

2. Limited Liability Companies (Amendment) Bill 2013 – Third Reading approved

Mr Braidwood to move:

That the Limited Liability Companies (Amendment) Bill 2013 be read a third time and do pass.

The President: Item 2, Limited Liability Companies (Amendment) Bill 2013: Mr Braidwood.

Mr Braidwood: Thank you, Madam President.

Madam President, during the last Reading of this Bill the Hon. Member of Council, Mr Coleman, raised the question of whether a single member Limited Liability Company could be used to allow the member to hide from his responsibilities. The example that he cited was a USA doctor seeking to evade lawsuits by hiding behind a corporate vehicle.

I will now try to explain the rationale, Madam President, to Hon. Members, why an individual cannot hide from his responsibilities behind an LLC.

Mr Coleman is correct that the LLC will not afford protection to the member in certain circumstances. The principle of not permitting the member of a company to hide behind that company to escape some sort of obligation, is one that is well established. This is what is known as 'piercing the corporate veil'. The corporate veil exists to distinguish a company as a legal person separate from its shareholders. However, where the relevant test has been satisfied, the courts have shown a willingness to pierce the veil.

The recent decision in the English case, *Caterpillar Financial Services UK Ltd v Saenz Corporation Limited 2012*, describes a relevant test that must be met before the courts will consider piercing the corporate veil. These include: that ownership and control of a company are not sufficient in themselves to allow the veil to be pierced; nor can the veil be pierced where there is no unconnected third party, purely on the basis that to do so would be in the interests of justice.

There must be evidence of impropriety; however, impropriety alone is insufficient to pierce the veil. It must be further evidenced that the impropriety is linked to avoidance or concealment of a liability through the use of the company structure. For the court to pierce the veil the wrongdoer's intentions may be considered, but in any case, it must be shown that they controlled the company and used it as a facade to conceal their wrongdoing. Whether or not the company was incorporated with deceptive intent, the courts will want to see that it was being used as a facade at the time of the relevant transaction. A remedy will only be provided in respect of the particular wrong that has been committed.

Hon. Members will be aware that English case law is highly persuasive in the Isle of Man, so this case is likely to influence the thinking of the Manx courts.

This Bill, Madam President, is being progressed with the intention of making the member and owner of the LLC clearly identifiable. You will recall that the Bill seeks to ensure that the tax treatment is that of a disregarded entity: in other words, that the *member* is taxed and *not* the LLC itself.

Madam President, I acknowledge that it is possible that some may seek to try to abuse a single member LLC; however, I think that it would be unlikely that this would be, such as, an American doctor seeking to evade negligence claims. It seems likely that other legislation would prevent this in any event. For example, it may be that organisations, such as the American Medical Association, may require doctors to register personally and to carry medical insurance personally. This would then rule off this type of risk. For other risks, as before, it is possible to pierce the corporate veil where the courts deem this to be required.

Madam President, I hope that is sufficient explanation for the Hon. Member.

If I may, Madam President, I will now go on with the Third Reading.

I will now provide a brief recap of the Limited Liability Companies (Amendment) Bill 2013. The concept of the limited liability company, the LLC, was introduced into the legislation of the Isle of Man with the Limited Liability Companies Act 1996. LLCs have traditionally been thought of as resembling partnerships, with added protection against liability for the members. This is much the same as the protection afforded to the members of any other limited company.

The tax treatment of LLCs in the Isle of Man is consistent with their close resemblance to partnerships. It is the members themselves who are taxed and *not* the LLC.

In the United States of America a single member LLC can make the election to be treated as a corporation, or do nothing and be treated as a disregarded entity. The latter achieves tax treatment consistent with that of the Isle of Man. It is the member that is taxed and not the LLC.

At the time that the Isle of Man's Act was brought into operation USA LLCs were required to have two or more members. Over time, all of the states have amended their legislation to allow for the creation of single member limited liability companies.

The Bill proposes to amend the Limited Liability Companies Act 1996 to permit LLCs to be formed with either a single member or with two or more members. An addition to the Income Tax Act 1970 makes the tax treatment of single member LLCs clear.

Some classes of assets that are either located in the United States of America, or are registered in the United States of America, are regulated by the US state and federal authorities. As a general rule the US authorities require these types of assets to be owned by US citizens. A single member LLC that is a disregarded entity for tax purposes meets the test of being a US citizen.

The amendments proposed in this Bill should enable a US citizen to satisfy the US authorities, that the US asset held in a Manx LLC is indeed owned by a US citizen. This might be desirable where goods are to be imported into the European Union, where the use of a Manx LLC is likely to go some way to meeting the EU requirement that a company must be established in the EU in order to qualify for any reliefs available.

Madam President, there are some basic requirements that must be met to ensure that companies established in the Isle of Man are eligible for the special reliefs, and do not fall within the definition of an abusive practice. There is no change to the existing policy. This Bill does not seek to circumvent the existing requirements and conditions for qualification for special reliefs.

Madam President, this Bill, if enacted, will provide an additional alternative to achieving an outcome that is currently available.

Madam President, I beg to move the Third Reading of the Limited Liability Companies (Amendment) Act 2013.

Mr Crowe: I beg to second, and reserve my remarks, Madam President.

The President: The Hon. Member, Mr Coleman.

Mr Coleman: Thank you, Madam President.

I am grateful for the Hon. Member of Council for his reassuring comments about the efficacy of limited liability companies with single members. I am happy to be wrong in my previous comments, although I think I am only partially wrong from what the Member has said.

I think one of the things we have to be careful of is that some of the states in America actually treat creditors as silent partners within single member limited liability companies, and I think that time will tell as to the long-term use of this vehicle.

Thank you, Madam President.

The President: The mover to reply.

Mr Braidwood: Thank you, Madam President.

I just thank the Hon. Member of Council, Mr Coleman, for his comments – and we will wait and see. All we are really doing, Madam President, is changing from having to have two members, just to one member of the LLC which, as I said, has been incorporated into all the states in America.

I beg to move.

The President: The motion is that the Bill be read a third time and do pass. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.