

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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In the Matter of the Application of

**TRIAL/IAS PART: 20
NASSAU COUNTY**

**JANE LEVI ZIFFER, JEANETTE PRINGLE, and
STEVEN LEVI, as collective 50% Shareholders
of Tower Isles Frozen Foods, Ltd.,**

Index No: 010846-11

Petitioners-Plaintiffs,

**For an Order pursuant to § 1104 of the Business
Corporation Law Judicially Dissolving
TOWER ISLES FROZEN FOODS, LTD.,**

Respondent,

- and -

**ISAAC TAPPER, as Executor of the Estate of
Beryl Joy Levi, PATRICK JOLLY and JAMES
JOBSON, individually and as Co-Trustees under
a Voting Trust Agreement dated August 20, 2010,**

Respondents-Defendants,

- and -

**HELENIA WHITTER, FRANK GORDON, JASPER
EDWARDS, INA LYSLOFF, JOHAR LOCKWALA,
ALI GOKHAN, GERALDINE CAMPBELL,
EMMANUEL PECORARO, LEMBERT PEART,
ISAAH CLARK, ANGELO PECORARO, CLIVE
CARVER, CARLTON CAMPBELL, ASLIM
SOMARU, TREVOR SMITH, ALEXIS BARNSTORE,
HYACINTH EDWARDS, and TED JACKSON,**

Additional Respondents.

On October 24, 2011, this Court issued a Decision and Order referring to a hearing the Petitioner's application to judicially dissolve the respondent Tower Isles Frozen Foods Ltd. ("Tower Isles") and to appoint a temporary receiver. At the November 9, 2011 conference before the Court to schedule the hearing, the Court heard additional argument on the Petitioner's application that the Court vacate, *nunc pro tunc*, and declare null and void any actions taken by the Board of Directors of Tower Isles ("Board") since the February 2011 death of Beryl Joy Levi. The Court invited further letter briefing from the parties on those issues, and scheduled a hearing for January 4, 2012 on the application for dissolution and appointment of a receiver.

The Court has considered the arguments set forth in the initial motion papers, as well as the supplemental letters from Petitioner's counsel dated November 18, 2011 and November 23, 2011, and the supplemental letters from Respondent's counsel dated November 14, 2011 and November 21, 2011. Upon consideration of the foregoing, the Court grants Petitioner's application to vacate, *nunc pro tunc*, any actions of the Board since the February 2011 death of Beryl Joy Levi.

The Court's analysis begins with a determination of whether the parties' November 26, 2003 Stipulation ("2003 Stipulation") that the Court (Austin, J.) so-ordered permits replacement of a director upon the death of that director. A plain reading of the 2003 Stipulation leads the Court to conclude that it does not.

With respect to the matters now before the Court, the 2003 Stipulation provides as follows:

26. The shareholders of TOWER ISLES hereby consent to the election of the following directors of TOWER ISLES, effective immediately: (i) RONY KESSLER, on behalf of the 50% shareholder of the Estate of Earl Levi, (ii) BERYL JOY LEVI, and (iii) a neutral director appointed by the Court. Such directors shall serve during the pendency of this action or until further Order of the Court.
27. Each of BERYL JOY LEVI and RONY KESSLER shall comport herself or himself in a professional manner in their dealings with each other including but not limited to participating in board meetings in an organized and professional manner. Should the neutral director appointed by the Court advise the Court in writing of any particular instance of unprofessional conduct on the part of BERYL JOY LEVI or RONY KESSLER, then the Court, after providing notice and opportunity to the parties and their attorneys, may in its sole discretion remove such director. If the director removed is BERYL JOY LEVI, then she shall select a successor director. If the director removed is RONY KESSLER, then the Estate of Earl Levi shall select a successor director. . . .

Thus, by its own terms, the 2003 Stipulation does not provide for the filling of vacancies caused by any reason other than the Court's removal of a director. The Court has not removed a director. Thus, there is no basis for such a director to be appointed in accordance with the above

provisions.

In the absence of any applicable provision in the 2003 Stipulation, the company's by-laws govern. Those by-laws provide that "vacancies occurring in the board for any reason except the removal of directors without cause may be filled by a vote of a majority of the directors then in office." Here, it is undisputed that a vacancy occurred in Tower Isles' Board upon the death of Beryl Joy Levi. It is further undisputed that the death of Ms. Levi does not somehow amount to her being removed without cause from the Board. Thus, pursuant to the by-laws, the vacancy in the Board is to be filled by the remaining directors. Because it is undisputed that director Isaac Tapper was not selected to fill the vacancy caused by Ms. Levi's death in accordance with the above provisions, he is not a member of the Board of Directors of Tower Isles. Moreover, because Tower Isles' Board of Directors has not met, in accordance with the by-laws, since Ms. Levi's death, any actions taken by those purporting to constitute the Board are of no force and effect.

The Court is not persuaded by Respondent's argument that the parties' "custom and usage" permits the Court to reach a contrary conclusion. At the outset, the Court has already concluded that the 2003 Stipulation is unambiguous, and does not apply to the present facts. Accordingly, it would be inappropriate to consider the parties' custom and usage. *Estate of Anglin v. Estate of Kelley*, 270 A.D.2d 853, 854 (4th Dept. 2000) (court may not consider parties' course of performance in interpreting agreement in the absence of any ambiguity). Moreover, there is no evidence of "custom and usage" among the parties that would allow the parties, as is presently the case, to replace a director upon that director's death.

The Court has located only one case that addresses the issue presented here, and notes that the case squarely supports the Court's decision. In *Stile v. Antico*, 272 A.D.2d 403 (2d Dept. 2000), the Second Department affirmed the trial court's decision declaring invalid a meeting of a company's board of directors at which new directors were added. The Second Department further held that any attempt to amend the bylaws at that meeting was invalid, and rejected the argument that an additional director was added by custom and usage. Applying *Stile* to the instant case, it appears that, like *Stile*, any attempt to add directors in violation of a company's by-laws must be rejected by this Court.

Beyond the plain meaning of the 2003 Stipulation, there are firm policy considerations supporting the Court's conclusion that the 2003 Stipulation cannot be a basis for adding directors on the facts before the Court. The 2003 Stipulation essentially invited further judicial involvement in the management of Tower Isles, and essentially permitted the Court to determine a replacement director in certain circumstances. Limited judicial involvement in corporate government is preferred, however. Thus, an interpretation of the 2003 Stipulation that invites more judicial involvement — such as that urged by Respondent — must be rejected.

Respondent's warning about "dire consequences" that would befall Tower Isles if the Court granted Petitioner's application also rings hollow. At the outset, the Respondent does not outline any specific harm that would somehow occur upon the Court granting the instant application. Moreover, as a result of the Court granting the Petitioner's application, the remaining directors actually must attempt to speak with each other and attempt to run the business. It is thus curious why the Respondent would not support a course of action that

would encourage the remaining directors to interact with one another, as it could well vitiate — or at least be probative regarding — the Petitioner’s claim of oppression that will be the subject of the hearing commencing on January 4, 2012.

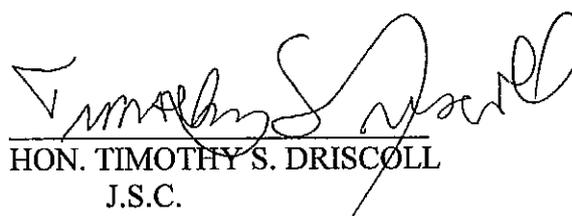
Accordingly, the Court grants the petitioner’s application to annul the previous actions of Tower Isles’ Board of Directors that have been taken since the February 2011 death of Joy Levi. That Board shall now be reconstituted in accordance with the by-laws.

Counsel shall appear before the Court, as previously scheduled, on January 4, 2012 to commence the hearing.

This constitutes the Decision and Order of the Court.

ENTER

DATED: Mineola, NY
December 21, 2011


HON. TIMOTHY S. DRISCOLL
J.S.C.