JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 99/89

BEFORE: THE HON MR JUSTICE WRIGHT, J.A.
THE HON MISS JUSTICE MORGAN, J.A.
THE HON MR JUSTICE BINGHAM, J.A. (AG)

BETWEEN	JAMAICA EXPORT CREDIT INSURANCE CORPORATION	CLAIMANT/ APPELLANT
AND	ALCRON DEVELOPMENT LIMITED	PLAINTIFF/ RESPONDENT
AND	ANTILLEAN FOOD PROCESSORS LIMITED (IN RECEIVERSHIP)	DEFENDANT/ RESPONDENT

R.N.A. Henriques, QC, Allan Wood and Ransford Braham instructed by Livingston Alexander Levy for claimant/appellant

Crafton Miller, Nancy Anderson and Susan Richardson for plaintiff/respondent

K.C. Burke for Bailiff

July 9th & 10th and ~~December~~ 4, 1991

WRIGHT, J.A.

This is an appeal against the undermentioned order made by Patterson J. on November 10, 1989:

> "IT IS HEREBY ORDERED that the whole of the goods listed in the Schedule of the Bill of Sale exhibited to the said Affidavit of Roy Williams be sold by the Bailiff and that the proceeds of sale be applied in the following manner:-
>
> Firstly, for the payment of all fees charges and expenses incurred by the Bailiff in taking possession keeping and selling the goods covered by the Bill of Sale. The Bailiff is authorised to deduct the amounts mentioned above in accordance with the prescribed scale of fees.
>
> Secondly, the net proceeds of sale shall be paid into the Treasury to the credit of this Suit,
>
> (a) to be applied in satisfaction of the Defendant's indebtedness to the holder of the bill of sale, Jamaica Export Credit Insurance Corporation Limited, the Claimant, and
>
> (b) the surplus, if any, to be applied in satisfaction of the Defendant's indebtedness to the Plaintiff herein, Alcron Development Limited

AND IT IS FURTHER ORDERED that in respect of the goods and chattels not covered by the Bill of Sale to wit the 3 motor vehicles which were seized and have been sold by the Bailiff, the proceeds of sale being in the hands of the Bailiff, that the Claimant do not have any claim thereto, and that the Bailiff should proceed as Section 609 of the Judicature (Civil Procedure Code) Law directs, namely "All moneys payable under a judgment levied by execution, or otherwise under the process of the Court shall be paid into the Treasury to the credit of the suit, unless the Court otherwise directs", AND the Court doth order that the Bailiff's fees, charges and expenses incurred in relation to the said 3 motor cars levied shall be deducted from the proceeds of sale of those goods and thereafter, the net proceeds of sale shall be paid into the Treasury to the credit of the suit, to be applied in satisfaction of the Plaintiff's Judgment

AND IT IS FURTHER ORDERED that the Claimant do pay to Howard Saint Clair Bennett, Bailiff (the Applicant) his costs of and occasioned by these proceedings and also that the Claimant do pay to the Plaintiff herein its costs of and occasioned by these proceedings to be taxed if not agreed.

Certificate for Counsel for Howard Saint Clair Bennett, Bailiff (The Applicant) and for the Plaintiff.

AND, on Application of Counsel for the Claimant, special leave granted to the Claimant to appeal in accordance with Section 557 of the Judicature (Civil Procedure Code) Law."

The seven Grounds of Appeal on the basis of which the appeal was presented are as follows:

"1. That the learned trial Judge erred as a matter of law when he held that the motor vehicles and other goods not forming part of the Bill of Sale can be sold and the proceeds thereof paid to the Plaintiff/Respondent as an execution creditor as such an order is contrary to the provisions of the Companies Act.

2. The learned trial Judge erred as a matter of law when he made an Order contrary to the statutory provisions namely, the Companies Act which provided that after a Petition for winding-up has been presented to the Court and before execution is completed by sale of the goods no sale can take place and the proceeds delivered to the execution creditor as the interest in such goods have to be shared pari passu with all unsecured creditors.

3. The learned trial Judge erred as a matter of law when he failed to appreciate that the Claimant/Appellant was also an unsecured creditor and having presented a Petition to wind up the Defendant/Respondent, Antillean Food Processors Limited before execution was completed, that the execution creditor would not be entitled to have the whole of the proceeds of sale to the detriment of the unsecured creditors as provided by the provisions of the Companies Act.

4. That the learned trial Judge erred as a matter of law when he held that the chattels, the subject matter of the Bill of Sale should be sold and costs deducted for the Bailiff and the proceeds thereafter paid over to the Claimant/Appellant.

5. The learned trial Judge erred as a matter of law as he failed to appreciate that the provisions of the Companies Act applied to both secured and unsecured creditors and after a Petition for winding-up was executed and before execution completed no Order could be made which in effect adversely affected secured and unsecured creditors.

6. The learned trial Judge erred as a matter of law when he failed to appreciate that the Claimant/Appellant is a secured creditor protected by a Bill of Sale and could not be made liable for the cost of the execution creditor in respect of the Bailiff and consequently further erred when he made an Order that the goods of the secured creditor, the Appellant should be sold to pay such costs and the proceeds thereafter paid to the secured creditor.

7. The learned trial Judge erred as a matter of law when he failed to appreciate that it was only the Claimant/Appellant as the secured creditor, who could elect whether or not to realise the security by selling same and the Judge erred when he made an Order that the Chattels protected by the Bill of Sale should be sold."

The facts of the case reveal an intricate network of relationships. The Defendant/Respondent (Antillean) and the Plaintiff/Respondent (Alcron) are related companies. Antillean is a debtor of Jamincorp International Merchant Bank Ltd. (Jamincorp) which was wound up by order of the Supreme Court made on September 9, 1988 pursuant to a petition which was filed on October 7, 1986; the majority of the shares in Alcron is owned by Jamincorp while Alcron owns the building occupied by Antillean at a monthly rental of US$046,000.00. It was not surprising that the rental fell in arrears resulting in the issue of a writ on 28th July, 1986 claiming US$1,994,130.44. Appearance was entered but no defence having been filed and delivered Alcron on October 21, 1986 entered judgment for the sum claimed plus $293.70 for costs. Subsequently, on November 5, 1986 a writ of Seizure and Sale was issued and it appears that it was executed on November 28, 1986. On that very day the claimant's

attorney-at-law by letter informed the bailiff of the claimant's interest under a Bill of Sale in certain of the goods taken in execution viz, the furniture in the chairman's office and the factory machinery equipment and fittings. That Bill of Sale was executed on December 1, 1983 and was duly registered in accordance with section 93(1) of the Companies Act. The goods not covered by the Bill of Sale included three motor cars, finished goods, furnishings and fixtures. Alcron would not admit the entitlement of the claimant to the goods under the Bill of Sale so the bailiff could not release them but it is to be noted that they were not removed from the premises.

On December 12, 1986, just two weeks after the execution of the writ of Seizure and Sale the claimant presented a petition under the Companies Act for the winding up of Antillean on the ground that that company was insolvent and unable to pay its debts. The debt owed to the petitioner was stated to be US$9,499,382.31 plus interest and there were several other creditors.

The petition came before the court on February 9, 1987 when, at the request of Antillean, it was adjourned to March 26, then to April 25 and finally to May 25, 1987. Those adjournments were influenced by the proceedings for the winding-up of Jamincorp. No further action has been taken regarding the petition for the winding up of Antillean. Accordingly no liquidator was ever appointed. However, it is relevant to note that much earlier, to wit, on June 3, 1985 pursuant to the Bill of Sale the claimant (JECIC) had put Antillean into Receivership and appointed a Receiver who was still in place when the petition for winding-up was filed.

In due course the bailiff advertised some of the goods for sale by public auction and on March 28, 1987 he sold the three cars. Two days later on March 30, the claimant's attorney-at-law wrote to the bailiff as follows:

"March 30, 1987

The Bailiff
Resident Magistrate's Court
St. Andrew
Kingston 10

Attention: Mr. Bennett

Dear Sir:

Re: Suit No. C.L. A 143 of 1986
Alcron Development Limited vs
Antillean Food Processors Ltd

We write on behalf of the JECIC a creditor of Antillean Food Processors Limited. It has been brought to our attention that in the Gleaner of Wednesday March 25, 1987 and Saturday March 28, 1987 you advertised equipment and motor vehicles for sale.

We wish to inform you that machinery and equipment for fish processing is covered by a Bill of Sale in favour of our clients dated December 1, 1983 and registered on December 19, 1983, at the Companies Registry.

In so far as three (3) motor vehicles are concerned, which we understand you have purported to sell on March 26, 1987, we wish to inform you that any disposition of the funds of the sale constitutes a breach of the Companies Act, as a Petition to wind up the Company was presented to the Court by our clients on December 12, 1986. The law is quite clear on the point that any execution after the commencement of winding up shall be void to all intents. The law further provides that execution is not completed until there has been seizure and sale.

It is clear in this case that as the Petition was presented on December 12, 1986, execution was not completed before the presentation, as the chattels were not sold prior to that date.

The purported sale by you is therefore void, and if you have funds in hand as the proceeds of such sale, they cannot be distributed to the execution creditor. To do so will constitute a breach of the law and our clients will have to hold you responsible therefor.

Yours faithfully,
LIVINGSTON, ALEXANDER & LEVY

Per:"

This letter emphasizes the difference in the ownership of the goods secured by the Bill of Sale and the other goods with particular reference to the three cars and I think Patterson J. is correct when he held concerning that letter:

> "In my view it does not lay claim, either specifically or by reference, to the three motor vehicles taken in execution."

But more of this anon. It was not until May 30, 1987 that the bailiff notified Alcron of the claimant's claim and requested them to admit or dispute the title of the claimant to the goods. But Alcron would not admit and as a result the bailiff issued the instant interpleader summons dated July 13, 1987 which reads:

> " "TAKE NOTICE that you are hereby Summoned to appear before the Supreme Court on the 27th day of October, 1987 at the hour of ten of the clock in the forenoon on the hearing of an Application on the part of Howard Saint Clair Bennett the Bailiff of the Resident Magistrate's Court for the parish of Saint Andrew that the Plaintiff and Jamaica Export Credit Insurance Corporation Limited the Claimant appear and state the nature and particulars of their respective claims to the goods and chattels seized by the Bailiff of the Resident Magistrate's Court for the parish of Saint Andrew under a Writ of Seizure and Sale issued in this action and maintain or relinquish the same and abide by such Order as may be made herein, and for such Order to be made for costs as may be just and reasonable.
>
> WITNESS the HONOURABLE Edward Zacca, Chief Justice of the Supreme Court of Judicature of Jamaica, this 13 day of July 1987.
>
> R E G I S T R A R.
>
> TO: The Plaintiff
> Alcron Development Limited
> or its Attorneys-at-law"

However, despite the terms of this summons it was not until November 9, 1989 almost three years from the date of seizure and over two years from the date of the summons, when the parties were before the court that Alcron admitted the claimant's claim to the goods covered by the Bill of Sale. Despite the manifest intransigence of Alcron in this regard the learned trial judge nevertheless ordered the sale of all the goods secured to JECIC and made the bailiff's fees in respect of those goods a priority claim on the proceeds of sale.

Grounds 4,6 and 7 of the Grounds of Appeal complain about the manner in which the learned trial judge dealt with the goods covered by the Bill of Sale. I will, therefore, now address my attention to

this aspect of the case.

Goods Secured by the Bill of Sale

In written submissions which were amplified in arguments before us two main contentions are set forth viz:

1. Alcron having eventually conceded JECIC'S claim those goods ought not to have been ordered sold.

2. Having regard to the fact that from the day of the seizure JECIC asserted its claim, liability for the bailiff's fees for the period during which Alcron persisted in denying that claim should have fallen not on JECIC but on Alcron.

The learned trial judge in making the orders complained of relied upon the provisions of sections 558 and 608 of the Judicature (Civil Procedure Code) Law which read as follows:

"'558 - When goods or chattels have been seized in execution by a bailiff, or other officer charged with the execution of process of the Court, and any claimant alleges that he is entitled under a bill of sale or otherwise, to the goods or chattels by way of security for debt, the Court or a Judge may order the sale of the whole or a part thereof and direct the application of the proceeds of the sale in such manner, and upon such terms as may be just'.

'608 - Where any property of any kind is seized in execution, under any judgment or order in any suit or proceeding, which is claimed by any person other than judgment debtor, such claim may be determined by the Court in a summary way upon an interpleader summons to be taken out by such claimant against the party prosecuting the judgment or order, or by the bailiff against such claimant and the prosecuting party: Provided, that on the hearing of such summons, make such order for the trial and determination of the rights of the parties as it thinks expedient, and for the custody in the meanwhile of the property in dispute, and the costs thereof; and where some third person claims to be entitled, under a bill of sale or otherwise, to any property so seized as aforesaid, by way of security for a debt, the Court may order a sale of the whole or part thereof, upon such terms as to payment of the whole or part of the secured debt or otherwise, as it thinks fit, and may direct the application of the proceeds of such sale in such manner, and upon such terms as to such Court may seem fit'."

Unfortunately he seems to have lost sight of the requirement that such order as the court made should be "upon such terms as may be just" (sec. 558) and gave undue prominence to the payment of the

bailiff's fees. After setting out the provisions of section 608 (supra) and making reference to the power of sale contained in section 558 (supra) the learned trial judge proceeded thus:

> "In the instant case, the claimants have alleged that they are entitled under a bill of sale to certain goods listed in the schedule thereto and the judgment creditors have in these proceedings, relinquished claim to those goods so listed. In the circumstances I will order a sale of the whole of those goods and direct that the proceeds of sale be applied in the following manner..."

In my opinion the order for sale bears all the trappings of a non sequitur. There is nothing in what preceded the order which even vaguely indicated that such an order would be made. The claimant cannot, of course, deny the power of the court to make such an order in appropriate circumstances but contend that the instant case does not provide such circumstances. It is submitted that due regard must be had to the history of the legislation empowering a sale of goods secured by a bill of sale and, further, that having regard to the history of this case Alcron should pay the bailiff's fees in respect of the goods under the Bill of Sale. For this latter submission support is sought from the 1991 Supreme Court Practice (UK) Order 17/6/1 which states:

> "As a general rule in a sheriff's interpleader where the claimant fails the sheriff is entitled to his costs (including possession money) from the time of the notice of claim or from the sale, whichever be the earlier. Where the claimant succeeds the sheriff is entitled as against the execution creditor to costs from the time when the latter authorized the interpleader proceedings - i.e. generally from the return of the interpleader summons. But in either case the sheriff gets his costs from the execution creditor who (if successful) obtains a remedy over against the claimant. Similarly a successful claimant gets his costs against the execution creditor from the return of the interpleader summons."

It is certainly not difficult to identify or apply the justice running through this provision.

On the historical aspect of the legislation earlier referred to notice must be taken of the fact that section 558 and 608 (supra) are in pari materia with Order 17 rule 6 of the Supreme Court

Practice 1991 (UK) formerly Order 57 rule 12 which were first introduced in the United Kingdom by the Common Law Procedure Act 1860 and 24 Victoria C 126 section 13. These provisions sought to remedy an injustice which arose from the fact that a dishonest debtor could seek shelter from his creditors by means of a bill of sale far in excesss of the debt due to the creditor who held the bill of sale. Those goods enjoyed immunity against seizure and sale to satisfy other debts. The new provisions sought to rectify this defect by allowing a sale of those goods. But since it would not be justice to substitute one form of injustice for another which would certainly be the case just to order the sale of the secured goods conditions were attached. Prominent among those conditions is the requirement that upon sale of the aforesaid goods a surplus in excess of the secured debt must be realised, because it was never intended to deprive the secured creditor of his interest. This position was clarified by Lindley M.R. in Stern v Tegner [1898] 1 QB 37 at p.40 as follows:

> '"Now I come to Order 57 R. 12: 'When goods or chattels have been seized in execution by a sheriff or other officer charged with the execution of process of the High Court, and any claimant alleges that he is entitled, under a bill of sale or otherwise, to the goods or chattels by way of security for debt the Court or a judge may order the sale of the whole or a part thereof, and direct the application of the proceeds of the sale in such manner and upon such terms as may be just'. That rule is copied and reproduced with slight variations from section 13 of the Common Law Procedure Act, 1860 (23 and 24 VICT. C.126), the object of which is very concisely stated thus by Day J. (Day on the Common Law Procedure Acts, 4th Ed page 361): 'This section confers new and valuable powers. Hitherto if the claimant established a title to goods and however great the value by way of security for however small a sum the execution was defeated absolutely, as the Court had no power to provide for the realisation of the security and the disposal of the surplus or for the payment of the debt and discharge of the security by the execution creditor. This defect is now mended and a convenient and much used scheme for defeating creditors is interrupted".'

Later on he had this to say:

> "'But Order 57 R 12 was not intended to deprive secured creditors of the benefit of their security, and when this will, or very likely will, be the effect of a sale the

> court ought not to direct the sale, but ought to direct the sheriff to withdraw."

The learned Master of the Rolls then proceeded to deal with the question of sale in three instances the third of which would be applicable to the instant case. At page 42 he had this to say:

> "The third case is somewhat more difficult. When it is doubtful whether the security is sufficient to pay off the secured creditor or not, what is the right course to take? The proper course in such a case is for the court to say 'Unless the execution creditor will guarantee the secured creditor against any loss by sale, we will not order the sale'. Here the execution creditor and the trustee have declined to redeem and declined to give any guarantee against any loss. ...upon the evidence I am perfectly satisfied that if these goods are sold by the sheriff it is extremely doubtful whether there will be enough to pay the bill of sale holder. Under those circumstances, how can it be just to enforce a sale and deprive him of his security? That would be to abuse the rule not to put it into operation in a case to meet which it was passed."

It is patent from the judgment of the learned trial judge that none of the abovementioned factors were considered in coming to the decision to order the sale. Indeed it was pointed out that the security was even less than the debts due and that there was no evidence of what a forced sale of the security would yield. In those circumstances the sale would in all likelihood do harm to the claimant and no good to Alcron (the execution creditor). In not dissimilar circumstances Bramwell B in Pearce v Watkins (1851) Foster & Finlayson's Reports p.377 at p.378 held that the claimant has a right to "nurse his security".

Mr. Miller for Alcron (the plaintiff/respondent) did not seek to sustain the Order for the sale of the goods secured by the Bill of Sale. Indeed, any such effort would have been futile. The Order is demonstrably bad and must be set aside. The bailiff's fees in respect of those goods must be paid by Alcron and the claimant is entitled to the costs of appeal and costs in the court below with respect to those goods.

The Unsecured Goods

Grounds of Appeal 1,3 and 5 relate to these goods concerning which it was submitted that in making an order for the distribution to the plaintiff/respondent of the proceeds of the sale of the three motor vehicles not falling under the Bill of Sale, the learned judge acted in disregard of the relevant provisions of the Companies Act and the proper principles to be applied.

Now, in considering the locus standi of the claimant vis-a-vis these goods it is recognized that the claimant's position differs substantially from its position with reference to the secured goods to which it could plead entitlement. Here the claimant, as an unsecured creditor for a portion of its debts is resisting the payment of one unsecured creditor, Alcron, over other unsecured creditors. The petition for winding up discloses the following debts:

To the claimant - US$9,499,382.31 + interest
US$1,497,027.40

Norwegian Knoners - 19,367,641.62 + interest

Jamaica Citizens Bank Ltd. - US$2,217,040.05.

The petition alleges the insolvency of the Company (Antillean). As an unsecured creditor for rental amounting to US$1,994,130.44 plus costs $293.70 Alcron sought to garner the only realized assets i.e. the proceeds of the sale of the three cars. Should that claim be sanctioned and, if not, how should the matter be treated? Sections 299 and 300 of the Companies Act relate to this issue. The sections are as follows:

> "S299 (1) Where a creditor has issued execution against the goods or lands of a company or has attached any debt due to the company, and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator in the winding up of the company unless he has completed the execution or attachment before the commencement of the winding up:
>
> Provided that -
>
> (a) where any creditor has had notice of a meeting having been called at which a resolution for voluntary winding up is to be proposed, the

date on which the creditor so had notice shall for the purposes of the foregoing provision be substituted for the date of the commencement of the winding up;

(b) a person who purchases in good faith under a sale by a bailiff any goods of a company on which an execution has been levied shall in all cases acquire a good title to them against the liquidator; and

(c) the rights conferred by this subsection on the liquidator may be set aside by the Court in favour of the creditor to such extent and subject to such terms as the Court may think fit.

(2) For the purposes of this section an execution against goods shall be taken to be completed by seizure and sale, and an attachment of a debt shall be deemed to be completed by receipt of the debt and an execution against land shall be deemed to be completed from the date of the order for sale or by seizure as the case may be, and, in the case of an equitable interest, by the appointment of a receiver.

(3) In this section and in section 300 the expression "goods" includes all chattels personal, and the expression "bailiff" includes any officer charged with the execution of a writ or other process.

S300 (1) Subject to the provisions of subsection (3), where any goods of a company are taken in execution, and, before the sale thereof or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the bailiff that a provisional liquidator has been appointed or that a winding up order has been made or that a resolution for voluntary winding up has been passed, the bailiff shall, on being so required, deliver the goods and any money seized or received in part satisfaction of the execution to the liquidator, but the costs of the execution shall be a first charge on the goods or money so delivered, and the liquidator may sell the goods, or a sufficient part thereof, for the purpose of satisfying that charge.

(2) Subject to the provisions of subsection (3), where under an execution in respect of a judgment for a sum exceeding forty dollars the goods of a company are sold or money is paid in order to avoid sale, the bailiff shall deduct the costs of the execution from the proceeds of the sale or the money paid and retain the balance for fourteen days, and if within that time notice is served on him of a petition for the winding up of the company having been presented or of a meeting having been called at which there is to be proposed a resolution for the voluntary winding up of the company and an order is made or a resolution is passed,

> as the case may be, for the winding up of the company, the bailiff shall pay the balance to the liquidator, who shall be entitled to retain it as against the execution creditor.
>
> (3) The rights conferred by this section on the liquidator may be set aside by the Court in favour of the creditor to such extent and subject to such terms as the Court thinks fit."

First of all, however, it must be borne in mind that when a winding up petition has been filed the fundamental principle is that creditors of a class must be treated on an equal basis. Accordingly, one creditor should not be given any preference over other creditors of the same class. See Bowkett v Fullers United Electric Works Ltd [1923] 1 K.B. 160. By section 210(2) of the Companies Act the winding up of Antillean "commenced at the time of the presentation of the petition for winding up" i.e. December 12, 1986 and section 209 makes void to all intents "any attachment... or execution put in force against the estate or effects of the company after the commencement of the winding up". In this case the writ of Seizure and Sale was issued on November 5, 1986 and executed on November 28, 1986 - roughly two weeks ahead of the presentation of the winding up petition. Accordingly the execution was not void.

In the instant case, unlike in Bowkett's case (supra) there was no application to stay or restrain the proceedings. Accordingly, the fruits of the execution must be dealt with. Apropos of the claimant's contention reference was made to D. Wilson (Birmingham) Ltd. v Metropolitan Property Development Ltd. and Anor (1975) 2 All E.R. 814 a case decided under section 325(1)(c) of the Companies Act of 1948 which is in pari materia with section 299(1)(c) (supra). The point at issue was whether the court should allow a judgment creditor the benefit of garnishee proceedings which had been initiated after the parent company of a group had gone into creditors' voluntary liquidation and the judgment creditor had been advised that creditors had decided on a moratorium of six months and a decision to proceed with a scheme of arrangement under section 206 of the Companies Act for the ultimate benefit of all creditors. In an appeal against the

making absolute of the garnishee order nisi the Court of Appeal held, inter alia, that:

> "(ii) In considering whether or not to exercise its discretion to make absolute a garnishee order in favour of a judgment creditor of a company which had gone into liquidation, the court had to bear in mind the position of all other creditors of the judgment debtor and, in particular, was bound to have regard to any proceedings which had been launched for ensuring the distribution of the available assets of the debtor company among its creditors pari passu. The fact that the debt which the judgment creditor was seeking to attach was one which only existed because the judgment creditor had performed for the judgment debtor, was not a reason for disregarding the fundamental policy of the law that creditors should as far as possible be treated with equality."

The garnishee order was discharged and so the judgment creditor was not allowed to steal a march on the other creditors. I suspect that the relevance of the case to present proceedings is the emphasis placed on the fundamental policy of the law as stated. Further support was sought from Rainbow and another v Moorgate Properties Ltd (1975) 2 All.E.R. 821. In that case the parent company of a group of companies engaged in development went into voluntary liquidation on June 7, 1974 because of acute financial difficulties. A creditor with unsecured debts took steps to secure his debts and on November 11, 1974 obtained charging Orders nisi on the debtor's leasehold interest in the property. On December 3, 1974 the company presented its own petition for a winding up order. The orders nisi were nonetheless made absolute. Because of the fact that the debtor was or was likely to turn out to be insolvent the Court of Appeal held that it was wrong to grant the charging Order because that would prefer one unsecured creditor over other creditors. On that basis the court overturned the charging Orders.

Comparing the calendar of events in the instant case Mr. Miller was quick to point out that unlike in the Rainbow case in the instant case Alcron's effort at satisfying its debt was earlier than the presentation of the winding-up petition which he observed has not been prosecuted to a conclusion. No liquidator has been

appointed despite the conclusion of the hearing in the Jamincorp winding-up which had occasioned the postponement of hearings for the winding-up of Antillean. Accordingly, contended Mr. Miller, Alcron is entitled to the proceeds of sale of the three motor cars. He submitted, further, that the requirement for service of a notice on the bailiff by section 300(2) of the Companies Act (supra) involving as it does a divestment of rights must be strictly observed. And indeed, counsel for the claimants do not appear to differ from this contention because the notice on which reliance is placed is that contained in the letter dated March 30, 1987 - two days after the sale of the cars on March 28. Under the section the bailiff is required to retain the proceeds of sale after deducting the costs of execution for fourteen days and if within that time the relevant notice is served on him then the balance of the proceeds of sale shall be paid by him to the liquidator "who shall be entitled to retain the same against the execution creditor".

But Mr. Miller seems to think there is a way out for Alcron. It was his opinion that since no liquidator has been appointed the funds should be paid to Alcron, there being no one else to whom payment may be made. For this proposition he relied on In re Grosvenor Metal Co. Ltd. (1949) 1 Ch.63 in which a discretion granted by section 325(1)(c) similar to section 300(3) was exercised in favour of the execution creditor who had failed to complete execution before the commencement of the winding up of a company, against the liquidator. But circumstances present in that case are absent from this case. There the creditor had delayed execution at the request of the officers of the company and, while they were exonerated from any trickery Vaisey J. was of the opinion that, but for these requests the creditor would not have delayed. He accordingly set aside the rights of the liquidator.

By contrast reference was made to Re Memco Engineering Ltd. (1985) 3 All.E.R. 267. In that case the Customs and Excise levied distress on the goods of a company on October 20, 1982. On December 13,

1982 the Inland Revenue presented a petition for the winding-up of the company and on February 28, 1983 a winding-up Order was made. On May 18 the company's plant and machinery were sold by agreement between the liquidator and the Customs and Excise and the proceeds put into a joint account. A dispute subsequently arose between Customs and Excise and the liquidator as to which of them was entitled to the proceeds of sale. The claim of Customs and Excise to a declaration that they were entitled to the proceeds of sale was denied but a discretion granted by section 231 of the 1948 Act was exercised in favour of Customs and Excise since there was no unconscionable conduct or delay on their part.

In the Memco case there was a winding-up order as well as a liquidator. Here there is neither. Does this lead to the conclusion that the rights of Alcron are thereby rendered superior to the rights of other unsecured creditors? That would be the effect of upholding Mr. Miller's contention. Relevant considerations include the following:

(a) Antillean is insolvent. Consequently, the other unsecured creditors would stand to receive nothing;

(b) The execution was not completed before the commencement of the winding up (see sec. 299(2));

(c) Antillean has not been wound up nor has a liquidator been appointed.

Section 299(1) (supra) was obviously predicated upon the follow-through from the presentation of the petition to the conclusion of the proceedings. But although the process has been stymied I cannot read into the intendment of the section an advantage of one unsecured creditor over others. The petition has not been dismissed. In the circumstances, it is my view that the appropriate course is to place the net proceeds of sale into the Treasury so that the appropriate steps can be taken for the disbursement of those funds in a manner that is just.

The final consideration relates to costs. As regards the bailiff's fees, charges and expenses incurred in relation to the distress levied on the motor cars I agree that these must be deducted from the proceeds of sale. However, concerning the order for the

costs of the proceedings in the court below I can find no just reason for requiring them at the hands of the claimant who was summoned to court to see to its interest. It was only at court that the claimant's interest in the secured goods was admitted. How then could the claimant be held liable for any costs of those proceedings? It was submitted that the claimant rendered itself liable by remaining in court after its claim was admitted and contesting the issue of the unsecured goods. But such an argument is not sound unless it makes out that the claimant was intermeddling where it had no interests to protect. But clearly that was not so because, although the claimant could not lay claim to those goods as being their property, yet consistent with the Interpleader summons which required them to "appear and state the nature and particulars of their respective claims to the goods and chattels seized by the bailiff" they were entitled to remain in court and to state their claims as unsecured creditors. Significantly, there has been no finding that such a claim was not maintainable. In the circumstances the order that the claimant pay the costs of the applicant and the plaintiff occasioned by these proceedings cannot stand. Those costs rest squarely upon the shoulders of Alcron.

In conclusion, therefore, the Appeal is allowed. The Orders made in the court below except the order for the payment of the bailiff's fees etc. regarding the distress and sale of the unsecured goods are set aside. The claimant is to have the costs of appeal and its costs in the court below, to be paid by Alcron, to be taxed if not agreed. The costs of these proceedings incurred by the bailiff are to be paid by Alcron and are to be taxed if not agreed. The net proceeds of the sale of the unsecured goods are to be paid into the Treasury to abide the order of the court.

MORGAN, J.A.

I have had the advantage of reading the judgments of my learned brothers, Wright, J.A. and Bingham, J.A. (acting) in which they have carefully covered all the issues. I agree with their reasoning and conclusion and order and there is nothing I can usefully add.

BINGHAM, J.A. (AG.)

This is an appeal from a judgment of Patterson, J., on 16th November, 1989 whereby he ordered:-

> (i) A sale of goods belonging to the appellant under a Bill of Sale and that the proceeds be applied towards:
>
> (a) The payment of all fees, charges and expenses of the Bailiff.
>
> (b) The balance to be paid into the treasury in satisfaction of the defendant/respondent indebtedness.
>
> (ii) A sale of goods and chattels not covered by the Bill of Sale taken into execution under a writ of seizure and sale and the proceeds applied towards:
>
> (a) the payment of all fees, charges and expenses of the Bailiff.
>
> (b) the balance to be paid into the treasury to the credit of the suit.

The grounds of appeal being advanced were that:

> "1. That the learned trial Judge erred as a matter of law when he held that the motor vehicles and other goods not forming part of the Bill of Sale can be sold and the proceeds thereof paid to the Plaintiff/Respondent as an execution creditor as such an order is contrary to the provisions of the Companies Act.
>
> 2. The learned trial Judge erred as a matter of law when he made an Order contrary to the statutory provisions namely, the Companies Act which provided that after a Petition for winding-up has been presented to the Court and before execution is completed by sale of the goods no sale can take place and the proceeds delivered to the execution creditor as the interest in such goods have to be shared pari passu with all unsecured creditors.
>
> 3. The learned trial Judge erred as a matter of law when he failed to appreciate that the Claimant/Appellant was also an unsecured creditor and having presented a Petition to wind up the Defendant/Respondent, Antillean Food Processors Limited before execution was completed, that the execution creditor would not be entitled to have

" the whole of the proceeds of sale to the detriment of the unsecured creditors as provided by the provisions of the Companies Act.

4. That the learned trial Judge erred as a matter of law when he held that the chattels, the subject matter of the Bill of Sale should be sold and costs deducted for the Bailiff and the proceeds thereafter paid over to the Claimant/Appellant.

5. The learned trial Judge erred as a matter of law as he failed to appreciate that the provisions of the Companies Act applied to both secured and unsecured creditors and after a Petition for winding-up was executed and before execution completed no Order could be made which in effect adversely affected secured and unsecured creditors.

6. The learned trial Judge erred as a matter of law when he failed to appreciate that the Claimant/ Appellant is a secured creditor protected by a Bill of Sale and could not be made liable for the cost of the execution creditor in respect of the Bailiff and consequently further erred when he made an Order that the goods of the secured creditor, the Appellant should be sold to pay such costs and the proceeds thereafter paid to the secured creditor.

7. The learned trial Judge erred as a matter of law when he failed to appreciate that it was only the Claimant/Appellant as the secured creditor, who could elect whether or not to realise the security by selling same and the Judge erred when he made an Order that the Chattels protected by the Bill of Sale should be sold."

The facts giving rise to the appeal are that the plaintiff/ respondent as the judgment creditor is the lessor of premises occupied by the defendant/respondent as the judgment debtor.

On 21st October, 1986 the plaintiff/respondent obtained a judgment against the defendant/respondent in the sum of US$1,994,130.64 being an amount due for rental in respect of the demised premises. A writ of seizure and sale was issued on 5th November, 1986.

The defendant/respondent had earlier on 3rd June, 1985 been placed into receivership as a result of arrears due under the bill of sale.

The Secured Goods (Grounds 4, 6 & 7)

In executing the writ of seizure and sale, the bailiff seized items including office equipment, furnishings, fixtures, factory machinery and equipment which had been secured to the appellant under the bill of sale.

The appellants have contended that as there was no issue raised at the hearing of the interpleader summons as to the undoubted right of the appellant to the goods forming part of their security, the subsequent order of the learned trial judge insofar as it affected the secured property was wrong and ought to be set aside.

The bailiff had notice of the appellant's claim to the secured goods taken into execution immediately upon the seizure occurring. Following shortly thereon on 12th December, 1986, the appellants filed a creditors petition to wind up the defendant/respondent on the ground of insolvency. It is common ground that the bill of sale was granted to the appellant as security for a loan to the defendant/respondent. The undisputed facts show clearly that when the plaintiff/respondent levied execution the defendant/respondent was insolvent. At best it was doubtful whether in a winding up, the sale of the assets would realise sufficient funds to satisfy the debt due to the appellants, let alone realise a surplus to satisfy the other creditors including the plaintiff/respondent. although persisting in their claim to seizure of the goods secured by the bill of sale at the outset, the plaintiff/respondent later withdrew this claim at the commencement of the hearing of the interpleader summons.

In such circumstances the submission by learned counsel for the appellant that the learned trial judge embarked on a frolic of his own in ordering a sale of goods forming part of the appellant's security is not without merit. He relied for support on

Stern v. Tegner [1896] 1 Q.B. 37. There Lord Lindley, M.R. in enunciating the principles applicable to an order for sale in such cases said: (pp. 41 & 42)

> "... But Order LVII., r. 12, was not intended to deprive secured creditors of the benefit of their security, and when this will, or very likely will, be the effect of a sale, the Court ought not to direct the sale, but ought to direct the sheriff to withdraw. There are three cases which arise in practice. First of all, the case where the security is ample and where the bill of sale holder tries to assert his rights so as to defeat the execution creditor. That is the common case which s. 13 of the Common Law Procedure Act, 1860 was intended to rectify. The bill of sale holder cannot stand upon his rights when it is plain that he is defeating the execution creditor, which, of course, involves the assumption that after paying off the bill of sale there will be something left. That is a plain case: in such a case a sale will be ordered. The next case is where the security is plainly deficient. Then if there were a sale there would not be a surplus, whence it follows that the only proper course is to direct the sheriff to withdraw. What has the execution creditor to do with the goods if he cannot possibly get anything out of them? That is another plain case. The third case is somewhat more difficult. When it is doubtful whether the security is sufficient to pay off the secured creditor or not, what is the right course to take? The proper course in such a case is for the Court to say, 'Unless the execution creditor will guarantee the secured creditor against loss by sale, we will not order the sale.' Here the execution creditor and the trustee have declined to redeem, and declined to give any guarantee against any loss. <u>That has induced me to look more carefully than I did in court into the evidence, and upon the evidence I am perfectly satisfied that if these goods are sold by the sheriff it is extremely doubtful whether there will be enough to pay the bill of sale holder. Under those circumstances, how can it be just to enforce a sale, and deprive him of his security? That would be to abuse the rule, not to put it into operation in a case to meet which it was passed."</u> (Emphasis supplied)

It is clear from the above that none of the courses giving rise to an order for sale were applicable to this case. In the face of the undoubted right of the appellants to the unencumbered possession of the property secured by the bill of sale, the stand of the plaintiff/respondent in persisting in their claim resulted in the interpleader proceedings. Once they relinquished their claim however, in the light of the evidence of insolvency there remained no valid basis for the course resorted to by the learned judge in ordering a sale. Although he had a discretion to do so, that had to be based upon reasonable grounds and here none existed.

Indubitably therefore, the order relating to the secured goods must be set aside as bad. This would include the order for costs, charges and expenses incurred by the bailiff in relation to the execution. Such must be borne by the plaintiff/respondent whose persistence in its claim despite having full knowledge of the existence of the property secured under the bill of sale from the outset, brought about a situation which resulted in the secured property being taken into execution. This claim they persisted in although they were fixed with actual notice of the bill of sale before levying execution.

As to the unsecured goods (grounds 1, 3 & 5), this situation admits of no easy solution. These goods include three cars and it is with the disposition of the proceeds of the sale of these goods that this appeal is mainly concerned. One is here faced on the one hand with a judgment creditor who by obtaining a judgment before the winding-up had commenced has placed itself in the shoes of a secured creditor . The crucial question is whether the judgment/creditor is entitled to obtain the fruits of its judgment resulting from the execution and subsequent sale less the costs incidental thereto or whether, having regard to the statutory provisions of section 299 when read together with section 300 of the Companies Act, it is caught by the proviso thereto and therefore would rank for payment equally with creditors of the same class; in which event the balance

of the proceeds from the sale of the cars ought to be paid into Court pending a winding-up order and subsequent distribution by the liquidator.

Sections 299 and 300 read:

> "299. (1) Where a creditor has issued execution against the goods or lands of a company or has attached any debt due to the company, and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator in the winding up of the company unless he has completed the execution or attachment before the commencement of the winding up:
>
> Provided that—
>
> (a) where any creditor has had notice of a meeting having been called at which a resolution for voluntary winding up is to be proposed, the date on which the creditor so had notice shall for the purposes of the foregoing provision be substituted for the date of the commencement of the winding up;
>
> (b) a person who purchases in good faith under a sale by a bailiff any goods of a company on which an execution has been levied shall in all cases acquire a good title to them against the liquidator, and
>
> (c) the rights conferred by this subsection on the liquidator may be set aside by the Court in favour of the creditor to such extent and subject to such terms as the Court may think fit.
>
> (2) For the purposes of this section, an execution against goods shall be taken to be completed by seizure and sale, and an attachment of a debt shall be deemed to be completed by receipt of the debt and an execution against land shall be deemed to be completed from the date of the order for sale or by seizure as the case may be, and, in the case of an equitable interest, by the appointment of a receiver.
>
> (3) In this section and in section 300 the expression 'goods' includes all chattels personal, and the expression 'bailiff' includes any officer charged with the execution of a writ or other process.

"300.—(1) Subject to the provisions of subsection (3), where any goods of a company are taken in execution, and, before the sale thereof or the completion of the execution by the receipt or recovery of the full amount of the levy notice is served on the bailiff that a provisional liquidator has been appointed or that a winding up order has been made or that a resolution for voluntary winding up has been passed, the bailiff shall, on being so required, deliver the goods and any money seized or received in part satisfaction of the execution to the liquidator, but the costs of the execution shall be a first charge on the goods or money so delivered, and the liquidator may sell the goods, or a sufficient part thereof, for the purpose of satisfying that charge.

(2) Subject to the provisions of subsection (3), where under an execution in respect of a judgment for a sum exceeding forty dollars the goods of a company are sold or money is paid in order to avoid sale, the bailiff shall deduct the costs of the execution from the proceeds of the sale or the money paid and retain the balance for fourteen days, and if within that time notice is served on him of a petition for the winding up of the company having been presented or of a meeting having been called at which there is to be proposed a resolution for the voluntary winding up of the company and an order is made or a resolution is passed, as the case may be, for the winding up of the company, the bailiff shall pay the balance to the liquidator, who shall be entitled to retain it as against the execution creditor.

(3) The rights conferred by this section on the liquidator may be set aside by the Court in favour of the creditor to such extent and subject to such terms as the Court thinks fit."

Learned counsel for the appellant has submitted that once a winding up has commenced then such funds that are realised from a sale by the execution creditor must be held by the bailiff pending the appointment of a liquidator for the benefit of the creditors. He relied in support of this proposition on several authorities commencing with Bowkett v. Fullers United Electric Works Ltd. [1923] 1 K.B. 160. In this case a garnishee order was set aside as it had not been made absolute before the commencement of the winding up. It was further held that in exercising its discretion

in making such an order, a Court ought to consider the position of all the creditors and had to have due regard to any proceedings which had been instituted for ensuring the distribution of the assets of the judgment debtor pari passu.

Counsel also cited in support **D. Wilson (Birmingham) Ltd. v. Metropolitan Property Development Ltd. & Anor.** [1975] 2 All E.R. 814. This case was followed and applied in **Rainbow et al v. Moorgate Properties Ltd.** [1971] 2 All E.R. 821.

All these cases, the latter two being based on section 325 (1) of the Companies Act (1948) (U.K.) which is in pari materia with section 300 of the Jamaica Companies Act establish with equal consistency that a Court of Equity leans against giving priority to a creditor over other creditors of the same class. Where accordingly, a creditor acts with knowledge of a state of affairs to the detriment of other creditors of the same class in seeking to carry a claim into execution then that creditor will not be entitled to retain the benefit of the fruits thereof, but must allow the proceeds to be paid over into a common fund for the benefit of the creditors of that class.

Learned counsel for the plaintiff/respondent in response sought to contend that as the bailiff was not fixed with notice of the appellant's claim to the unsecured goods prior to the sale and distribution of those goods, they were therefore entitled to retain the benefit of the execution. He cited section 300 of the Companies Act as well as Re: **T.D. Walton Ltd.** [1966] 2 All E.R. 157. Reliance was also placed on **Re: Grosvenor Metal Co. Ltd.** [1950] 1 Ch. D. 63 and Re: **Memco Engineering Ltd.** [1985] 3 All E.R. 267 at p. 271 (I).

In Re: **T.D. Walton Limited** (supra) as the notice of the commencement of the winding up proceedings was not received by the sheriff before the expiration of the statutory period under section 325 (1) of the Companies Act 1948 (section 300 of the local Act) the execution creditors were held to be entitled to retain the benefit of the execution as against the claim of the liquidator.

Re Grosvenor Metal Co. Ltd. (supra) referred to was on the particular facts on all fours with the circumstances which existed in Re T.D. Walton Ltd. (supra) and the consequences for the judgment creditor were the same.

Re Memco Engineering Limited (supra) on the facts is distinguishable as there the subject matter related to distress being levied as well as an extended statutory period. It was this that enabled the fact that the distress was levied within the three month period prior to the winding up order to be caught by the proviso to section 319 (7) of the Act.

In this case sections 299 and 300 of the Companies Act have to be read together in determining whether execution was completed before the winding up proceedings commenced, as it appears that it is only in such circumstances that the execution creditor (plaintiff/respondent) would be entitled to retain the benefit of the execution resulting from sale of the motor cars. Re Grosvenor Matal Co. Ltd. and Re T.D. Walton Ltd. (supra).

In such circumstances "execution would not be completed" to enable the judgment creditor to lay claim to the fruits of the judgment unless no notice of such commencement of a winding up was received by the bailiff during the fourteen day statutory period following execution and sale of the goods. In such a case, the execution creditor could lay claim to the balance of the proceeds of sale remaining after deducting the costs of execution remaining in the bailiff's hand.

In the instant case, the sale of the seized cars was effected on 28th March, 1987. On 30th March, 1987 notice of the commencement of the winding up by way of the filing of the petition was served on the bailiff. In such circumstances the bailiff was obliged by virtue of the provisions of section 300 (2) of the Companies Act to pay the money into Court pending the making of a winding up order. On the basis of these facts, I therefore find the reason being advanced by the learned judge below at pages 10 and 11 of the record of appeal in concluding that:

> "I hold that the only proper construction to be put on the paragraphs of the claimant's letter stated above is that it purports to advise the bailiff of his duties and does not purport to lay claim to the motor vehicles in question;"

is not altogether correct. This would be so by virtue of the fact that the petition for winding up filed by the appellant was a creditor's petition. One could regard this as clear evidence supporting the fact that by such a course the appellants were seeking to lay claim to a share in undistributed assets of the company which would include the balance of the proceeds of the sale of the cars taken in execution.

Learned counsel for the plaintiff/respondent further contended that the appellant has filed a petition for winding up and not pursued the matter any further. Since that date no attempts had been made to obtain an order from the Court.

The appellantson the other hand, has submitted that the delay in the hearing of the petition filed resulted from several adjournments granted by reason of other pending proceedings, in particular the proceedings to wind up an affiliated company, Jamincorp International Merchant Bank which is the majority shareholder in the judgment debtor. In such circumstances it would have been unjust for the Court to disregard the claims of the other creditors.

With this submission, I am in agreement. I see no warrant for regarding the claim of one creditor while disregarding that of the other creditors. That would not be doing equity.

On the facts which the learned judge had before him and having regard to the law applicable, I would allow the appeal and set aside the order below. I would further order that the costs of the the bailiff resulting from: (i) his taking into execution the secured goods be borne by the plaintiff/respondent; (ii) that the costs of the bailiff in relation to the unsecured goods taken into execution and sold be a first charge on the proceeds of sale. The

balance remaining to be paid into Court pending the winding up of the judgment debtor; (iii) that the costs here and below to be the appellant's such costs to be taxed if not agreed; (iv) the costs of these proceedings incurred by the bailiff are to be paid by the plaintiff/respondent and are to be taxed if not agreed.