IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT E-205 OF 1995

IN THE MATTER OF PARAMEDICS SERVICES (1981) LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT

B. Frankson for Petitioner.

A. Wood and A. Levy for Respondent.

HEARD: 9th, 10th November, 1995, 14th December, 1995 and 22nd February, 1996

ELLIS J:

The Petitioner by a petition dated 24th May, 1995 prays for the following:

(i) A declaration that the Respondent is in breach of his fiduciary duties to the company.

(ii) An account of what is due from Respondent in respect of all monies, profits or gains, which would have been realized by the company but for the wilful and/or neglect and/or breach of the fiduciary duties of the Respondent to the company.

(iii) An Order for payment by the Respondent to the company of any such monies received by the Respondent and/or any sums found due upon taking of the account with interest thereon at a rate as the court deems just.

(iv) A declaration that the Respondent is a trustee for the company of apartments Nos. 202 and 304.

(v) An order for the winding up of the said company.

(vi) Such other relief as court deems just.

Mr. Wood for the Respondent applied for paragraphs 10 and 11 of the Petition and 10 and 16 of the supporting affidavit to be struck out. He based his application on ground that those paragraphs alleged grave allegations of fraud without supporting evidence. I ruled in his favour with the consequence that the paragraphs are no longer of relevance.

Mr. Frankson for the Petitioner argued that there has been a deadlock in the company. That deadlock he said is evidenced by inter alia the petitioner not having access to the company's property and a reluctance on the part of the respondent to facilitate the auditing of the books by auditors.

He said there was manifest mistrust between the parties and that exacerbated the deadlock.

He submitted that the nature of the parties relationship was akin to a partnership. On that premise he contended that the principles on which a partnership may be dissolved are applicable to this company. He relied on the case of **Re Yenidje Tobacco Company Limited. [1916] 2 Ch. 426** for his contention. Moreover, he argued the state of the company's financial affairs and its failure to comply with statutory requirements are conditions on which a court can exercise its discretion in winding up the company.

Mr. Wood for the respondent submitted that there was no deadlock between the parties. He admitted that the company was akin to a partnership. The respondent was appointed Chairman and Managing Director and the petitioner secretary.

The day to day management of the company resides in the managing director. This circumstances he said was founded at the incorporation of the company and was no unilateral imposition by the respondent. There is no deadlock since the complaint is against the management of the company and such management is within the company's construction. On this submission he cited in support **Loch v. Blackwood Limited [1924] ALL E.R. (P.C.P.)**.

Wood also submitted that the winding up of a company on just and equitable grounds imports a discretion. In this case, that discretion should not be exercised in petitioner's favour since if any deadlock exists it was authored by the petitioner himself. He supported this submission by the case of **Re W.R. Willcocks and Company Limited [1973] 2 ALL E.R. 93**.

The company remains workable within its constitution. In that circumstances there are reasonable alternatives to a winding up order. He cited S.206 (2) of the Companies Act and the case of **Re Davis (East Ham) [1961] 3 A.E.R. 926**.

An application to wind up a company, which is in substance a partnership, must satisfy the tribunal that circumstances which would go to a dissolution of a partnership are in existence. The case of **Re Yenidje Tobacco Company [1916] 2 Ch. 426** is authority for that proposition.

In the instant case, on the applicant's affidavit he says there is a deadlock within the circumstances of Yenidje's case and he places full reliance on the case. In my view Yenidje's case is not be applied without a consideration of all the circumstances.

The Judicial Committee of The Privy Council in **Loch v. J. Blackwood Limited [1924] ALL E.R. 200** is an authority on point. In his speech at page 203 letters H-I, Lord Shaw said:

> "It is undoubtedly true that at the foundation of applications for winding up on the just and "equitable rule," there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to private lives or affairs, but in regard to the company's business. Furthermore, the lack of confidence must spring not from disatisfaction at being out voted on business affairs or on what is called the domestic policy of the company."

So too in **Re Davis Investments Limited [1961] 3 ALL E.R. 927** at page 929 at letterd D Lord Justice Donovan said:

> "Counsel for the petitioner's argument goes to this length: that in a case of a two man company, if the shareholders, being equal in shareholding, fall out, one of them alleging that further co-operation is impossible, then the court, in the answer of a reply from the other shareholder must at once treat them as though they were partners and order a winding up, as it would, in a partnership case order a dissolution. I do not think that is the law."

I conclude that in the cited passages the applicability of Yenidje's case was limited.

As I said before a court must consider all the circumstances before exercising its discretion to make an order for the winding up of a company.

The circumstances I find to be present here are:

(a) the respondent has replied by affidavit;

(b) that reply includes the production of the memorandum and articles of association of the company;

(c) the competence of the respondent to act as chairman and managing director with a casting vote derives from the articles.

In examining the circumstances, I find that conduct of which the petitioner complains falls within the company's articles and nothing in the petition suggests any fact which goes to a lack of probity in the conduct of the company's affairs.

In addition, I make bold to say that the so called deadlock alleged by the petitioner was his own creation.

Section 206 (2) of The Companies Act empowers a court to refuse a petition for winding up a company where it is of opinion that some other remedy exists and petitioner is unreasonably seeking to have the company wound up rather than pursuing that other remedy.

The petitioner's affidavit which grounded his complaint and also the affidavits of the respondent evince nothing which suggests that the company is not workable.

The so called dispute between the shareholders as to the conduct of the company's affairs can be solved within the articles of the company. In that regard I make reference to articles 81, 99, 106, 112 and 114.

The respondent by letter of July 17, 1995 to the petitioner sought to offer some other remedy than the winding up order.

I see no reply to that letter from the petitioner and that to my mind, suggests a refusal to consider that other remedy.

Mr. Frankson however challenges the sincerity of that letter by submitting that it came after the petition was presented. That is a fact, but I have found no authority which requires the offer of other remedy must come before a petition. I dismiss that challenge.

In all the circumstances, I find that:

(1) There is no deadlock as to the conduct of the company's affairs which cannot be solved within the articles of the company;

(2) There exist other remedies than a winding up order;

(3) Those other remedies were advances to the peititoner;

(4) The petitioner by his conduct has unreasonably refused the alternative remedies;

(5) The petitioner has not, on his affidavits and arguments on his behalf, convinced me to exercise my discretion in favour of granting his petition.

The petition is therefore dismissed. The parties are to take advantage of other remedies as exist within the company's articles and otherwise.

There shall be costs to the respondent to be agreed or taxed.