IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN EQUITY
CLAIM NO: HCV 2567 of 2004

IN THE MATTER OF THE COMPANIES ACT

AND

IN THE MATTER OF AN APPLICATION TO WIND UP JAMAICA INVESTMENT ASSOCIATES LIMITED

BETWEEN	KES DEVELOPMENT LTD.	PETITIONER
AND	JAMAICA INVESTMENT ASSOCIATES LTD.	RESPONDENT

Walter Scott, Esq. and Ms. Wanda Joseph instructed by Chancellor & Co. for Petitioner:
D.R. Williams for the Respondent
Heard September 22, and October 6, 2005

ANDERSON J.

I have been asked to provide my reasons for my ruling in the instant case and I set these out herewith.

When the petition filed by the Petitioner for the Company Jamaica Investment Associates Limited to be wound up pursuant to the provision of sections 203 and 204 of the Companies Act came on for hearing on the dates in set out above, the Respondent by way of a motion sought to have the petition struck out. The relevant sections read as follows:

Section 203.

A Company may be wound up by the Court if:

a) the company has by special resolution resolved that the company be wound up by the Court:

b) default is made in delivering the statutory report to the Registrar or in holding the statutory meeting;

c) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;

d) the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven;

e) the company is unable to pay its debts;

f) the court is of opinion that it is just and equitable that eh company should be wound up.

Section 204.

A company shall be deemed to be unable to pay its debts:-

a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding fifty pounds then due, has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum, or to secure a compound for it to the reasonable satisfaction of the creditor; or

b) if execution or other process issued on a judgment, decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

c) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.

I gave no written judgment as I handed down my ruling at the hearing. I now understand that in light of a pending appeal to the Court of Appeal, there is now a requirement for my reasons for the ruling and these are set out below:

At the hearing, during which submissions were made by both counsel. Dr. Williams submitted on his motion that the petition should be struck out. He referred to the petition as well as the letter of demand and the affidavit of Aubrey Smith. In his affidavit Mr.

Aubyn Smith for the Respondent averred that the Respondent did not owe the sum claimed by the Petitioner or any other sum. He said that any money received by the Respondent was by way of an equity investment by the managing director of the Petitioner in a sand mining operation previously carried on by the Mr. Smith personally. It was his submission that the Respondent was therefore not "indebted" the petitioner nor was the Petitioner a "creditor" of the Respondent. He said that the important thing was that the Respondent was disputing that the Petitioner was its creditor. Xxxxxxxxxxxxx He submitted that unless the creditor could rely on section 204(a) and fulfill all its conditionalities, the Petitioner could not succeed. He said the debt was disputed; that there was no other evidence of insolvency and indeed there was evidence of solvency. He relied upon **In Re London and Paris Banking Corporation (1919) Equity 444**.

Mr. Scott, for the Petitioner, asked that the motion to strike out be dismissed and the winding up order made. He said that there was evidence of a cheque having been drawn to and negotiated by the Respondent. This, he said, was *prima facie* evidence of payment to the company. Such a payment must either have been a loan, a gift or a contribution to equity. He also adverted to the affidavit evidence before me and in particular the admission contained in a letter from the Respondent to the Petitioner dated June 15, 2004 in which it acknowledged that "we are indebted to you in the sum of two million dollars", and submitted that the existence of the debt was established. The letter indicated that the money had been paid directly to First Caribbean International Bank, and the Petitioner attached to its affidavit, a copy of the cancelled cheque. That letter also stated: "*We are in the final phase of a refinancing of our operations and will pay you the above sum as soon as we get our first disbursement*". The letter went on to say: "So far as your direct investment in the actual sand mining operations are concerned, we further confirm that we take responsibility to settle with you as soon as the current plans to restart the operations begin to generate income". I believe that the clear and unmistakable inference to be drawn from this letter is that the Respondent was acknowledging a debt to the Petitioner and there is no basis upon which to hold that the payment acknowledged, related to the investment.

Among the authorities cited and on which the Petitioner placed reliance was the following:

In Re Tweeds Garage (1962) (CR 406; or 2 W.L.R. 38

Herewith, a summary of that case:

> A petition for the compulsory liquidation of a company was based on an alleged debt of £20,039 19s. 3d The evidence showed that the company was insolvent. The company admitted the existence of a debt to the petitioner but disputed the amount of the debt alleged in the petition:-
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> Held, that the only qualification required of the petitioner was that it was a creditor; and that, where there was no doubt (and there was none here) that the petitioner was a creditor for a sum which would otherwise entitle it to a winding-up order, a dispute as to the precise sum owed was not a sufficient answer to the petition. See, **In re Brighton Club and Norfolk Hotel Co. Ltd. (1865) 35 Beav. 204**

In that case, where the court had to construe provisions very similar to ours, one of the arguments canvassed before the learned judge, Plowman J., was that if there was a disputed debt then a petition for winding up on the basis that the company was unable to pay its debts. It was urged that a "disputed debt" was one where there was a dispute, not only as to its existence, but also as to the quantum. The learned judge had this to say:

> "As I have said, there appears to be no direct authority on the point and it may be helpful to approach the question by referring to the relevant sections in the Companies Act, 1948. Section 222 of that Act provides: "A company may be wound up by the court if" - and there are a number of alternatives, (e) of which is: "the company is unable to pay its debts"; and (f): "the court is of opinion that it is just and equitable that the company should be wound up." Then in section 223 it is provided that "A company shall be deemed to be unable to pay its debts" - and there are a number of alternatives, (d) of which is: "if it is proved to the satisfaction of the court that the company is unable to pay its debts ..." Then section 224 (1) provides: "An application to the court for the winding up of a company shall be by petition presented, subject to the provisions of this section,

either by the company or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by all or any of those parties, together or separately."

From those sections it appears that the only qualification which is required of the petitioners in this case is that they are creditors and about that, as I have said, there is really no dispute. Moreover, it seems to me that it would, in many cases, be quite unjust to refuse a winding-up order to a petitioner who is admittedly owed moneys which have not been paid merely because there is a dispute as to the precise amount owing. If I may refer to an example which I suggested in the course of argument, suppose that a creditor obtains judgment against a company for £10,000 and after the date of the judgment something is paid off. There is a genuine bona fide dispute whether the sum paid off is £10 or £20. The creditor then presents a petition to have the company wound up. Is the company to be entitled to say: "It is not disputed that you are a creditor but the amount of your debt is disputed and you are not, therefore, entitled to an order"? I think not. In my judgment, where there is no doubt (and there is none here) that the petitioner is a creditor for a sum which would otherwise entitle him to a winding-up order, a dispute as to the precise sum which is owed to him is not of itself a sufficient answer to his petition".

The Petitioner also relied upon **C.J's Rent-a-Car v Premium Finance Ltd. (1996) 33 JLR 439**, **Re London and Paris Banking Corporation** relied upon by the Respondent and **In the Matter of Burke Successors (1989) 26 JLR 252**, a decision of Bingham J, as he then was. In that case, a belated challenge to the petition was launched by counsel for the respondent on the basis that there had been no compliance with section 205(1)(c) of the Companies Act and that the paragraph created a condition precedent to the hearing of the petition.

The relevant paragraph of section 205 (1) provides as follows:

(1) An application to the Court for a winding up of a company shall be by petition presented subject to the provisions of this section either by the company or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by all or any of these parties, together or separately:-
Provided that;-

(a)

(b)

(c) the court shall not give a hearing to a winding up petition presented by a contingent or prospective creditor until such security for costs has been given as the court thinks reasonable and until a prima facie case for winding up has been established to he satisfaction of the court.

In that case, Bingham J. held, and I adopt his dicta, that even if the subsection imposed a condition precedent to the bringing of a petition to wind up, the Registrar's Certificate was conclusive that the matter was properly before the court. Moreover, counsel having taken full part in the court's deliberations could not now be heard to say that the matter was not properly before the court.

In his response, Dr. Williams sought to distinguish the authorities cited by counsel for the petitioner. He said **C. J's Car Rental** should be distinguished on the basis that there were, in that case, several cheques dishonoured and that there was a finding that the precarious financial position of the company allowed it to be deemed unable to pay its debts. He also sought to distinguish **Burke Successors** on the basis that there the Petitioner was a co-guarantor of the Respondent's liability. Finally, he suggested that **Tweed's Garage** could be distinguished on the facts as here the liability was disputed. I pause here to say that this attempt to distinguish Tweed is clearly a misconceived given the clear ratio of Tweed. After hearing the submissions on the motion to strike out the petition, I denied the motion and proceeded to hear the petition. Many of the arguments in the motion to strike out were re-hashed during the hearing of the petition.

For the petitioner Mr. Scott again referred to the affidavit of Aubrey Smith dated June 27, 2005 and the averments set out therein. The affiant purports to say that the payments from the Petitioner company were by way of investments and that the letter signed by the affiant acknowledging an indebtedness must have been signed under a mistake of fact. Mr. Scott submitted that the letter under reference was a clear admission of the indebtedness and the court could not go behind that admission. There had also been an admission that the statutory demand had been received and counsel invited the court to the view that the court was obliged, in accordance with section 204, to find that the Respondent was unable to pay its debts. The presumption raised under the section could only be rebutted by the clearest and most cogent credible evidence. Mr. Scott referred to the judgment of Rattray P. in the Jamaican Court of Appeal in the **C.J's Rent-A-Car Limited** case where his Lordship, referred to a dictum of Megarry J (as he then was) in Re Empire Investments Limited [1972] 2 All ER, 385 at 389.

> In the context of a notice requiring a person to do some act, I do not see how it can be said that the person neglects to do that act if the reason for not doing is a strenuous and genuine contention based on substantial grounds, that the person is not liable to do the act at all. If there is liability a failure to discharge that liability may well be 'neglect' whether it is due to inadvertence or obstinacy or dilatoriness, but a challenge to liability is a challenge to the foundations on which the contention of neglect in relation to an obligation must rest.

The learned President then said:

> I have no hesitation in accepting this to be a correct statement of the law. The real question to be determined is the bona fides of the appellant. Is there 'a genuine and strenuous contention based on substantial grounds' that the appellant is not liable to pay the debt? In Empire Investment Megarry J. found at page 388 that:
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> > I need only say that on the evidence before me, it seems quite plain that there is a bona fide dispute whether there is any debt at all, and that the dispute is not trivial or insubstantial but is based on solid grounds.

Petitioner's counsel reiterated that:-

a) if there is no dispute about the debt, and he submitted:- that there is none given the admission in the letter referred to above;

b) there was no evidence that the debt had been settled during the period since the statutory demand; and

c) the averments suggesting a basis other than a pure debt was an ex post facto attempt to provide a reason to dispute the debt,

then, the petition must succeed.

Dr. Williams asserted that notwithstanding the evidence to the contrary, the Petitioner was not a creditor of the Respondent. He also submitted that it was inappropriate to raise a winding up petition on just and equitable grounds as, according to **Ebrahimi v Westbourne Galleries Ltd. [1972] 2 All ER 492**, this was only available to shareholders and members. I held that any purported reliance upon this case as a basis for the exercise of some nebulous equitable jurisdiction of this court to deny the Petitioner's petition, was entirely misconceived.

I was satisfied based on the affidavit evidence before me that the Respondent was indebted to the petitioner in a sum greater than fifty pounds, that the appropriate notice was served on the Respondent by the Petitioner and for a period in excess of three weeks after the demand was made, the Respondent has neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the Petitioner. The Respondent is therefore deemed "unable to pay its debts" pursuant to section 203 (e). I was also satisfied based upon the affidavit evidence before me that the Respondent had been properly served; the appropriate notices had been placed in the newspapers and notice of the petition to wind up had also been published in the Jamaica Gazette, and the Supreme Court Registrar had certified that the proceedings were in order.

I ruled that the Petition should succeed and so ordered. I also ordered that the Respondent pay into Court the sum of Three Million Dollars ($3,000,000.00).

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ROY K. ANDERSON
Puisne Judge