JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 53/86

BEFORE: THE HON. MR. JUSTICE KERR - PRESIDENT (AG.)
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE DOWNER, J.A. (AG.)

IN THE MATTER OF THE JAMINCORP INTERNATIONAL MERCHANT BANK LIMITED

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IN THE MATTER OF THE COMPANIES ACT

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IN THE MATTER OF THE MINISTER OF FINANCE - PETITIONER/APPELLANT

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JAMINCORP INTERNATIONAL MERCHANT BANK - RESPONDENT/RESPONDENT

Mr. Ranse Langrin, Q.C. and Mr. D. Leys for Appellant

Mr. Carl Rattray, Q.C. and Miss Hilary Phillips for Respondent

November 19 and 20 and December 19, 1986

KERR, P. (AG.):

Pursuant to Section 11 of the Protection of Depositors Act, the Minister of Finance (the Minister) in the exercise of powers conferred by the Act, presented a winding-up petition under The Companies Act against the Jamincorp International Merchant Bank Limited (hereinafter referred to as Jamincorp) a company incorporated under the Companies Act with registered Office at 64 Knutsford Boulevard, Kingston 5 in the parish of St. Andrew.

As set out in the petition its memorandun of Association empowered Jamincorp:

> "To carry on in Jamaica and elsewhere the business of Merchants and investing bank in all its branches and departments and generally to undertake and transact in all the businesses of Bankers, Merchants, Brokers, capitalists and financiers, raising or taking up money; lending or advancing money and other objects set forth in the Memorandum of Association thereof."

The Company was incorporated on 9th May, 1978 and on the 7th September, 1978 was granted a licence under Section 4(1) of the Protection of Depositors Act enabling it to (a) carry on the business of accepting deposits or (b) issue advertisements for deposits, (Section 3).

The petition was based on two grounds thus:

> "1. .....
>
> 7. That the Company continues trading and its financial situation is such that at three months preceding the presentation of this Petition has carried on the business of accepting deposits when the Company is unable to pay sums due and payable to depositors, and further, the value of the Company's assets is less than the amount of its liabilities.
>
> 8. That the Company has failed to comply with Section 6 (b) of the Depositors Act in that it has not delivered accounts for the financial year ending 1985."

The petition was filed on October 7, 1986 and on October 15, The Trustee in Bankruptcy was appointed Provisional Liquidator. The filed affidavits in verification and in support of the petition were made by Oscar Simpson, an Assistant to the "Inspector of Banks" - appointed pursuant to Section 12(2) of the Protection of Depositors Act.

On October 23, 1986 appearance was entered on behalf of Jamincorp and on 31st October, 1986 a motion was filed seeking the following specific orders and reliefs:

"1. That the Minister of Finance, the Petitioner named in the Petition herein, which was preferred on to this Honourable Court on the ..... day of October, 1986, be restrained from taking any further proceedings upon the Petition.

2. That the Petition be removed from the file of proceedings and/or be struck out as it is an abuse of the process of this Honourable Court.

3. That the appointment of the provisional liquidator be rescinded.

4. That the Company be awarded damages for the loss of its reputation, goodwill, loss of profit and business.

5. That the Petitioner be condemned in costs."

The motion was supported by full and detailed affidavits by Elworth A.E. Williams, Vice-Chairman and a Director of Jamincorp. Notices of intent to make use of this affidavit at the hearing of the petition and to cross-examine Oscar Simpson were also filed.

Both petition and motion came before Wolfe J. on November 6, 1986 when he made the following specific orders against which this appeal by the Minister was brought:

"1. That the Petition be dismissed.

2. That the interim Order of appointment of the Provisional Liquidator is hereby discharged.

3. The question of damages be reserved for Assessment before a Judge on a date to be fixed by the Registrar.

4. That the damages when assessed and costs be paid to the Respondent prior to the presentation of any other Petition touching upon the same matter against the Respondent."

We allowed the appeal, set aside the orders of Wolfe J. and in turn made the following consequential orders:

1. That the appointment of the Provisional Liquidator be restored.

2. The affidavit of E.A. Williams dated 31st October, 1986 be deemed to be an affidavit in opposition to the petition and duly filed.

3. Petitioner to file affidavit in reply, if necessary, within five days hereof.

4. Petitioner or his Attorney to attend before the Registrar within five days hereof to satisfy the Registrar in the manner required by Rule 33 of the Company (Winding-up) Rules.

5. Costs of the 6th November, 1986 to be the respondent - to be taxed if not agreed.

6. Trial to be held in current term commencing not later than 8th December, 1986.

7. Liberty to apply.

8. No order as to costs of appeal.

At the hearing what transpired was sufficiently unusual as to merit detailed reference. Mr. Neville Fraser, who announced himself as holding brief for the absent Mr. Ranse Langrin, Q.C. and Mr. Douglas Leys, Attorneys for the petitioner applied for an adjournment on the basis that there was no memorandum of compliance by the petitioner as required by Rule 33 of the relevant Winding-up Rules but, wonderful to relate, went on to give the apparently unsolicited opinion that such a defect was fatal and could not be cured by an adjournment and even more surprisingly added as another ground for an adjournment that there was no affidavit from the respondent in opposition as required by Rule 36 of the Rules.

The respondent's Attorney, Mr. Carl Rattray, Q.C. welcomed this windfall. He endorsed Mr. Fraser's opinion. He referred to his notice of intention to use Mr. Williams' affidavit as an affidavit in opposition and, to cap it all, added as his own that there was no affidavit from the petitioner verifying the petition as required by Rule 30 of the Rules.

For the time being, the Companies (Winding-up Rules) (1949), of the U.K. were rendered applicable to Jamaica by Section 323 (4) of the Companies Act.

Rule 33 provides:

> "After a petition has been presented, the petitioner, or his solicitor shall, on a day to be appointed by the Registrar, attend before the Registrar and satisfy him that the petition has been duly advertised, that the prescribed affidavit verifying the statements therein and the affidavit of service (if any) have been duly filed, and that the provisions of the Rules as to petitions have been duly complied with by the petitioner. No order shall be made on the petition of any petitioner who has not, prior to the hearing of the petition, attended before the Registrar at the time appointed, and satisfied him in manner required by this Rule."

In holding that the provisions herein were mandatory Wolfe J. said at p. 91:

> "Counsel for the Applicant quite properly, in my view, conceded that the Rules governing the procedure to be followed on the presentation of a winding-up Petition are mandatory as opposed to directory. What then was the purpose of an adjournment when the defect under Rule 33 was terminal in nature?
>
> A date having been set for the hearing of the Petition it was obligatory of the Petitioner if he desired an order to be made on the Petition to obtain from the Registrar a date and to appear before the Registrar on that date to satisfy her of the compliance with the Rules. Failure so to do in my view is tantamount to an abandonment of the Petition. The defect as I have mentioned was incurable. To adjourn the petition in such circumstances would be an exercise in futility, as such an adjournment could not enhance the position of the Petitioner as far as this petition was concerned."

Before us Mr. Langrin submitted that the petitioner had substantially complied with Rule 33 in that, (i) the petition had been duly advertised and (ii) the prescribed affidavit verifying the petition and the affidavit of service had been duly

filed and a memorandum lodged with the Registrar to the effect that these requirements had been met. The omission of the Registrar to set a date for attendance with the result that there was no certificate of compliance from that officer was a formal defect or irregularity within the contemplation of Rule 226(1) - and that such irregularity was remediable without causing any substantial injustice to the respondent. In holding that the defect was incurable the learned judge erred. In any event the order dismissing the petition was in contravention of Rule 33 which stated that no order shall be made on the petition where there was non-compliance with the Section. In reply Mr. Rattray was consistent. He maintained that Rule 33 was mandatory. There was a duty on the petitioner to attend on the Registrar and satisfy him that there had been compliance with the Rules. He referred to the Practice Note - dated 20th February, 1961 - published in the Solicitor's Journal Vol. 105 at p. 207 and Re Royal Mutual Benefit Building Society (1960) 3 All E.R. 460.

In the Practice Note Buckley J. said:

> "That solicitors would be in danger of having some of their costs disallowed if they did not comply with the direction of the registrar of companies to attend on a particular date pursuant to r. 33 of the Companies (Winding-up) Rules, 1949, and satisfy him that the petition had been duly verified, served and advertised. For the convenience of solicitors as well as the registry, physical attendance before the registrar was not, in practice, required, but solicitors were required to lodge papers by a date of which they were notified when the petition was first set down. That date was usually the Monday before the Monday on which the petition was to be heard. In a considerable number of cases, solicitors had failed to observe that programme. If papers were lodged later, inconvenience and confusion resulted. There should be no difficulty in solicitors complying with the programme laid down; and, so far as he (Buckley J.) was concerned, solicitors who were late in that regard would be in danger of having some of their costs disallowed unless there was a good explanation."

It is worthy of note that Buckley J. an experienced judge in the field of litigation under the Companies Act did not advocate dismissal or the striking out of the petition but condemnation in costs.

In Royal Mutual Benefit Building Society (supra) the facts are important. In this case, the petition was presented on July 20, 1960 for the winding-up by the Court of the Building Society on the ground that the company had ceased to carry on business or was carrying on business only for the purpose of winding-up its affairs. In a letter dated September 30, 1960 the petitioner by his solicitors gave notice to the Society's solicitors that the petitioner would withdraw the petition and would not be proceeding further in the matter; that this fact was recorded on the Court's papers and therefore it would not be necessary for the Society's solicitors to attend Court as the petitioner's solicitors do not propose to do so and that in the circumstances any costs incurred by the Society after September 30 would be the Society's responsibility. By letter dated October 4, 1960 the Society solicitors informed the petitioner's solicitors that counsel would be instructed on behalf of the Society to make an application to the Court on the date fixed for hearing for the dismissal of the petition with costs. The petitioner did not attend before the Registrar on an appointed day before the hearing of the petition to show compliance with the rules as required by Section 33, and he was not represented by counsel. Counsel for the Society asked that the petition instead of being struck out be dismissed with costs against the petitioner.

In dismissing the petition with costs to the respondent Pennychuick J. said at 461:

> "The ordinary practice where the petitioner fails to comply with the requirements of r. 33 is to strike out the petition. In the present case, however, the society has appeared by counsel and asks that, instead of the petition being struck out, the petition

> "should be dismissed with costs against the petitioner. It appears to me that the society is entitled to the order for which it asks. It is quite clear that the society has the right to be represented by counsel at the hearing of a petition for the winding-up of the society. It seems to me, further, that in principle the society must have the right to an order for costs where the petition is unsuccessful, whether on the ground of non-compliance with the requirements of r. 33 or for any other reason. The petitioner was not represented, but my attention was called to the words in r. 33:
>
> > 'No order shall be made on the petition of any petitioner who has not ... attended before the registrar .... and satisfied him in manner required by this rule.'
>
> It seems to me that those words mean no more than that no order shall be made in favour of any petitioner who has not complied with the requirements of the rule, and do not operate to protect a petitioner from an order for costs where for any reason his petition is unsuccessful."

Resort to authority seems unnecessary for support of the well established proposition that a judge has a general discretionary power to strike out proceedings that are defective or to dismiss proceedings for want of prosecution.

In the cited case the petitioner had definitely and clearly indicated that he would not be prosecuting his petition and the question for the trial judge was whether he should merely strike out the petition for non-compliance with the Rules or dismiss it for want of prosecution with, in either event, costs to the respondent.

The instant case is clearly distinguishable. The petitioner had indicated indubitably his intention to proceed by taking the positive steps required by the Rule. On the 3rd day of November, 1986 a draft memorandum of compliance in the following form settled and signed by one W.W. Coke as petitioner's attorney was filed in the Registry:

"

MEMORANDUM OF PRESENTATION
OF PETITION

SUIT NO: E240 OF 1986

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN EQUITY

IN THE MATTER OF JAMINCORP
INTERNATIONAL MERCHANT BANK LIMITED

A N D

IN THE MATTER OF THE COMPANIES ACT

1. The Petition was presented on the 7th day of October, 1986, and filed on the 7th day of October, 1986 and appointed to be heard by a judge on the 6th day of November, 1986.

2. The Registered Office of the abovenamed Company is situate at No. 64 Knutsford Boulevard, Kingston 5 in the parish of Saint Andrew which is within ten miles of the Supreme Court Registry.

3. The Petition was advertised in the Daily Gleaner on the 27th of October, 1986 and in the Jamaica Gazette Extraordinary on the 27th of October, 1986.

4. The Affidavit of Oscar Simpson verifying the Petition was sworn to on the 7th day of October, 1986 and filed on the 7th day of October, 1986.

5. The Affidavit of Service of Petition sworn to on the 27th day of October, 1986 proves the service of the Petition on the Company Jamincorp International Merchant Bank Limited on the 17th day of October, 1986.

The appointed day to show compliance with the rules is the ..... day of November, 1986 at .....

REGISTRAR "

The Registrar omitted however to fix a date in the space provided for the purpose. It is not being contended that the procedural requirements mentioned therein had not been performed.

Rule 28 provides a time-table for advertising the petition and the sanction of removal from the file for failure to comply. No time-table or specific sanction is provided, in the event the Registrar fails to appoint a day for attendance on him as required

by Rule 33. Accordingly, if the petitioner's attorney was sufficiently alert and astute he could attend to obtain the Registrar's certificate of compliance at any time even on the morning of the 6th November before the petition came on for hearing. Accordingly, I am of the view that this defect in procedure in the instant case is clearly within the contemplation of Rule 226(1) which reads:

> "No proceedings under the Act or the Rules shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that Court."

Not appointing a day for attendance on him was an omission by the Registrar, a public officer. It follows, therefore, that notwithstanding the imperative "shall" in Rule 33, the appointing of the date for attendance to obtain a certificate of compliance is directory [see Halsbury's Laws of England - 3rd Ed. Vol. 36 paragraph 656 pp. 435-6].

Accordingly, I am of the view that in holding that the defect was incurable, Wolfe J. erred. I am, however, in sympathy with him because that was the view of counsel on both sides. Notwithstanding, the decision was his to make.

On the question whether or not the affidavit in verification of the petition by Oscar Simpson complied with Rule 30 the learned judge had this to say at p. 92:

> "Rule 30 which requires an affidavit verifying the Petition to be filed draws a clear distinction between individual Petitioners and Petitioners who are corporate bodies. The rule is unmistakably clear in relation to Petitioners, other than corporate bodies, that the affidavit verifying the petition must be filed by the Petitioner himself, or if more than one petitioner by one of them. It is my considered opinion that the word filed refers not the lodging of the affidavit in Court but to the making and swearing thereof. In relation to a corporate body the rule speaks of the verifying affidavit being filed by a person who has been

> "concerned in the matter on behalf of the corporation. The Companies (Winding-up) (Amendment) Rules 1967 (S.I. 1967 No. 1341) amending Rule 30 of the 1949 Rules requires the affidavit to be made by a director, secretary or 'principal officer'. See Vic Groves and Company Limited [1964] 1 W.L.R. 956. Oscar Simpson under whose hand the affidavit verifying the Petition appears, in the light of Rule 30, is not a person qualified to make the affidavit. The affidavit had to be made by the Petitioner himself, he not being a corporation.

Now Rule 30 reads:

> "Every petition shall be verified by an affidavit referring thereto. Such affidavit shall be made by the petitioner, or by one of the petitioners, if more than one, or, in case the petition is presented by a corporation, by some director, secretary, or other principal officer thereof, and shall be sworn after and filed within four days after the petition is presented, and such affidavit shall be sufficient prima facie evidence of the statements in the petition."

Before us Mr. Langrin submitted that Rule 30 is directory as to the kind of affidavit to be accepted as prima facie evidence of the statements in the petition. The Court therefore ought to accept in a proper case such as this, the affidavit of the Assistant Inspector of Banks having regard to his duties under the Protection of Depositors Act and that the material facts in the petition are more within his personal knowledge than the petitioner himself. Further, having regard to the multifarious functions of a Minister, it is not to be expected that every duty and power must necessarily be personally performed by him and in this regard the reasoning in Carltona Ltd. V. Commissioners of Works & Others (1943) 2 All E.R. at p. 563 is applicable.

In support of his argument that an affidavit filed by a person other than the petitioner may be accepted in certain circumstances he referred to the following cases, In Re Brandy Distillers Co. (1901) W.N. at p. 37; In Re African Farms, Limited (1906) 1 Ch. 640 and Re Allied Produce Co. Ltd. (1967) 3 All E.R. 399.

In reply Mr. Rattray re-affirmed his stand that this rule is mandatory (see In Re Charterland Stores and Trading Co.) (1900) 69 L.J. 861. He argued that the cases cited by petitioner's counsel do no more than state that the petitioner can act through an agent duly authorised or where the authority devolves. In the instant case Simpson is neither an agent nor has there been a devolution of authority. The person in the line of devolution is the Inspector, who is the Governor of the Bank. In both the African Farms and the Vic Groves cases, there were exceptional circumstances and in Brandy Distillers Company the Attorney-General is in a special position.

In Re Vic Groves Co. Ltd. (1964) 2 All E.R. 839, the petitioner of the winding-up petition was a limited company. The affidavit in support was filed by one of thirty-two divisional managers. It was held that the divisional manager was not a director, secretary or other principal officer within Rule 30 and although in exceptional circumstances a petitioning company might support its petition by an affidavit sworn by some person (not being a director, secretary or principal officer) under a power of attorney in its behalf yet in the present case there were no exceptional circumstances and the affidavit was not sufficient compliance.

This case in my view is not directly in point. A company is a non-natural persona and the rule in its wisdom specifically named the officers who could give a sufficient affidavit. That in exceptional circumstances some other person may give the necessary affidavit implies that the rule is not mandatory. Above all Pennycuick J. did not strike out the petition but in fact "take what is the usual course in cases of this kind, that is, make a winding-up order, subject to the production of an affidavit sworn by a director or secretary or principal officer."

In Re. Allied Produced Co. Ltd. the petition was presented by the Board of Trade under Section 169(3) of the Companies Act, 1948 seeking an order for the compulsory winding-up of the company. The petition was based on a report of inspectors appointed by the Board to examine the affairs of the company and supported by an affidavit sworn by a principal examiner in the insurance and companies department of the Board and who verified the statements in general terms exhibiting a copy of the inspector's report and deposes that he believes the facts set out therein to be true and that the opinions in the report are those of the inspector's. Although Buckley, J. made a winding-up order on this petition, this case is not conclusive on the point as he said at p. 400:

> "Here, nobody has appeared to contest the allegations contained in the petition. The allegations are, in the circumstances, in my judgment adequately supported by the evidence...."

In Chanterland Stores and Trading Co. the winding-up petition was presented by John Weil, a merchant of London and was in respect of a sum of £1,200 for goods supplied.

The affidavit verifying the petition was filed by Bernard Felix Foran, the Manager in London of the petitioner's business who deposed to the effect that the petitioner carried on extensive branch business in South Africa and was himself then engaged in South Africa; that such of the statements in the petition as related to the acts and deeds of the petitioner were true to the deponent's knowledge and such of the statements as related to the acts and deeds of other persons he believed to be true. In subsequent affidavit he deposed that he held a power of attorney authorising him (inter alia) to commence prosecute and enforce all actions and legal proceedings touching the business and affairs of the petitioner ..... and that he was specifically instructed by cablegram to take the present proceedings. On a

preliminary objection that the petitioner had not complied with the rule of similar terms and tenor as Rule 30 - Wright J. said at p. 862:

> "The rule lays it down absolutely that except in the specified case of a company being petitioner, the petitioners, or one of them, must make the statutory affidavit. I cannot see how I can put the matter right under the powers conferred on the Court by rule 177."

[Rule 177(1) being similar to present Rule 226(1)] and continued:

> "In my judgment those words are not wide enough to include the present case. There is here no question of proceedings being invalidated: the question is, what evidence does the Court require? Further, it does not appear to me that the latter part of the clause - as to the injustice not being capable of being remedied by any order of the Court applies. The case is, however, obviously one in which an opportunity ought to be given to the petitioner of putting the matter right. I will therefore give liberty to the petitioner to amend his petition, if so advised, by adding another person as co-petitioner, and extend the time for filing the statutory affidavit until the last day of the present sittings on which I take petitions. The petition must stand over until then."

With due deference to Wright J. in holding as he did, he was pontifical. In his failure to categorise the defect, either as a curable irregularity or as one invalidating the petition, created "a neither - fish - nor fowl" uncertainty. What however, is clear that he gave the petitioner the opportunity to remedy the defect by granting an adjournment and extension of time to do so.

It is not surprising that this case was considered and dissented from In Re African Farms Limited. In that case the petitioner was the Assistant Manager of the Company at its farm in Pietersburg, South Africa under a five years agreement from August 1904 and when the petition was presented he was absent from South Africa.

The affidavit filed in verification of the petition was made by Arthur Walter Ramsey of 4, Overbury Avenue, Beckenham, Kent, as the duly authorised attorney or agent of the petitioner. Warrington J. in overruling the preliminary objection that the petitioner has not personally sworn to the affidavit in verification said at p. 642:

> "I have also spoken respecting the matter to Buckley J., to whom the company business has been assigned. He has pointed out to me, and I in turn now desire to point out, that r. 29 does not state what is to be the result of non-compliance with its provisions. The rule does not say that the petition is in that case to fail. The rule is merely directory as to the kind of affidavit to be accepted as evidence. That leaves it open to the Court, in a proper case, to accept an affidavit which in an ordinary case coming before the Court would be accepted as sufficient evidence. I have already said that in this case the affidavit in question is of more value than that of the petitioner, and therefore, on the principle I have mentioned, I accept that affidavit as a sufficient compliance ....."

I have no hesitation in preferring the positive treatment of the question by Warrington J. to the uncertainties in the earlier opinion of Wright J.

Now in the instant case, Oscar Simpson in his affidavit dated 7th October 1986 verifying the petition deposes:

> "1. That I am authorised under Section 12(2) of the Protection of Depositors Act to assist the Inspector in the performance of his functions under the Act; that pursuant to such atthorisation, I am the principal person responsible for making regular inspection of Companies licensed under the said Act; that I have been concerned in this matter in such capacity with Jamincorp International Merchant Bank Limited as I have carried out several inspections on that Company.
>
> 2. That such of the statements in the Petition now produced and shown to me marked with the letter "A" as relates to the acts and deeds of Jamincorp International Merchant Bank Limited are true to the best of my knowledge."

and in a subsequent affidavit dated 15th October 1976 he deposes

to particular facts in support of the petition. It is agreed by all that there is but one Inspector of Banks and he is also the Governor of the Bank of Jamaica. His extensive and exacting duties under the Protection of Depositors Act is set out in Section 12 of the Act. The legislature in its wisdom provides for the appointment of a person to assist the inspector in carrying out his duties. Such an appointee at all material times was Oscar Simpsom. The petition contains serious allegations. He speaks from personal knowledge and is therefore in a better position than the petitioner to verify the allegations contained in the petition. His appointment and duties under the Act in my view provides the necessary relationship with the petitioner to render him competent to make the affidavit in verification.

In support of his contention the adjournment should have been granted, Mr. Langrin further submitted, that assuming the affidavit of Mr. E.A. Williams dated 31st October, 1986 was acceptable as an affidavit in opposition, it was not filed within the time prescribed by Rule 6, namely within seven days of the date on which the affidavit verifying the petition was filed and the petitioner was not given a reasonable opportunity of replying.

To this Mr. Rattray pointed out that although the affidavit in verification was sworn to on the 7th October, 1986 and the provisional liquidator appointed on the 15th October it was only on the 17th October that service of the relevant documents was effected on the respondent and the petitioner should not complain when he himself did not observe the rules.

The adage - "people in glass houses should not throw stones" is applicable to these circumstances. The petitioner was dilatory and accordingly, if it were necessary, an application by the respondent to extend time to file an affidavit in opposition would be virtually irresistible. On the other hand, an adjournment to give the petitioner time to reply to the affidavit in opposition

would be fair and reasonable. Surprisingly this was not urged before Wolfe J. as a ground for seeking the adjournment.

Mr. Rattray as an alternative or in addition to his arguments on the mandatory nature of Rules 30 and 33, submitted first that the learned judge did in fact exercise his jurisdiction and in this regard he adverted to the following statement in the learned trial judge's reasons for judgment.

> "To have granted the adjournment would have been undoubtedly a wrong exercise of the Court's discretion in that the Court felt it would have been harsh, unconscionable, oppressive and unjust to the Company as nought could have been achieved by such an adjournment.

He reminded the Court that as a reviewing Court, a Court of Appeal should not lightly interfere with the discretion of a trial judge.

Ever so often in interlocutory appeals we are reminded of the accepted approach of an appellate court in reviewing the exercise of a judge's discretion. The principle has been restated and reaffirmed in a number of cases and it is enough to quote the concise statement of the principle in the Privy Council case - Ratnam v. Cumarasamy (1964) 3 All E.R. at p. 934:

> "The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice."

However, I do not interpret that statement to mean that when an appeal challenges the exercise of judicial discretion, the Court of Appeal should adopt a 'laissez faire' attitude and where the interpretation or the identity of the reasons for the exercise of a discretion is called in question, the members of the Court of Appeal need do no more than piously intone "we cannot [learned judge] they purpose see but all is well thats done by thee."

As was said in Evans v. Bartham (1937) 2 All E.R. p. 654:

> "But the court is not entitled simply to say that, if the judge had jurisdiction, and had all the facts before him, the Court of Appeal cannot review his order, unless he is shown to have applied a wrong principle. The court must, if necessary, examine anew the relevant facts and circumstances, in order to exercise by way of review a discretion which may reverse or vary the order. Otherwise, in interlocutory matters, the judge might be regarded as independent of supervision."

With reference to the passage referred to on this point in my view it does not in any way alter or modify the opinion earlier expressed that the defects in the petitioner's proceedings were incurable and an adjournment was pointless. It is unrealistic to say that there was the proper exercise of his discretion in those circumstances. However this is not the end of the matter. It brings me to Mr. Rattray's second alternative submission, which was to the effect that in the particular circumstances of the case it was just and equitable to dismiss the petition. To summarise, he drew attention to the following circumstances:

(i) That the petitioner had not proceeded with due diligence and with the expedition required by the rules and the nature of the proceedings.

(ii) That the ex parte order appointing the provisional liquidator was so onerous that the respondent had to obtain orders for limited access to funds and records to be able to honour outstanding financial commitments and to provide for certain imminent contingencies; and

(iii) Having regard to the nature of the respondent's business, the adjournment would cause further irreparable damage.

These circumstances merit due consideration but a balance must be struck. On the other side of the scale there are the following weighty circumstances:

(i) The petition brought by the Minister under the Protection of Depositors Act, the title of which Act is suggestive of its legislative intent, is prima facie in the public interest.

(ii) The allegations in the petition and supporting affidavit raised issues of exceptional public importance and it is in the public interest as well as in the interest of Jamincorp that there should be prompt and final determination of the issues by the Court.

(iii) There were irregularities on both sides and as stated above, the defects in the petitioner's proceedings were not only remediable but could be easily and promptly remedied.

(iv) The dismissal of the petition was subject to the following rider:

> "The dismissal not being a dismissal on the merits."

It was conceded by Mr. Rattray that this decision has left unresolved important questions as the petitioner can again bring a fresh petition.

Accordingly, the interest of justice was strongly in favour of granting the adjournment for the procedural irregularities to be remedied. It would be sufficient sanction to condemn the petitioner in costs.

For these reasons I concurred in allowing the appeal with the consequential orders as set out above.

CAREY, J.A.:

We are concerned in this appeal with two matters of procedure under the Companies (Winding-up) Rules 1949 (the U.K. Rules) which by Section 323(4) of the Companies Act have become incorporated into our law. The merits or otherwise of the proceedings filed against the respondent is not before us and nothing I say in this judgment is to be taken as expressing any view whatsoever in that regard.

The matter arises in this way. On the 6th November last, Wolfe, J., had before him a petition presented by the Minister of Finance under Section 11 of the Protection of Depositors Act, praying that the respondent company be wound up. The petition was supported by an affidavit in verification, a requirement of Rule 30 of the Winding-up Rules. By reason of the fact that the Minister of Finance, was not the deponent, a difficulty, it is said, has arisen. This is one of the procedural matters to which I earlier animadverted. The learned judge also had before him a Motion filed on behalf of the respondent which sought the following orders:

> "1. That the Minister of Finance, the Petitioner named in the Petition herein, which was preferred on to this Honourable Court on the ..... day of October, 1986, be restrained from taking any further proceedings upon the Petition.
>
> 2. That the Petition be removed from the file of proceedings and/or be struck out as it is an abuse of the process of this Honourable Court.
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> 3. That the appointment of the provisional liquidator be rescinded.
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> 4. That the Company be awarded damages for the loss of its reputation, goodwill, loss of profit and business.
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> 5. That the Petitioner be condemned in costs."

> "30. Every petition shall be verified by an affidavit referring thereto. Such affidavit shall be made by the petitioner, or by one of the petitioners, if more than one, or, in case the petition is presented by a corporation, by some director, secretary, or other principal officer thereof, and shall be sworn after and filed within four days after the petition is presented, and such affidavit shall be sufficient prima facie evidence of the statements in the petition."

The learned judge in the face of this conjoint application for dismissal by both parties was perforce constrained to accede to the agreed course, and accordingly, he made the order which gives rise to this appeal. It is right to point out that counsel for the Minister at the hearing in the Court below did not expressly assent to the orders sought on the Respondent's Motion, but his conduct in the circumstances inevitably led to the result which I have indicated. In these circumstances, one must have a great deal of sympathy for the learned judge, because, in the event, he had before him what amounted to an unopposed application to dismiss the petition.

Nevertheless, I fear he fell into error; he exercised his discretion, in my view, wrongly. Let me say at once that I am very conscious of the function of this Court in reviewing the exercise of a discretion. I accept as correct the statement of Buckley LJ., expressed in a judgment of the English Court of Appeal in Beck v. Value Capital Ltd. [1976] 2 All E.R. 102 at page 108 where he said this:

> "It is sufficient if the appellate court is satisfied that the judge, having taken all the proper circumstances into consideration, has arrived at a decision that is so clearly wrong that he must have misappreciated the weight to be given to some aspect of the case."

course, it may dismiss it. This view is not without precedent. Pennycuick, J., (as he then was) in Re Royal Mutual Benefit Building Society [1960] 3 All E.R. 460 at page 461 thought the phrase means - 'no more than that no order shall be made in favour of any petitioner who has not complied with the requirements of the rule ....."

If that be the true construction, then plainly the provision cannot be held mandatory but rather directory. So it must be wrong for the judge to have observed that the failure of the petitioner to attend before the Registrar was tantamount to an abandonment, or that the defect was incurable. What I suggest the rule requires is that the Registrar be satisfied as to compliance, prior to the Court making any order in favour of the petitioner in the terms of his application, in short, granting the petition.

The learned judge thought that an adjournment would have been "harsh, unconscionable, oppressive and unjust to the company." But, as it seems to me, this approach leaves entirely out of consideration, the interest of the public at large. The Minister of Finance acting under statutory powers conferred by the Protection of Depositors Act is charged with the responsibility of protecting the many depositors who have invested in the company. Plainly he is performing a public duty. In the proper exercise of his discretion, it was incumbent on the judge to weigh this aspect of the matter in the scale and he plainly, did not. He thus misappreciated this aspect of the matter. This Court can, therefore, and in my judgment, should do so.

It is not to be supposed that I am supporting shoddy work by the state's legal representative, but that deficiency, I venture to think, can best be dealt with by an

order for costs against them, and appropriate critical comment.

The learned judge's other basis for arriving at his decision was his conclusion that the deponent to the affidavit verifying the petition was not qualified to do so. He came to this conclusion by considering the plain meaning of the words of the Rule. I must confess some difficulty in appreciating why it was felt that it was at all necessary to consider this point when, at all event, no order could be made in favour of the petitioner on the petition or there could have been no hearing of the petition. Howsoever that may be, it would be useful to quote Rule 30. It ordains as follows:

> "30. Every petition shall be verified by affidavit referring thereto. Such affidavit shall be made by the petitioner, or by one of the petitioners, if more than one, or, in case the petition is presented by a corporation, by some director, secretary, or other principal officer thereof, and shall be sworn after and filed within four days after the petition is presented, and such affidavit shall be sufficient prima facie evidence of the statements in the petition."

The deponent to the affidavit, Oscar Simpson styled himself in these terms in paragraph 1:

> "1. That I am authorised under Section 12(2) of the Protection of Depositors Act to assist the Inspector in the performance of his functions under the Act; that pursuant to such authorisation, I am the principal person responsible for making regular inspection of Companies licensed under the said Act; that I have been concerned in this matter in such capacity with Jamincorp International Merchant Bank Limited as I have carried out several inspections on that Company."

The learned judge relied on Re Vic Groves & Co. Ltd. [1964] 2 All E.R. 839 to support his conclusion. In that case, a petition to wind up a company was presented by a

company. The affidavit in support was sworn by a divisional manager of the company, who was not in fact a director, secretary or other principal officer of the company. The company had taken the course of giving the divisional manager a power of attorney empowering him to present winding up petitions. Pennycuick, J., held that the deponent was not a director, secretary or other principal officer of the company within Rule 30 of the Companies Winding-up Rules 1949 and although in exceptional circumstances a petitioning company might support its petition by an affidavit sworn by some person (not being a director, secretary or other principal officer) under a power of attorney on its behalf, yet in the present case there were no exceptional circumstances and the affidavit was not sufficient compliance with Rule 30. Despite this conclusion, Pennycuick, J., did not dismiss the petition as Wolfe, J., did, but said this at page 842:

> "In the circumstances, I will take what is the usual course in cases of this kind, that is, to make a winding-up order subject to the production of an affidavit sworn by a director or secretary or a principal officer."

The significance of the case lies not in what the learned judge said, although that was important, but what he did. At page 841, he said this -

> "..... and I think that it is better to keep to the literal terms of the rule unless there are special circumstances making a departure from the terms of the rule desireable."

That is but another way of saying the rule is directory.

In the present case, we are not concerned with a corporation but with the Minister of Finance of this country. I would have thought that the character of the

applicant brought the case within the category of "special circumstances" and would operate to allow an affidavit by some person qualified to speak to the matter contained therein, to be received as a sufficient compliance with the rule.

The case of In re the Brandy Distiller & Company [1901] WIN 37 is I think, helpful. There the Attorney General on behalf of the Crown desired to present a petition for the winding-up of the company and the question was, who should make the affidavit made by the petitioner. Rigby, L.J., according to the note of the judgment, thought that it was highly inexpedient to adhere so strictly to the rule -

> "as to require the affidavit to be made by the Attorney General himself. He thought that the officer of the Court ought to receive the petition if it were verified by the affidavit of some fit and proper person, and the Solicitor to the Inland Revenue would be a proper person for the purpose."

One would have thought, seeing that the purpose of the affidavit is to verify facts, that the affidavit would be of more value if it were deposed to by some person who had an intimate knowledge of the facts than one who could only speak from heresay. This approach is to be seen in another case. In re African Farms Ltd., [1906] 1 Ch. 640, Warrington, J., had before him a petition where the affidavit in verification was made by the attorney or agent of the petitioner and not by the petitioner himself. The learned judge said this at page 641:

> "It is plain here that the attorney knows the material facts and that the petitioner does not and therefore that the attorney's evidence is of more value than that of the petitioner."

the person who actually carries out the duties overseeing companies licensed under the Act, is the Inspector who is authorised to appoint an assistant. See Section 13 and Section 12(2). There can be little doubt that this assistant would have more material within his knowledge than either the Minister or the Inspector. The affidavit recites in paragraph 1:

> "1. That I am authorised under Section 12(2) of the Protection of Depositors Act to assist the Inspector in the performance of his functions under the Act; that pursuant to such authorisation, I am the principal person responsible for making regular inspection of Companies licensed under the said Act; that I have been concerned in this matter in such capacity with Jamincorp International Merchant Bank Limited as I have carried out several inspections on that Company."

For the purpose of Rule 30, I would have little difficulty in holding that the affidavit filed by the assistant is a sufficient compliance with the rule.

I must mention in re Charterland Stores and Trading Co. [1900] 69 C.D. 861. In that case the petition was presented by a merchant, one Julius Weil, while the affidavit was made by Bernard Felix Foran, who described himself as Manager of the business carried on by the petitioner. The judge in that case, Wright, J., held that the rule was explicit in its terms but observed in the result that the case was one in which an opportunity ought to be given to the petitioner of putting the matter right and ordered that the petition be stood over. The learned judge, it is clear, regarded the words of the Rule as mandatory. This case is, however, not supplied by other authority. By 1906 the practise with respect to the affidavit in verification had become established and the view in the Chancery Division was that -

the rule is merely directory as to the kind of affidavit to be accepted as evidence (per Harrington, J., in In re African Farms Ltd. [supra]). I would hold that In re Charterland Stores and Trading Co. (supra) it's no longer good law.

Seeing that the authorities show that the rule is directory, the learned judge was not obliged to dismiss the petition on this ground. It bears repetition that in any event, the petition was, strictly speaking, not yet ready for consideration.

I come now to the motion by the Respondent. It is enough to say that having dismissed the petition, the other orders were merely consequential.

In my judgment, a judge should be slow to dismiss proceedings on a technicality, where it is plain that there is a triable issue. The learned judge in the case had a defective petition to wind up a company licensed under the Protection of Depositors Act and a Motion to dismiss that petition. Where he fell into error was his conclusion that Rule 33 was mandatory and he was constrained to dismiss the petition. Moreover, he failed to consider the public interest represented by the Minister of Finance initiating proceedings.

It was for these reasons, I agreed with the other of my lords that the appeal be allowed and directions issued as to the future progress of the matter.

DOWNER J.A. (AG.)

The principal issue of law to be decided in this appeal is whether Wolfe J. exercised his discretion correctly in refusing to grant an adjournment to the Minister of Finance, the Petitioner in these proceedings. In order to appreciate how the point of law emerged it is necessary to cite the following passage from the learned judge's Reasons for Judgment which reads thus:

> "Before me, Mr. Fraser for the Petitioner indicated that he was unable to proceed and applied for an adjournment on the basis that the Petitioner had not complied with Rule 33 of the Companies (winding-up) Rules 1949. More particularly Mr. Fraser submitted that the Petitioner had not attended before the Registrar prior to the hearing of the Petition to show compliance with the Rules.
>
> Rule 33 states -
>
> 'After a petition has been presented, the Petitioner, or his solicitor shall, on a day to be appointed by the Registrar, attend before the Registrar and satisfy him that the petition has been duly advertised, that the prescribed affidavit verifying the statements therein and the affidavit of service (if any) have been duly filed, and that the provisions of the Rules as to petitions have been duly complied with by the Petitioner. No order shall be made on the Petition of any petitioner who has not, prior to the hearing of the Petition, attended before the Registrar at the time appointed, and satisfied him in manner required by this Rule.'

Further thereto Mr. Fraser contended that there was no affidavit of opposition filed as required by Rule 36 (1) which states:

> 'Affidavits in opposition to a petition shall be filed within seven days of the date on which the affidavit verifying the Petition is filed, and notice of the Filing of every affidavit in opposition to such a petition shall be given to the Petitioner or his solicitor or London Agent, on the day on which the affidavit is filed.'

"For purpose of completeness I set out below Rule 30 of the said Rules:

> 'Every Petition shall be verified by an affidavit referring thereto. Such affidavit shall be made by the petitioner, or by one of the petitioners, if more than one, or, in case the petition is presented by a corporation, by some person who has been concerned in the matter on behalf of the corporation, and, shall be sworn after and filed within four days after the petition is presented, and such affidavit shall be sufficient prima facie evidence of the statements in the petition.'

Counsel for the applicant quite properly, in my view, conceded that the Rules governing the procedure to be followed on the presentation of a winding-up Petition are mandatory as opposed to directory. What then was the purpose of an adjournment when the defect under Rule 33 was terminal in nature? A date having been set for the hearing of the Petition it was obligatory of the Petitioner if he desired an order to be made on the Petition to obtain from the Registrar a date and to appear before the Registrar on that date to satisfy her of the compliance with the Rules. Failure so to do in my view is tantamount to an abandonment of the Petition. The defect as I have mentioned was incurable. To adjourn the petition in such circumstances would be an exercise in futility, as such an adjournment could not enhance the position of the Petitioner as far as this petition was concerned. What an adjournment might have done was to afford the Petitioner time to file a new Petition whilst the restraining order remained in force on the Petition which had incurable defects. A court must never so indulge any litigant. To have granted the adjournment would have been undoubtedly a wrong exercise of the Court's discretion in that the Court felt it would have been harsh, unconscionable, oppressive and unjust to the Company as nought could have been achieved by such an adjournment."

It is clear that in coming to its decision the court below accepted the interpretation of Rule 33 as adumbrated by Mr. Fraser for the Petitioner and supported by Mr. Rattray for the respondent. On appeal however Mr. Langrin for the appellant has invited this court to construe the rule as directory. That submission was well founded. The rule obliges the Petitioner to

attend on the Registrar to satisfy her that the petition was duly advertised and that the prescribed affidavit of service (if any) had been duly filed and that the provisions of the Rules as to petition have been duly complied with by the Petitioner.

What was the purpose of this provision? To my mind it is to ensure that the respondent was made aware of the case against him and that the Registrar was satisfied that he was so aware. In this case the respondent was served with the relevant papers and the petition was advertised in the Jamaica Gazette of October 27, 1986 and the Daily Gleaner of the same date. The only lapse was the Registrar's signature to indicate that she was satisfied that the Rules had been complied with.

It is true that Rule 33 stipulates that, no order should be made on the Petition if the Petitioner had not prior to the hearing of the Petition attended before the Registrar at the time appointed and satisfied her in the manner required by the rule. It is to be understood that no order implementing the Petition should be made and this implied that there should be no hearing and determining on the merits until the Registrar signifies compliance with the rules. It would not however preclude the granting of an adjournment for this is a discretion which always inheres in a court. Moreover, quite apart from the construction of Rule 33 standing by itself we were directed to Rule 226 which states:

> "226 (1) No proceedings under the Act or the Rules shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that Court.

" (2) No defect or irregularity in the appointment or election of an Official Receiver, Liquidator or member of a Committee of Inspection shall vitiate any act done by him in good faith."

When this rule is considered it is clear that it envisages that procedural irregularities as the failure to attend on the Registrar may occur. In such a case an adjournment ought to have been considered and granted unless the Court below found that substantial injustice was caused by the defect or irregularity and that the injustice could not be remedied by any rule of the Court. Regard must be given both to the interests of the Bank and to the security of the depositors' funds.

It is against that background that we must consider the learned judge's ruling that the defect of not attending on the Registrar was terminal in nature and amounted to an abandonment of the Petition. He added that the defect was incurable. Of necessity, the finding that a new petition would have to be presented was wrong, as the procedural defect could have been cured by attending on the Registrar. Instead of seeing the application in that light, the judge saw an adjournment as a means by which the restraining order would remain in force on the basis of a Petition with incurable defects. It was because of that error, that, in addition to his failing to see that an adjournment was an option in the circumstances of this case, that he held, to adjourn would have been unconscionable, oppressive and unjust to Jamincorp International Merchant Bank Ltd.

There are many authorities to support the principle "that an appellate court will not interfere with the discretion of the judge unless he has proceeded in his judgment on some erroneous principle of law or has not exercised his discretion on the facts of the case" per Lindlay L.J. Young v. Thomas (1892) 2 Ch. 134 at 136. There are statements to the same effect in Evans v. Bartlam (1937) A.C. 473. It is on those principles

that I find that Wolfe J. erred in law in finding that he had no discretion to grant an adjournment and further that had he granted one it would have been oppressive to the Bank.

Because we have allowed this appeal and ordered that there be a hearing on the merits by December 8, 1986, it is important to confine these reasons to the issues necessary to dispose of the appeal. Apart from dismissing the Petition Wolfe J. discharged the appointment of the Provisional Liquidator who had been appointed on the 15th October by Harrison J. He also ordered that when damages were assessed and the costs determined they were to be paid to Jamincorp International Merchant Bank Ltd before any other Petition on the same matter be brought. It was in the light of those circumstances that the Petitioner appealed on the following grounds:

> "1. That the learned trial judge erred in law in dismissing the Petition on the basis that the procedural requirement of Rule 33 of the Company Winding Up Rules had not been complied with.
>
> 2. That the learned trial judge erred in law in holding that the Respondent's affidavit in support of the Motion to Dismiss the Petition could be lawfully used as an Affidavit in opposition to the Petition.
>
> 3. That the learned trial judge erred in law in holding that the Petition was invalid because the Affidavit in Verification of Petition was not sworn to by the Petitioner himself.
>
> 4. That the learned trial judge erred in law in failing to exercise his discretion in a judicial manner to grant an adjourn in circumstances when it was reasonable to do so.
>
> 5. That the learned trial judge erred in law in awarding damages and ordering that such damages be assessed and paid to the Respondent prior to the presentation of any other Petition -

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(a) when he had not heard the merits of the Petition but sought to dismiss the Petition on a procedural point;

(b) because an Order that such damages be assessed and paid to the Respondent prior to the presentation of any other Petition was invalid, ultra vires and in excess of jurisdiction having regard to the provisions, object and purpose of the Protection of Depositors Act."

It is pertinent to advert to interlocutory matters in order to appreciate the significance of the order below and grounds of appeal. The Petition was presented by the Hon. Minister of Finance on Jamincorp International Merchant Bank Ltd pursuant to Section 11 of the Protection of Depositors Act. That Act as the Title suggests is for the protection of Depositors. It is for the Minister, given his statutory powers to institute proceedings to protect Depositors. The grounds of the Petition were that the assets of the Bank were less than the amount of its liabilities that it was unable to pay its depositors and that the Bank failed to comply with section 6 (b) of the Act to deliver accounts to the Ministry of Finance for the financial year 1985. Such allegations were of a most serious nature and the Bank has presented a detailed answer to these charges. It is in the interests of justice that this matter be determined with promptitude and not only is it in the interests of justice but it is in the interests of the Bank to vindicate its claims against the Inspectorate who have been given enormous powers to police this area of the money market. It is not to be questioned that in a proper case a judge would have had the power to strike out a case and to order costs against the Petitioner, but the instances must be rare indeed when a court could fetter the statutory power of a Minister by imposing a condition that proceedings could only be instituted

again on the condition that the damages assessed and the costs determined be paid. This is not such a case and on this ground I would find for the appellant.

Complaint was made that the trial judge erred in law in holding that the respondent's affidavit in support of the Motion to dismiss could be used in opposition to the Petition. It must be noted that the petition came on for hearing on the 6th of November, 1986 and there was also a motion to dismiss the petition as well as an affidavit in support of that Motion. It is pertinent to set out the grounds of the Motion as it enables us to understand why the judge made the consequential orders he did. The grounds read:

> "1. That the Minister of Finance, the Petitioner named in the Petition herein, which was preferred to this Honourable Court on the day of October, 1986, be restrained from taking any further proceedings upon the Petition.
>
> 2. That the Petition be removed from the file of proceedings and/or be struck out as it is an abuse of the process of this Honourable Court.
>
> 3. That the appointment of the provisional Liquidator be rescinded.
>
> 4. That the Company be awarded damages for the loss of its reputation, goodwill, loss of profit and business.
>
> 5. That the Petitioner be condemned in costs,
>
> 6. That this Honourable Court grants such further or other relief as it deems."

The provisions regarding an Affidavit in opposition and reply are set out in 36 (1) of the Winding Up Rules cited previously. The affidavit in verification was filed on the 7th of October and served on the 17th of October. The factual situation was that the Petition was filed on the 7th of October, was served on the Company on the 17th of October, the Notice of Motion of

the Respondent and the affidavit was filed and served on the 31st of October, so there was a complaint by the Petitioner that no affidavit in response was filed and consequently there could be no affidavit in reply. Because of the ruling we have made, that the Petition stands, we ordered that the Affidavit in support of the Motion to dismiss be treated as an Affidavit in response.

As far as the remaining grounds of appeal are concerned complaint was made that the trial judge erred in finding that the Petition was invalid because the Affidavit of Verification of the Petition was not made by the Minister or the Inspector of Banks who had a statutory relationship with the Minister. It is necessary to cite section 12 in order to determine the competency of Oscar Simpson who deponed that he was authorised pursuant to section 12 (2) of the Protection of Depositors Act to assist the Inspector in the performance of his duties. That section reads:

> "12 (1) The Minister shall from time to time designate a fit and proper person to be Inspector for the purposes of this Act.
>
> (2) The Inspector may, with the approval of the Minister, in writing authorize any other person to assist the Inspector in the performance of his functions under this Act."

We were informed that the Governor of the Bank of Jamaica is the Inspector, and the Act recognizes that he would need assistance to carry out the duties pursuant to this Act. As a matter of construction the person appointed to assist the Inspector is a person capable of verifying the Petition, and he states that he is the principal person concerned in making regular inspection of companies licensed under the Act. Further, he deponed that he carried out several inspections of this Merchant Bank. Authorities were put before us regarding persons apart from the Petitioner whom the courts have held to be competent to verify. It is useful to cite two of these. In Re: African Farms Ltd (1906) 1 Ch. 640 the headnote reads:

> "Rule 29 of the Companies (Winding-up) Rules, 1903, which provides that a petition for winding up a company shall be verified by an affidavit made by the petitioner, is merely directory as to the kind of affidavit to be accepted as prima facie evidence of the statements in the petition. The Court will therefore, in a proper case, accept the affidavit of the petitioner's attorney or agent, particularly where it is satisfied that the material facts are more within the knowledge of the deponent than of the petitioner himself."

The other authority is re: Allied Produce Co. Ltd (1967) 3 All E.R. 399, Buckley J. stated in part:

> "The Petition is based on that report and is supported by an affidavit sworn by a gentleman who is principal examiner in the insurance and companies department of the Board of Trade, who exhibits a copy of the petition and verifies the statements in it in general terms. He exhibits a copy of the inspectors' report and he deposes to the effect that he believes the facts set out in the report to be true and that the opinions contained in it are the opinions of the inspectors."

In these circumstances the ruling of the trial judge that the officer Simpson could not make a verification or present the affidavit was contrary to the intendment of Section 12 of the Protection of Depositors Act.

With regard to the order made for damages, in the context of this case it would be for damages as a consequence of the ex-parte summons to appoint a Provisional Liquidator. The importance of the claim is that pursuant to section 11 (3) of the Protection of Depositors Act, while the proceedings on the petition are pending, the Bank could not accept deposits or make payments for the benefit of any person who was an officer of the company without the consent of the Court. For a Bank this is a drastic measure for as soon as the Petition has been served business ceases. However, given our decision that the petition stands, the order below for the assessment of damages on the basis of the usual undertaking given by the Attorney General must be set aside.

This case was keenly contested and well argued on both sides, and although at the close of the submissions we made the appropriate order, because of the importance of the issues involved we considered it necessary to put our reasons in writing.

What transpired before the judge at that hearing is not without interest and must, therefore, be rehearsed, and happily, that can be done quite shortly. Counsel who then appeared for the Minister of Finance (not being either of those now before us) sought an adjournment on the basis that Rule 33 of the Winding-up Rule had not been observed. Rule 33 provides as follows:

> "33. After a petition has been presented, the petitioner, or his solicitor shall, on a day to be appointed by the Registrar, attend before the Registrar and satisfy him that the petition has been duly advertised, that the prescribed affidavit verifying the statements therein and the affidavit of service (if any) have been duly filed, and that the provisions of the Rules as to petitions have been duly complied with by the petitioner. No order shall be made on the petition of any petitioner who has not, prior to the hearing of the petition, attended before the Registrar at the time appointed, and satisfied him in manner required by this Rule."

The specific defect to which he called attention was the failure of the petitioner or his attorney-at-law to attend before the Registrar to satisfy him as to compliance with the provisions of the Rule. He said, however, that this omission was fatal and could not be cured by an adjournment. He also deprecated the absence of an affidavit in opposition, as required by Rule 36.

One would be pardoned for thinking that Counsel was requiring the Court to dismiss his petition on the ground that his tackle was not in order.

When Mr. Rattray rose to address the learned judge, he supported the nascent application of counsel for the petitioner by pointing out the sanction for non-compliance, and fired off his own salvo - the affidavit in support of the petition was in breach of Rule 30 which states:

He continued at page 642:

> "I have looked into the practice, and have ascertained that there have been many cases, some of which are unreported, in which an affidavit other than that of the petitioner has been accepted. I have also spoken respecting the matter to Buckley J., to whom the company business has been assigned. He has pointed out to me, and I in turn now desire to point out, that r. 29 does not state what is to be the result of non-compliance with its provisions. The rule does not say that the petition is in that case to fail. The rule is merely directory as to the kind of affidavit to be accepted as evidence. That leaves it open to the Court, in a proper case, to accept an affidavit which in an ordinary case coming before the Court would be accepted as sufficient evidence."

The r. 29 in that case is the Precursor of R. 30.

We have, for whatever reason, (I suspect merely from convenience) incorporated the English Companies (Winding-up) Rules 1949 and accordingly, I would consider it highly illogical that we should or should have developed some practice altogether different from the jurisdiction from which the rule is derived. The rule being directory, the Court is not obliged to dismiss a petition on the ground that the petition is not verified by the petitioner.

Mr. Rattray who argued for the respondent, submitted on this point that specifically, Mr. Simpson was not authorised to make the affidavit. He made this into a point of law. What he said was that the Protection of Depositors Act does not create any statutory post of assistant Inspector, and accordingly, he was not an authorised agent of the Minister nor was he acting pursuant to devolution of ministerial power.

The Minister of Finance is authorised to file a petition for winding up a company under powers conferred by Section 11(i) of the Protection of Depositors Act. But

And again at page 109:

> "Where a trial judge is not shown to have erred in principle, his exercise of a discretionary power should not be interfered with unless the appellate court is of opinion that his conclusion is one that involves injustice, or, to use the language of Lord Wright, the appellate court is clearly satisfied that the judge of first instance was wrong."

The learned judge set out the reasons for his judgment in a note which has been made available to us and we have had the benefit of his views on the relevant rules. First, as to Rule 33 of the Winding-up Rules, he concluded, in agreement with both counsel, that the provisions were mandatory. He reasoned that an adjournment was incapable of curing the defect but would allow the petitioner time to file a new petition whilst a restraining order remained in force. "A court", he said, "must never indulge any litigant."

It was not in dispute that the petitioner had carried out the schedule of acts, with respect to which, the Registrar was required to be satisfied. Indeed as I understood the matter, all the relevant documents were filed in the Registry as to compliance but the Registrar had not appointed a day for the petitioner or his attorney to show compliance.

Rule 33 provides as a sanction against the petitioner's failure to attend before the Registrar that "no order shall be made on the petition." In this regard, the term "no order" means that no order in terms of the petitioner's application can be made on his petition, but it does not mean that the court must, willy nilly, dismiss the petition. The Court is at liberty to adjourn the proceedings or of