IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E300 of 1998

IN THE MATTER OF THERMO PLASTICS (JAMAICA) LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT

AND

	RICHARD L. DOWNER } PRICEWATER HOUSE COOPERS AND } PRICEWATER HOUSE COOPERS LTD }	APPLICANT
BETWEEN	THE GEON COMPANY	PETITIONER
AND	THERMO-PLASTICS (JAMAICA) LTD	RESPONDENT

Miss Hilary Phillips Q.C. and Mr. Kevin Williams instructed by Grant, Stewart, Phillips and Company for the Applicant.

Mr. Raymond Clough instructed by Clough, Long and Company for the Petitioner.

Mr. Paul Beswick and Mr. G. Anthony Levy instructed by G. Anthony Levy and Company for the Respondent

HEARD: 24TH August, 2005 and 23rd January, 2008

KING, J.

On the 9th April, 1998 the Petitioner obtained a judgment against the Respondent in the sum of US$241,899 with interest from the 9th April, 1998 and costs to be taxed. When on the 5th June, 1998 the judgment remained unsatisfied, the petitioner, by suit E300 of 1998 filed a petition to Wind Up the respondent. On the 10th December, 1998 PANTON J, as he then was, made an order in terms of paragraph one (1) of the prayer in the petition, viz., "that THERMO-PLASTICS (JAMAICA) LTD may be wound up by the Court under the provisions of Companies Act".

Having subsequently concluded that its chances of recovering its judgment debt would be enhanced by the setting aside of the winding up order which it had sought and obtained, the petitioner applied on the 27th April, 2004 for an order to set aside the order of PANTON J., made on 10th December, 1998.

On the 7th June, 2004 applications to Strike Out claim 2004 HCV 0486 were adjourned on condition that the order of PANTON J., in E300 of 1998 be perfected within seven (7) days and served on the Defendants. This order of the 7th June, 2004 made by BESWICK, J was upheld on appeal on the 27th July, 2004.

On the 6th October, 2004 M. McIntosh, J made an order setting aside the Order of PANTON, J. This is an application:

1. to intervene in the matter and

2. to set aside the Order of M. McIntosh, J.

There were three points argued in limine. Mr. Beswick, on behalf of the Respondents, argued firstly that application suffers from a fatal flaw in that it was made by way of Notice of Application for Court Orders under rule 11.8 (3) and in accordance with form seven (7) of the Civil Procedure Rules 2002 (CPR). He contends that since the court derives its jurisdiction to hear an application so made from the Rules, and since Rule 2.2 (3) (a) specifically provides that "these rules do not apply to insolvency (including Winding Up of Companies)" the court has no jurisdiction to hear this application.

Secondly, says Mr. Beswick, even if this application had been correctly commenced, S. 234 (1) of the former Companies Act which is the source of the court's power admits of no concept of an intervenor in Winding Up proceedings. There being no provision under Act for intervention the court has no power to hear the application.

Mr. Raymond Clough, representing the Petitioner also by way of a preliminary point, having adopted the submission Mr. Beswick added a third point, viz.,

that this court has no power to set aside the order of M. McIntosh J, she being a judge of coordinate jurisdiction acting in a manner which she considered to be within her jurisdiction. He maintains that, on the authority of the Privy Council decision in

STRACHAN vs. THE GLEANER COMPANY and ANOTHER (p.c. appeal no. 22 of 2004), a challenge to that order can only properly be made to the Court of Appeal.

Miss Hilary Phillips Q.C., on behalf of the applicants responded to the preliminary points as follows:

Point #1 – Form of Application

Though admitting that the CPR in rule 2.2 (3) (a) expressly excludes from its area of operation "insolvency (including Winding Up of companies)", and that the Companies (Winding Up) Rules 1948 of the United Kingdom (made applicable by section 323 (4) of the former Companies Act of Jamaica) require that this application be commenced by summons, she insists that this is not an irregularity that is fatal to the Application.

S.226 of the Companies Act provides that no proceedings under the Act shall be invalidated by any formal defect or irregularity unless substantial injustice has been caused by that defect or irregularity which cannot be remedied by an order of the court. Since the Respondent has not demonstrated any injustice caused by the irregularity in the originating process used, the irregularity can be remedied by an order of the court, if necessary, that a summons be filed and the matter proceed as if originally commenced by summons.

Point 2 – No Provision in Companies Act for Intervenor

The Order for Intervention which the applicant seeks would be made in exercise of Common Law powers of the Court.

Point 3 – This court has no power to set aside the Order of a Judge of Coordinate Jurisdiction who has assumed jurisdiction to make that Order.

Despite the decision in STRACHAN vs. THE GLEANER COMPANY if the order which the application seeks to set aside was made in the face of material non-disclosure which the person seeking that order knew (but failed to disclose) would affect a person not a party to the proceedings, then on the basis of Privy Council's decision in Jam Culture vs. Black River Upper Morass Development Company Ltd, and Agriculture Development Corporation (1989) 26 JLR 244. Such an Order may be set aside by a judge of co-ordinate jurisdiction.

As the time allocated for the hearing of this application was insufficient for arguing the substantive application Counsel sought a ruling on the preliminary points only.

The court thanks all Counsel for their assistance and decides as follows:

Point 1.

Winding Up proceedings under the Companies Act commenced with the filing of the Petition on 5th June, 1998. The present application is therefore not process to commence Winding Up proceedings but is an application brought in the course of those proceedings. The application unquestionably suffers from an irregularity in that it was sought to have the application brought as an application under the CPR which does not apply to Winding Up proceedings. However, if S. 226 of the former Companies Act is to have any meaning it must be that an irregularity such as this ought not to invalidate this application if no substantial injustice is caused by the irregularity or if an order of the court can remedy any such injustice caused.

Since it is not apparent as to what injustice would result from an Order of the Court that the matter proceed as if commenced by summons, that is the order of the court.

Point 2 – Intervention not provided for by the Companies Act.

Point 2

The question as to whether the Applicant ought to be allowed to intervene in the proceedings was not fully argued by Counsel, no doubt because this is not a preliminary point but one of the heads of substantive relief being sought. This question is therefore more conveniently argued at a later stage if necessary.

Point 3

An exparte Order of a judge of the Supreme Court, who must be taken to have assumed jurisdiction to make that order, may properly be set aside by a judge of co-ordinate jurisdiction on the ground of it having been obtained by non disclosure of facts "of sufficient materiality to justify or require immediate discharge of the order without examination of the merits" (Ralph Gibson L, J. in Brinks Mat Ltd. Vs Elcombe (CA) (1988) 1 WLR 1351 at page 1356).

On the other hand the ex-parte order of a judge of the Supreme Court cannot properly be challenged except in the Court of Appeal where the basis of the challenge is that the judge, in making the Order, assumed a jurisdiction which he or she did not have. This was made plain in the decision of the Privy Council in STRACHAN vs. THE GLEANER COMPANY.

Consequently a judge of the Supreme Court does have the power to set aside the order of M. McIntosh, J on the grounds of material non-disclosure if so persuaded.