NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 27/2003

BEFORE: **THE HON. MR. JUSTICE FORTE, P.**
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MRS. JUSTICE HARRIS J.A. (Ag.)

BETWEEN: **JAMINCORP INTERNATIONAL MERCHANT BANK LIMITED** **APPELLANT**

AND: **THE MINISTER OF FINANCE** **RESPONDENT**

Miss Carol Davis, Attorney-at-Law, instructed by Carol Davis and Co. for Appellant.

Miss Cheryl Lewis, Attorney-at-Law, instructed by the Director of State Proceedings for Respondent.

May 25, 26 and July 29, 2005

FORTE, P.

I agree with the reasons and conclusions advanced by Harris, J.A. (Ag.)

PANTON, J.A.

I agree.

HARRIS, J.A. (Ag.)

On May 26, 2005 we allowed this appeal from the judgment of Reid, J. We promised to put our reasons in writing. We now do so.

A Petition for the winding up of the Appellant company (hereinafter called the company) was filed by the Respondent in October, 1986. The Petition was grounded on section 11 of the Protection of Depositors Act (now repealed.) An order for the winding up of the company was granted on September 9, 1988. The order was made on the grounds that the company was unable to pay sums due and payable to depositors, the value of the company's liabilities exceeded its assets and that the company failed to deliver accounts for the financial year ending 1985.

Pursuant to the order and the provisions of the Companies Act, the company was put into liquidation and the Trustee in Bankruptcy was appointed provisional liquidator. Subsequently, Mr. Philmore Ogle was appointed Liquidator. On May 19, 1999, Mr. Ogle submitted his report to the Registrar of Companies in accordance with the requirements of section 228 of the Companies Act. The report shows that the depositors were fully paid with interest at 6% per annum. They received 153% of the sum due to them at the commencement of the liquidation. The Liquidator found a surplus of income over expenditure of $6,123,059.00. The Registrar of Companies failed to respond to the Liquidator and on July 3, 2001 the Liquidator submitted a copy of his Report to Mr. Elworth Williams, a shareholder

and director of the company.

The next significant step was the filing of a motion by the company seeking an order to stay the winding up proceedings. Reid, J had before him a reissued motion dated January 23, 2003. It was supported by affidavits filed by Elworth Williams, Neville Henry and David Levermore. He dismissed the application and awarded costs to the Respondent. Although he granted leave to appeal he gave no reasons for his decision to dismiss the motion.

The following five grounds of appeal were filed:

> "(a) The Learned Judge erred in dismissing the Application for Stay of Liquidation.
>
> (b) The Learned Judge erred in refusing to return control of the Appellant Company to its directors/and or shareholders.
>
> (c) The Learned Judge erred in that he failed to give any or sufficient weight to the fact that the Application for Stay of Liquidation and return of the Appellant to its shareholders was supported by the Liquidator appointed by the Court.
>
> (d) The Learned Judge erred in that he failed to give any or sufficient weight to the fact that all the debts of the Appellant had been repaid.
>
> (e) The Learned Judge erred in that on the evidence before him the Liquidation of the Appellant ought properly to have been stayed and the Appellant Company returned to its shareholders."

Miss Davis, for the Company, submitted that the majority of the members of the company and all interested parties have consented to the application, and

the creditors have been satisfied. All relevant parties, including the Liquidator are supportive of the order sought. She urged that the Liquidator having made a recommendation that the company be returned to its shareholders, great weight should be placed on the recommendation. Miss Lewis, for the Respondent contended that the Appellant merely places reliance on the Liquidator's recommendations and does not clearly advance evidence showing the reason for which the shareholders desire to have the Stay of Liquidation.

The critical issue in this case is whether the Learned Trial Judge had properly exercised his discretion in the refusal of the stay of the winding up proceedings.

Section 234 of the Companies Act empowers the court to make an order for a stay of winding up order if it is satisfied that all proceedings touching the winding up ought to be stayed. Section 234 provides:

> "234. The Court may at any time after an order for winding up, on the application either of the liquidator, or the Trustee, or any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the Court thinks fit."

The order for winding up of the company was made principally on the grounds of its inability to pay its depositors and that its liabilities exceeded its assets. The Liquidator's Report dated May 19, 1999 shows that although the

liquidation process is in place, the liabilities of the company do not exceed its assets. The report of the Liquidator having demonstrated that the assets are currently in excess of the liabilities, is clearly a factor to which great weight must be placed, provided all other relevant conditions are fulfilled.

Miss Lewis further argued that the consent of the shareholders is not a reason to support an order for stay of the winding up. In the instant case, it is unknown whether all the shareholders have consented to the application. She added that even if all the shareholders had given their consents, the court must take into consideration all the circumstances of the case and the interest of the public. In support of her submissions, she cited the case of **Re Telescriptor Syndicate Ltd** [1903] 2 Ch 174 where at page 180 Buckley,J said:

> "Where application is made in bankruptcy to rescind a receiving order or to annul an adjudication, the Court refuses to act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large. The mere consent of the creditors is but an element in the case. In **In re Hester** 22 Q.B.D. 641 some trenchant observations of Fry L.J. will be found on the idle notion that the Court is bound by the consents of the creditors. The Court has to exercise a discretion. It is bound to regard not merely the interests of the creditors. It has a duty with regard to the commercial morality of the country: see **In re Hester** 22 Q.B.D. 632, **In re Flatau** [1893] 2 Q.B. 219; **In re Taylor** [1901] 1 K.B. 744. I am here asked to exercise an analogous jurisdiction, and I may say that it is in my opinion desirable that so far as possible the Court should not assume a different attitude or act upon a different principle in the winding-up of a company and in the bankruptcy of an individual. I have here to

> say whether it is proved to my satisfaction that all proceedings in relation to this winding-up ought to be stayed."

The case of **Re Telescriptor Syndicate Ltd** (supra) is distinguishable from the present case. In the **Telescriptor** case, the company presented a motion for stay of winding up proceedings but had not gone before the Court with clean hands. The company was involved in undisclosed deals and agreements in connection with its promotion and formation. There was failure on the part of the directors to give information to the official receiver. There was also evidence that the promoter donated fully paid up shares to the directors. Clearly, in those circumstances a trial judge would not have given approbation to a stay. Although the purpose for the stay of the winding up proceedings would have been for the benefit of the creditors, it was found that the annulment or rescission of the winding up order would have been detrimental to commercial morality and to the interest of the general public. The court refused to act upon the assent of the creditors and dismissed the application for stay of winding up proceedings.

In the case under review, there is no evidence that the Appellant was involved in secret deals or that any information had been withheld from the Liquidator. The Liquidator had carried out his investigations, collected assets which he utilized to meet the liabilities of the company, in particular, the depositors had been repaid in full and awarded interest of 6% per annum. There is presently, a surplus of $6,123,059.00, comprising shares to the value of

$5.8 million in Alcron Ltd., $100.00, and gold coins. The Appellant is a minority shareholder of Alcron Ltd.

In the case of **Re Calgary and Edmonton Land Co. Ltd** [1975] 1 ALL ER 1046 Megarry J , in analyzing section 256 (1) of the English Companies Act 1948 , which was similar to section 234 of our Companies Act, said at page 1050:

> "The result is that the court can exercise its powers under s. 256 (as extended to a voluntary winding-up) if 'satisfied that the . . . required exercise of power will be just and beneficial', and may do so 'on such terms and conditions as it thinks fit', or make such other order on the application 'as it thinks just'. Under s. 256 itself the court 'may ...on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed' make an order for the stay 'on such terms and conditions as the court thinks fit'."

He also outlined those whom he considered the primary parties whose interest must be taken into consideration before the grant of a stay, where the assets of the company are sufficient to meet debts of the company, pay the creditors and there is surplus. These persons are: the creditors, the liquidator and the members of the company. At page 1051 he stated:

> "That brings me to the third point, that of the persons whose interests have to be considered on an application for a stay. These must, of course, depend on the circumstances of each case; but where, as here, there is a strong probability, if not more, that the assets of the company will suffice to pay all the creditors and the expenses of the liquidation, and so leave a surplus for the members of the company, there are plainly three

> categories to consider. First, there are the creditors. Their rights are finite, in that they cannot claim more than 100p in the £. I cannot see that in normal circumstances any objection to a stay could be made on behalf of the creditors if for each of them it is established either that he has been paid in full, or that satisfactory provision for him to be paid in full has been or will be made, or else that he consents to the stay or is otherwise bound not to object to it. Second, there is the liquidator. By s 309, all costs, charges and expenses properly incurred in the winding-up, including the liquidator's remuneration, are made payable out of the assets of the company in priority to all other claims. Where a liquidator has accepted office on this footing, I cannot see that in normal circumstances it would be right to stay the winding-up unless his special position had been fully safeguarded, either by paying him the proper amount for his expenses or by sufficiently securing payment. A liquidator who loses control of the assets by reason of a stay ought normally to be properly safeguarded in relation to his expenses. Third, there are the members of the company. No question of satisfying them by immediate payment of all that they are entitled to can very well arise; for unlike the creditors, with their ascertained or ascertainable debts, the rights of the members cannot be quantified until the liquidation is complete. Accordingly, in normal circumstances I think that no stay should be granted unless each member either consents to it, or is otherwise bound not to object to it, or else there is secured to him the right to receive all that he would have received had the winding-up proceeded to its conclusion. Each member has a right of a proprietary nature to share in the surplus assets, and each should be protected against the destruction of that right without good cause."

The depositors and creditors have been paid in full. The Liquidator has also received his remuneration. There are surplus assets amounting to $6,123,059.00. The Liquidator has shown that these assets could not be realized without needlessly prolonging the liquidation. The realization of the assets would be of benefit to the shareholders.

All the deponents to whom reference had earlier been made indicated their consent to the stay. Foremost of these was Mr. Elworth Williams who is a director and shareholder of the company and had been designated to speak on their behalf. It has also been noted that the Inspection Committee, through its chairman Mr. Neville Henry supported the liquidator's recommendation. In addition, Mr. David Levermore deposed that Meridian Investment Ltd, Mr. Lloyd Perkins and himself are the majority shareholders and they have consented to the stay. On the balance of probabilities the minority shareholders would not object to a grant of stay. The shareholders are entitled to participate in the proceeds of the surplus assets. Each ought to be protected in respect of his right to share in the assets.

Miss Davis submitted that, the appellant both in its capacity as a bank and a company, were affected by the order. She argued that once the company is in operation, it can proceed if so advised to regularize its position and that it needs to operate as a company, in order to make an application to operate as a bank.

If restored, the Appellant would be ineligible to operate as a bank. Operating as a bank will demand their compliance with the requirements of the Banking Act. Section 3 (1) of the Act provides:

> "3.-(1) A person other than a company duly licensed under this Act shall not carry on banking business in Jamaica; and any person who contravenes

this subsection shall be guilty of an offence."

Further, the Minister of Finance by virtue of section 4 of the Act would be required to grant a licence. Additionally, section 6 of the Act provides that a local bank cannot be issued a licence unless a share capital of not less than eighty million dollars has been subscribed. As the share capital of the company now stands, it would be unable to meet a subscription of eighty million dollars. A further restrictive provision of the Act is outlined in section 12, which, prohibits any person, unless duly authorized, to use the name bank. The restrictions imposed by the Act would make it impossible for the Appellant to operate as a bank, on a stay being granted.

The Financial Institutions Act also prohibits a company from conducting business of accepting deposits or issuing advertisements for deposits unless it is duly licensed. The Act further provides that a licence shall not be granted unless the company has capital of a minimum of twenty five million dollars. The Appellant would also be barred by virtue of this Act to conduct operations as a bank.

The Liquidator wishes to be relieved of his responsibility. He has effectively carried out the substantial part of the duties which he was required to perform, by meeting the liabilities of the company. To permit him to continue would result in unnecessary protraction of the liquidation. In all the circumstances and in the interest of justice, the shareholders ought to be

accorded the opportunity to realize those assets which remain uncollected by the Liquidator. It would be in the best interest of the members of the company that it be returned to its shareholders.

In light of the foregoing, I have found that the learned trial judge had wrongly exercised his discretion. The appeal is allowed. The order of the court below is set aside. Stay of the winding up proceedings granted to allow the shareholders the opportunity to realize the assets in Alcron Limited. It is ordered that the company cannot operate as a bank without first satisfying the statutory requirements, for so operating or trading. Costs to the Appellant here and in the court below to be taxed if not agreed.

FORTE, P:

ORDER:

1. The Appeal is allowed.

2. The Order of the court below is set aside.

3. Stay of the winding-up proceedings granted to allow the shareholders the opportunity to realize the assets in Alcron Limited.

4. The company cannot operate as a Bank without first satisfying the statutory requirements for so operating or trading.

5. Costs to the Appellant here and in the court below to be taxed if not agreed.