence of a state-created corporation, if that be authorized by the statute under which the corporation has been organized.

Id. at 127–28 (citations omitted). "Moreover, the question whether an action has abated because of the dissolution of a corporation is controlled by the law of the state of incorporation." *Gross v. Hougland*, 712 F.2d 1034, 1040 (6th Cir. 1983) (citing *Okla. Nat. Gas Co. v. Oklahoma,* 273 U.S. 257, 259 (1926)).

Additionally, our own law does not permit us to require a foreign corporation to have continued existence for purposes for suing or being sued. KRS 271B.14-050(2)(f) states that "Dissolution of a corporation shall not: . . . Abate or suspend a proceeding pending by or against a corporation on the effective date of dissolution[.]" While upon first reading, it may appear to apply to any corporation the world over, it does not, because KRS 271B.1-400(5) clarifies that the term "corporation" is defined as "a corporation for profit,

which is not a foreign corporation," and KRS 271B.1-400(12) defines a "foreign corporation" as "a corporation for profit incorporated under a law other than the law of this state[.]" Therefore, by its terms, KRS 271B.14-050(2)(f) cannot apply to require the continuance of this action.

Gibraltar seems to lack any similar provisions in its Companies Act which would allow for SIA to continue to exist for purposes of suit. However, whether SIA is in fact "dead" pursuant to Gibraltar law is not before us and remains a matter that would be within the circuit court's jurisdiction to resolve. SIA has not supplied the documentation to establish its "death." It has only provided its own assurance that it is dead as supported by Galliano's affidavit which opines that this is so.[12]

S.I.A's whole argument rests upon its assertion that we must respect the sanctity of its corporate structure, that it was a separate legal entity that is now "dead." While respecting the corporate structure may generally be appropriate, something else is called for when crimes are being committed

[12] Even if SIA has been dissolved, its status appears uncertain. The Companies Act § 410(1) provides for the voiding of a company's dissolution within two years "and, upon the making of such an order, such proceedings may be taken as might have been taken if the company had not been dissolved." We do not know how this provision has been interpreted by Gibraltar's courts, but a corporate death that is subject to being reversed may still allow a corporation to be sued. *See Lyman Lumber Co. v. Favorite Const. Co.*, 524 N.W.2d 484, 489 (Minn. Ct. App. 1994) ("Courts in other states have held that the effect of a reinstatement statute is to make the dissolution of a corporation a suspension of corporate privileges rather than a termination of the corporate existence."). We also lack any knowledge as to whether the Commonwealth has undertaken (or plans to undertake) any efforts to challenge SIA's dissolution under this provision, observe that it still appears to have time to undertake such an action and do not opine on what effect voiding a dissolution would have under Gibraltar law on this pending litigation.

against our citizens and the corporate structure (and voluntary death of such corporation) is interposed to defeat a legislative policy regarding liability. The examples of *Dare To Be Great, Inc. v. Commonwealth ex rel. Hancock*, 511 S.W.2d 224, 227 (Ky. 1974), and *Anderson v. Abbott*, 321 U.S. 349, 362-63 (1944), are illustrative.

In *Dare To Be Great*, the Commonwealth brought a civil action against a corporation, its parent corporation, and the sole owner of its parent corporation, pursuant to our Consumer Protection Act. *Dare To Be Great*, 511 S.W.2d at 225. The Commonwealth established that they were running an illegal pyramid scheme and obtained damages and a permanent injunction prohibiting them from engaging in certain trade practices deemed to be false, misleading and deceptive. *Id.* at 225-26. On appeal, the parent corporation and its owner argued the complaint against them should be dismissed because the trial court lacked jurisdiction over them. *Id.* at 226-27. Our then highest Court disagreed, explaining "[g]enerally a corporation will be looked upon as a separate legal entity but when the idea of separate legal entity is used to justify wrong, protect fraud or defend crime the law will regard the corporation as an association of persons." *Id.* at 227.

In *Anderson*, the United States Supreme Court had to decide whether bank stockholders who retained an investment position in the bank in exchange for stock from a holding company organized in good faith but undercapitalized could still be held liable for a bank failure so that double

liability could be assessed despite this corporate structure. 321 U.S. at 357-59. In holding that it could, the Court explained the relevant law as follows:

> [T]here are occasions when the limited liability sought to be obtained through the corporation will be qualified or denied. Mr. Chief Judge Cardozo stated that a surrender of that principle of limited liability would be made 'when the sacrifice is so essential to the end that some accepted public policy may be defended or upheld.' The cases of fraud make up part of that exception. But they do not exhaust it. An obvious inadequacy of capital, measured by the nature and magnitude of the corporate undertaking, has frequently been an important factor in cases denying stockholders their defense of limited liability. That rule has been invoked even in absence of a legislative policy which undercapitalization would defeat. . . . It has often been held that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement. The Court stated . . . that 'the courts will not permit themselves to be blinded or deceived by mere forms of law' but will deal 'with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require.' We are dealing here with a principle of liability which is concerned with realities not forms.

Id. at 362-63 (internal citations omitted).

Additionally, the assets of even a dissolved corporation may still be available to satisfy its obligations.

> All [a corporation] has for the payment of its debts is its property and assets, and the law, for the protection of creditors, has impressed this property with a trust character for the payment of the debts, and said that the corporation holds it for the benefit of its creditors, and when it parts with this property, getting in return nothing the creditor can subject, the law will follow the property into the hands of the taker and make it liable to the extent of the value of the property received.

Am. Ry. Express Co. v. Commonwealth, 190 Ky. 636, 228 S.W. 433, 441 (1920). *See Smith v. Bear, Inc.*, 419 S.W.3d 49, 57 (Ky. App. 2013) ("Generally, when a shareholder receives assets of a corporation that dissolves, such assets are

held in trust for the corporation's creditors, and the shareholder remains personally liable for the corporate debt to the extent of the value of the corporate property received.").

Despite the protracted nature and length of this litigation, it is still in the early stages. Discovery has not been obtained and factual findings about the corporate structure have not been made. However, the limited evidence before us certainly suggests that SIA's assets may have been transferred and then the corporation fraudulently dissolved for the purpose of insulating the responsible (and profiting) parties from any liability for an illegal gambling scheme which targeted our citizens. We do not look kindly upon what appears to be a deliberate attempt to evade the jurisdiction of our Courts and the legal consequences of its actions.

Whether recovery ultimately may be had against SIA, depending upon what discovery reveals there may be other avenues for compensation. A constructive trust against SIA's former assets or corporate veil piercing may be appropriate and there may be other parties who could be substituted for SIA. Among them may be McComber, SIA's sole director and potential alter ego; as she is not dead, there is no reason that recovery (if proper) could not be pursued against her. *See People v. Parker*, 30 Ill. 2d 486, 491, 197 N.E.2d 30, 32 (1964) (determining that the dissolution of a corporation and subsequent lapse of a corporate survival statute prior to suit by a creditor did not prohibit liability against a director of the corporation, where the corporation failed to notify creditors of the pending dissolution); *Edwards v. Chicago & N. W. Ry.*

Co., 79 Ill. App. 2d 48, 54-55, 223 N.E.2d 163, 166 (Ill. App. Ct. 1967) (explaining a parent corporation could be liable for fraud if by its actions it induced the injured party not to file suit against a defunct corporation during the period it was amenable to suit under a corporate survival statute). She also has potential liability as a director or member pursuant to Gibraltar law.[13]

However, the only way to determine what is appropriate in this specific case, is to let the discovery continue.

b. An Adequate Remedy by Appeal Exists.

Many errors do not require the granting of a writ of prohibition as they can eventually be corrected on appeal. "No adequate remedy by appeal or otherwise means that the injury to be suffered by [the petitioner] 'could not therefore be rectified in subsequent proceedings in the case.'" *Ridgeway Nursing & Rehab. Facility, LLC v. Lane*, 415 S.W.3d 635, 640 (Ky. 2013) (quoting *Bender v. Eaton*, 343 S.W.2d 799, 802 (Ky. 1961)).

When it comes to petitions for writs of prohibition involving discovery, our Court has opined that "there will rarely be an adequate remedy on appeal if the alleged error is an order that allows discovery." *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004). However, it bears examining why this is so. Generally, the discovery is objectionable because it is claimed to be in

[13] The Companies Act §§ 224-225 provides that the liability of directors can be made unlimited by memorandum. The Companies Act § 361 specifies that the liability of members of the company undergoing voluntary dissolution is governed by the Insolvency Act, §§ 184-197. The Insolvency Act does provide for some specific liability to members under § 186 which is then severely limited by § 187.

violation of a privilege. *See Dudley v. Stevens*, 338 S.W.3d 774, 776 (Ky. 2011) ("It is well settled that there is 'no adequate remedy by appeal' if privileged documents are turned over to an opponent through discovery." (quoting *Bender*, 343 S.W.2d. at 802)).

SIA's objection to discovery has nothing to do with fear that a privilege will thereby be violated. The discovery ordered here is only objectionable to SIA because SIA contends it should not have to respond because it is defunct.

In this sense, it is irrelevant that the order being challenged relates to discovery. Certainly, SIA (like other defendants) does not want to disclose information that will establish its liability and the amount of damages due.[14] However, it appears SIA would also object to any future court order requiring it to do anything further in this lawsuit, as it believes the case should simply be dismissed due to its alleged status as a non-entity.

Thus, this is one of the rare cases in which an objection to discovery is not about whether what is being requested is improper, but whether SIA is subject to the authority of the circuit court. Therefore, the general presumptions about granting writs to prohibit discovery do not apply.

Although not controlling, we also agree with the authority from our sister courts that an appeal provides an appropriate remedy for defunct corporations.

[14] The timing of SIA's dissolution so that discovery need not be answered perhaps hints that there is something particularly damning to be found or reflects the knowledge that the circuit court and the Commonwealth will be dissatisfied by an anticipated response that pertinent records have been destroyed (as Galliano represented McComber told him had occurred), raising the specter of sanctions.

See State ex rel. Nat'l Sur. Co. v. Super. Ct. of King Cnty., 180 Wash. 587, 589-90, 41 P.2d 133, 134 (1935) (determining writ of prohibition and writ of certiorari inappropriate because an appeal provides an adequate remedy); *State v. Stevens*, 159 Ark. 666, 252 S.W. 900, 901 (1923) (holding "an erroneous ruling of the court on the motion [to quash service of a complaint on the basis that the corporation sued was a foreign and dissolved corporation], or a failure to rule, cannot be reached by a writ of prohibition. For an error made by the court in that respect, the remedy to obtain a review by this court is by appeal")

If an error in continuing the case has taken place and eventually results in a verdict against SIA, the propriety of such a judgment can properly be addressed on appeal. In the meantime, discovery should continue.

c. A Great Injustice and Irreparable Injury Will Not Result if the Petition is Not Granted.

SIA cannot show that our denial of its petition would work a great and irreparable injury upon it. A great and irreparable injury under our caselaw is not merely the high costs in time and money attendant with litigation, but, instead, is "something of a ruinous nature[,]" *Bender,* 343 S.W.2d at 801, or even "incalculable damage to the [petitioner] . . . either to the liberty of his person, or to his property rights, or other far-reaching and conjectural consequences[,]" *Powell v. Graham,* 185 S.W.3d 624, 629 (Ky. 2006) (quoting *Litteral v. Woods,* 223 Ky. 582, 4 S.W.2d 395, 397 (1928)).

Permitting discovery will not cause a severe injury to SIA. It is not a great injustice for a corporation which attempts to avoid liability by dissolving to

have to continue with a lawsuit which has been going on since 2012, especially here where McComber was its sole officer and, thus, was responsible for directing this litigation both before and after dissolution.

d. Consideration of the "Unclean Hands Doctrine" also Suggests that a Great Injustice and Irreparable Injury Will Not Result if the Petition is Not Granted.

Application of the "unclean hands doctrine" also provides a basis for concluding that it is not unjust to deny SIA the equitable remedy of a writ of prohibition.

The "unclean hands doctrine" is itself a rule of equity.

> Under the "unclean hands doctrine," a party is precluded from judicial relief if that party "engaged in fraudulent, illegal, or unconscionable conduct" in connection "with the matter in litigation." *Suter v. Mazyck,* 226 S.W.3d 837, 843 (Ky. App. 2007). "In a long and unbroken line of cases this court has refused relief to one, who has created by his fraudulent acts the situation from which he asks to be extricated." *Asher v. Asher,* 278 Ky. 802, 129 S.W.2d 552, 553 (1939).

Mullins v. Picklesimer, 317 S.W.3d 569, 577 (Ky. 2010).

Although the Commonwealth did not specifically cite this doctrine, it made several references to the unfairness of SIA being allowed to profit from its fraudulent actions regarding its dissolution and we believe this played a role in the decisions by the circuit court and the Court of Appeals. We observe that the unclean hands doctrine appropriately dovetails with the third element which must be established to grant a second-class writ. There can be no great injustice and irreparable injury when a party has put itself in its current position of needing to request a writ of prohibition based on its own allegedly fraudulent acts meant to escape the legal process instituted against it.

While SIA argues that it is unfair that it must continue to respond to the Commonwealth's lawsuit after its dissolution, SIA conveniently overlooks that it chose to voluntarily dissolve without any prior notice to the Commonwealth, the trial court, or its own counsel and it also failed to disclose to Galliano any information about the pending lawsuit and outstanding discovery requests. Had SIA made such a disclosure to Galliano, such knowledge likely would have obligated him to provide the Commonwealth with notice and precluded him from making truthful representations to Gibraltar that the dissolution was appropriate and that he and SIA had conformed their actions to what Gibraltar's Companies Act requires.

SIA ignores that, acting through McComber, it appears to have violated several requirements of the Companies Act, which if properly followed would have precluded its voluntary dissolution. These include McComber making false representations and omitting key required information. Additionally, in the underlying lawsuit, it appears that SIA may have also acted in bad faith by hiding its dissolution schemes until the dissolution was granted and only then presenting notice of it to the trial court as a *fait accompli*.

As to discovery, SIA also may have acted in bad faith in seeking and obtaining an extension to its discovery deadline, all the while knowing that the dissolution process was underway and would be completed just before this extension. SIA also may have acted in bad faith in failing to maintain pertinent records once it had notice of the potential litigation. *See Norton Healthcare, Inc. v. Disselkamp*, 600 S.W.3d 696, 733 (Ky. 2020) (explaining "parties in civil

litigation must not destroy evidence the parties know is relevant to potential litigation"). These combined concerns provide additional reasons why a writ of prohibition was properly denied.

III. CONCLUSION

The law does not allow foreign corporations to use voluntary dissolution as a means to subsequently divest our Courts of such jurisdiction. Further, the law does not condone fraudulent dissolutions to prevent such corporations from facing the legal consequences of their actions. No one is above the law and corporate dissolution is not an escape hatch from the consequences of illegal actions. Equity requires that this lawsuit continue.

For these reasons, a writ of prohibition is not available to remedy the error alleged by SIA. The order of the Court of Appeals is therefore affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANT:

William E. Johnson
Patrick Brennan

COUNSEL FOR REAL PARTY IN INTEREST/
APPELLEE:

James L. Deckard
William C. Hurt
William H. May, III
Hurt, Deckard & May, PLLC

APPELLEE:

Hon. Thomas D. Wingate, Judge