IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2006 HCV 4063

IN THE MATTER OF COLGLO EQUITIES JAMAICA LIMITED.

AND

IN THE MATTER OF THE COMPANIES ACT

BETWEEN	MARCUS JONES	1ST CLAIMANT
AND	DELORES JONES	2ND CLAIMANT
A N D	COLGLO EQUITIES JAMAICA LIMITED	DEFENDANT

Mrs. Marvalyn Taylor-Wright instructed by Taylor-Wright and Co. for the Claimants/Petitioners.

Mr. Christopher Dunkley instructed by Phillipson and Partners for Colglo Equities Jamaica Limited.

Company – Petition for Winding Up – Whether there is a bona fide dispute as to the debt – Whether company solvent – Requirements for advertisement in the *Jamaica Gazette* of the hearing of the petition.

24th, 25th January and 7th February 2008

BROOKS, J.

On the 7th June 2005, Marcus and Delores Jones secured a judgment against Colglo Equities Jamaica Limited. The judgment was in the sum of $4,200,879.70 with interest and costs to be added thereto. Colglo has failed to pay the judgment debt or any part of it.

There is no indication that the Joneses followed the normal method of securing the services of the Bailiff of the Supreme Court. Instead they sent a statutory notice pursuant to section 221(a) of the Companies Act demanding payment. In the absence of any positive response from Colglo, the Joneses have filed a petition for Colglo to be wound up. The debt owed at the time of the filing of the petition was $6,657,764.80.

Mr. Dunkley has, on behalf of Colglo, sought to resist the petition. He submitted that the court ought not to grant the petition because the debt is *bona fide* disputed and that Colglo is solvent. The question for the court to consider is whether, in the hybrid approach used by the Joneses, the argument that the debt is being disputed, is available in respect of a judgment debt. There is also a question as to whether the notice of the hearing of the petition was properly advertised. In assessing the matter I shall:

a. outline the submissions concerning the dispute;

b. consider the obligation to pay judgment debts in this context;

c. assess whether the dispute falls within the category of a *bona fide* dispute; and

d. examine whether advertisement of the petition in the *Jamaica Gazette* is mandatory.

The Submission that there is a Dispute

Mr. Dunkley relied on two affidavits sworn to by a Mr. Horace Harris, the Managing Director of Colglo. Mr. Harris explained that Colglo was a property developer. Colglo, he said, owns lands which have been developed into a gated community with over seven hundred lots, featuring a golf course, shopping centre, parks, a lake, a clubhouse and other amenities. A number of the lots have been sold and others are available for sale. He says that the company has a net worth of $100,000,000.00. On this evidence Mr. Dunkley submitted, this company is clearly able to pay its debts.

Mr. Dunkley also submitted that the judgment on which the petition is based was a default judgment and that such a judgment by itself ought not to be the basis of the grant of a petition. Finally he submitted that the court ought to take into account the fact that Colglo has an existing claim against the Joneses and is seeking to effect service of the Claim Form on them.

Based on all these factors, counsel argued that the court ought to find that there is a *bona fide* dispute, that Colglo's failure to pay the debt is not "neglect" for the purposes of section 221 (a) of the Companies Act and that the petition ought to be dismissed. He submitted that the application to wind up the company is an act of oppression. Mr. Dunkley cited *Cercle Restaurant Castiglione Company v Lavery* (1881) Ch. D. 555 and *In re*

London and Paris Banking Corporation (1875) L.R. 19 Eq. 444 in support of his submissions.

The obligation to pay the judgment debt

A convenient place from which to start the assessment of Mr. Dunkley's submissions is the well established principle that judgments of the court are to be obeyed until they are set aside. In *Chuck v. Cremer* (1846) 1 Coop. temp Cott. 342, Lord Cottenham L.C. stated:

> "A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... That the course of a party knowing of an order, which was null or irregular, and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed."

The principle has been enforced in our jurisdiction. Cooke J.A. in *Bastion Holdings Ltd. v. Bardi Ltd. and anor.* SCCA 14/2003 (delivered 29/7/05), stated that "a party who disagrees with the procedural framework must comply with any orders of the court made within the framework until it has been decided that the court was in error".

Mr. Dunkley is therefore not on good ground when he seeks to devalue the status of the judgment against Colglo. The fact that it is a default judgment does not make it any less valuable. The Joneses are entitled to the grant of the petition barring any substantial procedural flaws or proof of improper conduct.

In *In re Amalgamated Properties of Rhodesia (1913), Limited* [1917] 2 Ch. 115 the petitioner had secured an order of costs against A. Company, and had had the costs taxed. On the hearing of a petition for winding up A. Company as a result of non-payment, Sargant J. opined (at page 121) that:

> "the petitioners, as judgment creditors...are *prima facie* entitled *ex debito justitiae* to a winding up order, and it seems to me to be impossible to displace that *prima facie* position without the very strongest proof that the petition is being improperly made use of for some ulterior motive."

The learned judge went on to say,

> "I have yet to learn that judgment creditors who are entitled to be paid a judgment debt are to have evil motives attributed to them, or are to be deprived of their rights, because they are seeking to enforce those rights before the assets to which they look are mortgaged or charged in such a way as to deprive them of the legitimate expectation of being paid."

I respectfully adopt the reasoning outlined by the learned judge.

Is the dispute a *bona fide* one?

From the above analysis I find that there is, in fact, a debt owed by Colglo to the Joneses. There is no dispute as to the amount involved. The cases cited by Mr. Dunkley are therefore not applicable here, as they do not involve judgment debts.

The fact that the Joneses have proceeded by way of the statutory notice rather than exhibiting a return from the Bailiff showing that Colglo has nothing to levy, does not make the judgment any less valuable for these purposes. It is still a judgment of this court, of which Colglo is aware, and

has failed to honour. In the *Amalgamated Properties of Rhodesia (1913), Limited* case cited above, the petitioner, after securing its costs judgment, had then served a statutory demand for payment, with which A. Company had failed to comply. No complaint was made concerning that procedure.

Mr. Harris has not specified any matter which could displace the Joneses' *prima facie* entitlement to the fruits of their judgment. Although Mr. Harris deposes that Colglo is solvent, he has not exhibited any audited accounts to support his assertion. He has exhibited copies of certificates of title for land. Though Colglo is the registered proprietor of the lands comprised in the titles, the documents reveal that there are charges against those titles, including mortgage debts. Those assets therefore, do not, by themselves, demonstrate solvency.

The non-payment of the debt, on the other hand, is an indication of insolvency. Derek French, the learned author of *Applications to Wind Up Companies* makes (at paragraph 6.11.1) the following observation which is relevant to this aspect of the instant case:

> "... usually the only evidence such a petitioner will have that the company is unable to pay its debts is that it has not paid the full amount of the petitioner's claim..."

In my view there is no *bona fide* dispute concerning this debt.

Advertisement of the Petition

On an examination of the papers the court observed that the petition had not been advertised in the *Jamaica Gazette* as is the usual practice. When tackled about the omission, Mrs. Taylor-Wright, for the Joneses, submitted that the petition was advertised twice, one week apart, in the Daily Observer, which is a nationally circulated newspaper. She argued that:

> "The important thing is to bring the proceedings to the attention of the public and the company. The publication in the newspaper satisfied that requirement. The advertisement in the *Gazette* should not be considered a requirement."

Counsel also averted to the fact that the Registrar of this court had referred to the advertisement in the newspaper (albeit an earlier publication) and had issued a certificate (pursuant to rule 33) indicating that (among other things) the rule regarding advertisement had been complied with.

The question is whether the apparent requirement to advertise in the *Jamaica Gazette* should be considered mandatory.

Although the present Companies Act ("the Act") was passed in 2004, the winding-up rules which are applicable are the Companies (Winding-up) Rules of 1949 of England. (See section 340 (4) of the Act.) The fact that, in 2008, rule 28 of the Winding-Up Rules (1949) still is being referred to in this country, is a little surprising. The rule requires that the petition "shall" be advertised once in the "*London Gazette,* and once at least in one London

daily morning newspaper". Where a company was based outside of London a newspaper for that locality could be used in addition to the *London Gazette.*

I should quickly point out, that section 340 (4) goes on to give the court the authority, "to make such alterations to those Rules as may be deemed expedient to render the same applicable to any matters before [the] court". That is, so long as the result is not inconsistent with the terms of the Act. Section 43 of the Interpretation Act is of similar import to section 340(4). This therefore, brings into focus, the *Jamaica Gazette.*

It is my understanding that, like the *London Gazette,* the *Jamaica Gazette* is the "newspaper" for the publication of official communication. The home-page for the website of the *London Gazette* describes it as:

> "Published by Authority. Official Newspaper of Record for the UK and a modern, efficient way to disseminate and record official, regulatory and legal information in print, online and electronic forms".

Without the embellishment, the essence is that the publication is by authority and that it is a newspaper of record. The importance of the *London Gazette* in winding-up matters has been demonstrated in a number of cases, though admittedly of 19th century vintage, and it appears from them that the date of advertisement in the *London Gazette* was of importance in deciding the order of precedence for the presentation of petitions. (See *Re* Storforth

Lane Colliery Co. (1879) 10 Ch. D 487.) In Jamaica, Section 3 of the Interpretation Act stipulates (among other things) that in all Acts, regulations and instruments of a public character the word, ""*Gazette*" or "Government *Gazette*" or "Jamaica *Gazette*" means the Jamaica *Gazette* published by order of the Government...". The *Jamaica Gazette* is therefore the local equivalent of the *London Gazette.*

The Winding-Up Rules were previously adopted by the Companies Act of 1967 (now repealed). In considering those rules, Kerr, P. in *In the matter of the Jamincorp International Merchant Bank Limited* (1986) 23 J.L.R. 522, at page 528 H, opined that, "(r)ule 28 provides a time-table for advertising the petition and the sanction of removal from the file for failure to comply". The context of the comment was to draw a distinction between rules 28 and 33 (providing for securing the registrar's certificate). The learned President held that the latter rule was not a mandatory requirement, the breach of which, lead to inevitable dismissal of the petition. The Privy Council upheld the decision on appeal. (*Jamincorp International Merchant Bank Limited v Minister of Finance* (1987) 24 J.L.R. 261.)

In the absence of any other authority being brought to my attention, I am inclined to reject Mrs. Taylor-Wright's submissions. The intent of rule 28 is to bring the existence of the petition to attention. It seems however,

that it is not solely so that the public; contributors, creditors and persons intending to conduct business with the company might be aware of the situation, but also that public authorities are also alerted and may act appropriately. There also ought to be an official record. It may be true that the *Jamaica Gazette* does not have the breadth of circulation that the *Daily Observer* enjoys, and it may be that officials do peruse nationally circulated newspapers for notices, but I have nothing to convince me that publication in a newspaper necessarily brings the matter to official attention.

The indications seem to be otherwise. From as far back as the 1880 Bankruptcy Act the requirement was for advertisement in both media. Section 144 of the Bankruptcy Act states as follows:

> **144. Advertisement in Gazette and newspaper. Claims to be made within one year of advertisement.**
>
> 144. On the direction of the Minister in writing on such report, that proceedings be taken under this Act, the Accountant-General shall give public notice by advertisement in the *Gazette*, **and** in one or more newspapers printed and published in this Island... The advertisement aforesaid shall be published as aforesaid as often during the said year as the Accountant-General may deem expedient, but not less than four times. (Emphasis supplied)

Despite the passage of the years the *Jamaica Gazette* continues to enjoy currency as it has not been displaced in the recently passed Companies Act. Section 337 subsection (3) provides that when the Registrar of Companies seeks to strike a defunct company off the register, he may, along

with other steps, "publish in the *Gazette* **and** in a daily newspaper circulating in the island" a notice of his intention. (Emphasis supplied)

For these reasons I find that rule 28 when applied to our local situation requires the publication in the *Jamaica Gazette* of notice of the hearing of the petition. Because this is a rule of long standing, and I have received varying reactions from practitioners, as to the requirement, I must confess some hesitance in making this finding. I would therefore, be happy if the situation were to be clarified by the Rules Committee of the Supreme Court.

Defects in the petition

There is at least one other defect attending this petition; it does not stipulate the shareholding of the company as is required by the relevant form referred to in rule 26 of the Winding Up rules of 1949. This defect may be easily remedied by an amendment, especially since Colglo is represented.

Conclusion

Based on the above I think that it is fair to say that the Joneses are owed a debt about which, neither as to the fact nor the quantum, there can be any proper dispute. They have demanded payment and it has not been forthcoming. The non-payment is evidence of Colglo's inability to pay. It has not shown that the petition is an abuse of the process of the court.

The Joneses' right to petition is not affected by the fact that Colglo may have a claim in court against them, which, to date, has not been served on them. See *Re Douglas Griggs Engineering Ltd.* [1963] Ch. 19.

The usual practice in compliance with rule 28 of the Winding-Up Rules (1949) is to advertise in the *Jamaica Gazette* **and** in a daily newspaper. I find that in applying the rule to our jurisdiction the requirement is mandatory. As a result, failure to advertise in the *Jamaica Gazette* is in breach of rule 28 and the petition cannot be granted in the face of that breach. The certificate of compliance was therefore issued in error by the Registrar. The breach of rule 28 is not fatal to the petition, but there must be compliance before the petition can be granted.

The order, therefore, is that:

1. The Petition dated April 20, 2005 and filed in this action is hereby adjourned for a date to be fixed by the Registrar.
2. The Petition shall be removed from the file if the petitioners fail, on or before 15th February 2008, to apply for a fresh date for the hearing.