JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS. 107, 108, 109 & 110/06

BEFORE: **THE HON. MR. JUSTICE PANTON, P.**
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE COOKE, J.A.

BETWEEN	**RAJU KHEMLANI**	**APPELLANT**
AND	**PUBLIC SUPERMARKET LTD.**	
	TOPAZ INVESTMENTS LTD.	
	KAY MART LIMITED	
	LORD & LADY LIMITED	**RESPONDENTS**

Gordon Robinson and Ms. Sherry-Ann McGregor, instructed by Nunes, Scholefield, DeLeon & Co. for the appellant

Ms. Hilary Phillips, Q.C., and Mrs. Andrea Bickhoff-Benjamin, instructed by Grant, Stewart, Phillips & Co., for the respondents

March 10, 11 and April 25, 2008

PANTON, P.

1. This appeal concerns a dispute between two brothers who are the sole shareholders in the respondent companies. They are equal in their shareholdings and they are the sole directors. It is undisputed that they have not been seeing eye to eye for a considerable period of time.

2. The appellant filed petitions under the Companies Act seeking to have the respondents liquidated and dissolved, with an alternative that a receiver-

manager be appointed. There is a difference of view as far as the parties are concerned in respect of the applicable sections of the Companies Act. However, that difference is of no moment as, by the wording of the petition, it is clear what the appellant is seeking.

3. The appellant's brother, Suresh Khemlani, as managing director of the respondents, gave instructions for the petitions to be resisted, and for the filing of notices of motion which sought the restraining of the appellant from taking any further proceedings on the petitions, and the removal of the petitions from the files of the proceedings.

4. The senior puisne judge, Marva McIntosh, J., heard applications by the parties, and on November 1, 2006, ordered upon the respondents' motions that the appellant "be restrained from taking any further proceedings upon the petition whether by advertising the same or otherwise". She also ordered that the petitions were to "be removed from the file of the proceedings".

5. In their written skeleton submissions, the respondents said that the petitions not having been advertised were not properly before the Court. They may well be correct on that score. However, the learned judge seems to have focused her attention on the petitions and, indeed, at the conclusion of her reasons for judgment, she wrote: "These motions are refused". She must have been referring to the petitions, seeing that she had actually granted that which the respondents were seeking.

6. The reasons for judgment are brief enough to be quoted in full:

> "A company may be wound up if the Court is of the view that it is 'just and equitable' so to do.
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> In determining this, the Court can see this as an opportunity to look into the company's internal affairs and although the burden rests on the Applicant to demonstrate that the circumstances warrant intervention, the Courts are willing to consider the motivation derivision (sic) during a company's action.
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> The Applicant must satisfy the Court that he has 'clean hands' so that if the matters complained of by the Applicant are matters for which he (the applicant) can be blamed then the application may not be granted. In the instant cases, the companies' inability to carry on business profitably (including paying their suppliers and customers) was due, in the opinion of this court, to the unreasonable actions of the Applicant himself and in the circumstances he should not be allowed to succeed in his applications. E.g. The Applicant instructed the companies' bankers by letter not to honour any cheques submitted by the companies involved unless these cheques bore the signatures of both himself and Suresh Khemlani. Prior to this the signature of Suresh Khemlani was sufficient and cheques were honoured – the effect of the Applicant's letter to the bank resulted in the companies' inability to pay any monies due and owing.
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> The Applicant complained that he had not been invited to board meetings but I accept the evidence in the affidavit of Suresh Khemlani that the Applicant had refused to attend board meetings of the companies and had virtually relinquished participating in any activities.
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> The information presented in affidavits filed by the Respondent and which are accepted by the Court

> suggest that Applicant (sic) filed these petitions to wind up these companies for the collateral purpose of bringing pressure to bear on the Respondent companies so that he (the Applicant) would be in a management capacity in these companies and pursue his own objectives, prevent enquiries in relation to the dissipation of company assets by him and force payments for shares to which it is questionable or doubtful that he has any beneficial entitlement.
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> These motions are refused."

7. The appellant filed the following grounds of appeal:

> "1. The Learned Judge in Chambers erred in Law in effectively putting an end to the Petitioner's Action based only on the disputed Affidavit evidence of his brother, when the circumstances of the dispute between the brothers made it clear that this was a most dangerous and unreliable source upon which to base such a fundamental denial of access to the Courts of justice.
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> 2. The Learned Judge erred in Law in refusing the Petitioner a trial of his Petition based on a finding of bad faith, and impure or wrongful motives when there was in fact no or no reliable evidence of any such motive.
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> 3. The Learned Judge erred in failing to take into account that, in his capacity as a 50% shareholder of the Respondent Company who was unable to obtain the agreement of the other 50% shareholder on any matter involving the company, the Petitioner had no alternative but to bring this action to resolve the impasse as neither shareholder could outvote the other in any internal company proceedings.
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> 4. The Learned Judge erred in making such a drastic decision to deny the Petitioner access to the courts in a matter in which the facts were so hotly disputed at such an early stage when, at the trial of the Petition, all these issues as well as the issues raised

> by the Petitioner could easily have been explored and the affidavit evidence tested in cross-examination or by independent witnesses.
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> 5. The Learned Judge erred in Law in permitting the Respondent to participate in the proceedings in the way that it did in light of the undisputed evidence that the shareholders had not voted to permit the company to defend the proceedings or to authorize the company to retain Attorneys to represent it. In fact the evidence was clear that, based on the inflexible impasse between the two brothers and in the absence of the appropriate corporate resolution authorizing the company to take the action it has; and in the absence of an entry of appearance on behalf of the other shareholder, Suresh Khemlani who would have been entitled to participate and oppose the Petition as an interested party, the company ought not to have been heard in opposition to the Petition.
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> 6. The decision of the Learned Judge in Chambers to effectively strike out the Petitioner's proceedings was wrong in law as there was no obvious flaw on the face of the proceedings nor was there any undisputed fact which justified such drastic action.
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> 7. The decision of the Learned Judge in Chambers was unreasonable in light of the evidence."

7A. It is clear from the reasoning of the learned judge that she ignored the respondents' motions and concentrated her focus on the petitions and on what she perceived as the petitioner's motives. In arriving at her decision, she clearly made findings of fact on the basis of affidavits that contained disputed facts, without the parties having had the opportunity to challenge the various allegations in the affidavits. Learned Queen's Counsel, Miss Phillips, contended that the absence of cross-examination of the parties was due to a request by the

appellant's attorney-at-law, so the appellant ought not to be allowed to complain about that now. However, this statement by Miss Phillips cannot be regarded as one of law, without any regard for the particular circumstances. Where there are disputed facts in opposing affidavits, the tribunal may not be in a position to make a proper finding even though one of the parties may wish to forego cross-examination.

8. In the instant situation, there is no doubt that the brothers are at odds; they have been so for many years. They do not communicate, so their companies do not have the benefit of their collective wisdom and enterprise. According to the evidence that was presented, they cannot even agree on the procedure to be followed for the drawing and presentation of cheques. The ruling of the learned judge has not brought any resolution to the matter. It may even have made the situation worse. This is not good for corporate peace or a stable business environment.

9. The English case ***Re Yenidje Tobacco Co.*** [1916-17] All E.R. Rep. 1050 was not unlike the instant one. The headnote tells the story.

> "The two life directors of a private company each held an equal number of the class of shares which carried voting rights, and in the articles there was no provision for a casting vote by either of them. Differences arose between the two directors. They would not speak to each other and a third person had to convey communications between them, the one refused to give effect to the award of an arbitrator in favour of his co-director on a dispute

> between them, and one director had brought an action for fraud against the other.
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> **Held**: the company was in effect a partnership between the two directors, and the same principles should be applied as those which were applied in a case of dissolution of partnership; there existed in the management of the company a deadlock which could not have been contemplated by the parties when the company was formed; in these circumstances it was "just and equitable" that the company should be wound-up; and a winding-up order would be made".

Warrington, L.J., in stating his reasons for dismissing the appeal and thereby sanctioning the winding-up of the company, said:

> "...the court has in more cases than one expressed the view that a company may be wound-up if, for example, the state of things is such that what may be called a deadlock has been arrived at in the management of the business of the company. I am prepared to say that in a case like the present, where there are only two persons interested, where there are no shareholders other than those two, where there are no means of overruling by the action of a general meeting of shareholders the trouble which is occasioned by the quarrels of the two directors and shareholders, the company ought to be wound-up if there exists such a ground as would be sufficient for the dissolution of a private partnership at the suit of one of the partners against the other of the partners. Such ground exists in the present case. I think, therefore, that it is "just and equitable that the company should be wound-up."
> (p.1053 C-E)

Lord Cozens-Hardy, M.R. had earlier made the following point:

> "We are told that the court ought not to interfere because the company is prosperous, making large profits, rather larger profits than before the dispute became so acute ...Whether there would be such

> profits made in circumstances like this or not, it does not seem to me to remove the difficulty which exists, which is contrary to the good faith and essence of this, that the parties formed the scheme of a company managed by these two directors which should be worked amicably, and it would not justify the continuance of the state of things which we find here." [p.1052 I -1053A]

10. In the case before us, the appellant has been denied the opportunity of having his request properly heard by the Court. On that score alone, he ought to succeed. The petitions cannot be put on indefinite hold; nor can they be dismissed without a proper hearing. We find that there is merit in the appeal, particularly on the basis set out in grounds 2, 3, 4 and 7.

SMITH, J.A.

I agree.

COOKE, J.A.

I agree.

PANTON, P.

ORDER

The appeal is allowed; the order of the Court below made on November 1, 2006, is set aside. The motions are dismissed, and the petitions are restored to the file of proceedings to proceed in the Supreme Court in the normal way. Costs both

here and in the Court below are awarded against the respondent companies to the appellant; such costs to be agreed or taxed.