NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 54/96

COR: **THE HON. MR. JUSTICE RATTRAY, P**
THE HON. MR. JUSTICE PATTERSON, J A
THE HON. MR JUSTICE BINGHAM, J A

BETWEEN	**RONALD SAHOY**	**PETITIONER/APPELLANT**
A N D	**PARAMEDICS SERVICES (1981) LIMITED**	**RESPONDENT**

Barry Frankson & Earl Witter instructed by Gaynair & Fraser for Appellant

Allan Wood & Anthony Levy instructed by Levy, Gordon-Palomino & Co for Respondent

22, 23, 24, 25 September & 24th November, 1997

RATTRAY, P

This appeal is brought consequent upon the refusal by Ellis J, to make an order for the winding up of the respondent Company on a Petition brought by the petitioner/appellant Ronald Sahoy o/c Robin Sahoy.

The Company was incorporated in 1981 as a private company with a nominal shareholding of Two Hundred Dollars ($200) equally divided between the Petitioner, a Medical Practitioner and one Conrad Levy, an Insurance Underwriter. On the filing of the Petition by Dr. Sahoy, Mr. Levy entered an appearance as an interested party. No appearance was entered for the Company. In effect therefore, the issues in the Petition were joined between Mr. Levy and Dr. Sahoy.

They were not only the two equal shareholders, they were also the only subscribers to the Memorandum and Articles of the Company and the only Directors of the Company. Mr. Levy was the Managing Director and Chairman of the Board of Directors and Dr. Sahoy as well as being a Director was Secretary of the Company.

The fundamental object of the Company was:

> "To establish and operate a medical clinic and offices for the purpose of carrying out medical examinations of persons for all purposes."

The Memorandum of Association of the Company mandated that:

> "The business of the Company shall be managed by the Directors," that is Dr. Sahoy and Mr. Levy.

Article 65 of the Company states:

> "In the case of an equality of votes, whether on a show of hands or on a poll, the Chairman of the meeting at which the show of hands take place or at which the poll is demanded, shall be entitled to a second or casting vote."

The effect of this Article is that in the event of a disagreement between Dr. Sahoy and Mr. Levy, the only two shareholders, the casting vote of Mr. Levy, the Chairman would determine the issue. This is hardly a device fashioned to achieve an amicable settlement of a deadlock between the only two shareholders on any issue on which they each hold a serious opposing viewpoint.

The Petitioner alleged -

> "That the relationship between the petitioner and the respondent had become strained and communication has totally broken down. There is a complete deadlock between us in consequence of which no consensus can be reached on matters concerning the affairs of the Company."

It was further alleged against Mr. Levy as follows:

a) Ouster of the Petitioner from making important managerial decisions of the company and dealing with the funds of the Company as if they were his own:

b) Conducting the Company's business in a manner oppressive to the Petitioner:

c) Failure to have statutory returns of the Company filed since 1991 and to have the Company's accounts audited.

Consequently, the Petitioner asserted his loss of faith in the conduct and management of the affairs of the Company and concluded that it was therefore just and equitable for the Court to wind up the Company.

The questions which had to be determined in this petition were as follows:

1. Bearing in mind the structure of the Company, is there evidence which establishes a complete deadlock between the only two shareholders and Directors of the company?

2. If the answer is in the affirmative how does this deadlock affect the operations of the Company?

3. Do the Articles of the Company disclose the existence of a satisfactory mechanism by which this deadlock, having arisen could be satisfactorily resolved?

4. In the circumstances, are there satisfactory alternative remedies available in lieu of an Order for winding up of the Company?

Affidavit evidence of the petitioner Dr. Sahoy, identifies in 1993 a dispute between himself and Mr. Levy over a decision taken by Mr. Levy and the Office Manager, Mrs. Sydney Parkins to close the offices of the Company between 1.00 p.m. and 2.15 p.m. each afternoon. Dr. Sahoy considered that period to be the time when most persons would be seeking Company services. In a letter dated 21st June, 1993 (Sahoy to Levy) this disagreement is documented as well as concerns raised by him to Mr. Levy about:

a) "Inordinately long waiting time of clients requiring ECG tests which they can only take during their working hours. These delays are obviously due to internal inefficiency in the management of the Company's operations of which you are directly responsible."

b) The disagreement of Mr. Levy to Dr. Sahoy's suggestion to stagger "the lunch break of our staff to facilitate speedier and more efficient service".

The letter continues:

> "It was in these circumstances that you requested one week within which to secure acceptable offers for the take over of the Company's business

> whether issuing from you or from third parties. The week has expired and nothing is forthcoming from you or elsewhere."

This letter also records the intention of Dr. Sahoy to apply to the Supreme Court for an order to wind up the Company and ends as follows -

> "It follows that with immediate effect there should be no further disbursements made from the Company's assets, nor any new business accepted. As Secretary of the Company I shall also be taking immediate physical custody and control of all the Company's records, in particular its books of Accounts and I am quite sure I shall have your full co-operation in this regard and that you will advise the staff accordingly."

Dr. Sahoy had also alleged fraud against Mr. Levy with respect to the use of Company funds relying upon information given to him by one Anna-Marie Dyke, which he verily believed. These allegations were ordered to be struck out by the Judge on an early application on behalf of Mr. Levy as there was no evidence to support it. The truth is that Anna-Marie Dyke had in fact made these allegations to Dr. Sahoy, but they could not be substantiated because the source of the information, Anna-Marie Dyke though admitting having made them withdrew them in writing as being accusations made by her in anger against Mr. Levy when a 10 year long intimate relationship between them had broken up and she wished to hurt him. The withdrawal statement is annexed in an affidavit by Mr. Levy. Miss Dyke's information given to Dr. Sahoy, although not capable of establishing fraud confirmed in fact that she had made the allegations to Dr. Sahoy.

This would support, despite their withdrawal, Dr. Sahoy's claim to having verily believed them. The making of these allegations by Miss Dyke was an element to be considered, not in determining their truth and thus establishing fraud on the part of Mr. Levy, but as a factor contributing to the loss of confidence between Dr. Sahoy and Mr. Levy.

The affidavits sworn to by both Mr. Levy and Dr. Sahoy speak clearly of a breakdown in the relationship between these two persons. It was a breakdown not only in terms of personal relationships but involved intimately the running of the business of the Company. Without going into details we are able to identify the following areas of conflict between these two persons whose co-operation was so crucial to the existence of, and the operation of the Company:

1. The role of Mrs. Sydney Parkins as Office Manager and her torn loyalties between both parties. Eventually it is clear that she took the part of Mr. Levy, and Dr. Sahoy attempted to dismiss her.

2. The interpretation placed by Dr. Sahoy, on payment to him by cheques due in respect of their Company arrangements drawn on Mr. Levy's personal account in Eagle Commercial Bank as well as the explanations for this given by Mr. Levy. The Court is not in this regard required to determine the existence or otherwise of malpractice. Its concern must be to identify the issues which resulted in breakdown or deadlock.

3. The evidence in relation to a dispute between Dr. Sahoy and Mr. Levy as to who was empowered to sign cheques which led to the Bankers freezing the accounts of the Company.

4. The situation reached whereby both parties ceased communication directly and dealt with each other only through their respective lawyers.

5. The notification by Messrs. Gaynair and Fraser, Attorneys-at-law for Dr. Sahoy to Messrs. Levy, Hanna & Co. Attorneys-at-law for Mr. Levy of the appointment of an independent auditor to check the accounts of the Company.

6. The proposals made by Mr. Levy for Dr. Sahoy to buy out his shares or for him to buy out Dr. Sahoy's shares. This must be seen as an acceptance by Mr. Levy of the existence of a deadlock in respect of which he was making suggestions as to how it could be broken.

7. The alternative proposal of the appointment of a third Director which was also made by Mr. Levy. Again, this must also be seen as an acceptance of the existence of deadlock.

8. The resulting impossibility of having cheques signed and the effect on the operation of the Company.

9. The situation which led to Mr. Levy applying for and obtaining an Interim Injunction in Suit E172 of 1992 restraining Dr. Sahoy from -

a) "taking any action intended to, or having the effect of forcing the Plaintiff to close its business;

b) conducting himself in a threatening, loud, noisy or abusive manner whilst in or about the business premises of the Plaintiff;

c) threatening or abusing the employees and officers of the Plaintiff or threatening to or attempting to terminate the employment of employees of the Plaintiff;

d) changing the locks on the doors of the Plaintiff's business premises;

e) interfering with the day to day operations of the Plaintiff business and preventing the employees of the Plaintiff from carrying out their lawful duties;

f) in any manner whatsoever interfering with the smooth and normal day to day operations of the Plaintiff's business".

10. The dispute existing as to whether it was agreed by both parties that as Managing Director and Chairman of the Company, Mr. Levy would have authority to exercise all the powers vested in the Board of Directors of the company. This must be seen as against Article 89 of the Company that 'The business of the Company should be managed by the Directors ...'

Dr. Sahoy had alleged in the Petition that -

> "It was agreed that the Petitioner and the Respondent would participate equally in the management of the company ..."

Mr. Frankson for the petitioner has relied upon the authority of **In re Yenidje Tobacco Company, Limited** [1916] Ch. D. 426 to urge a consideration of the position of a Company structured as this Company was, "and in what respect it can be

fairly called a partnership in the guise of a private Company." In the **Yenidje** case, Lord Cozens Hardy M.R. at page 430 of the Report cited with approval a passage from Lord Lindley in his book on Partnership at page 657 as follows:

> "Refusal to meet on matters of business, continued quarrelling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation have been held sufficient to justify a dissolution. It is not necessary, in order to induce the Court to interfere, to show personal rudeness on the part of one partner to the other, or even any gross misconduct as a partner. All that is necessary is to satisfy the Court that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it."

An examination of the structure of this Company and the manner in which the business is conducted between these two sole shareholders and Directors established that it was in fact really a partnership cloaked in the legal garment of the Company as was the case in **In re Yenidje**. At page 431 of the Report Lord Cozens Hardy had posed the question -

> "... is it likely, is it reasonable, is it common sense, to suppose those two partners can work together in the manner in which they ought to work in the conduct of the partnership business? Can they do so when things have reached such a pass,..."

and continuing was of the view:

> "Certainly, having regard to the fact that the only two Directors will not speak to each other, and no business which deserves the name of business in the affairs of the company can be carried on, I think the Company should not be allowed to continue."

The Law Lord applied the principles applicable to a partnership to a Company so constituted and stated at page 432:

> "I think that in a case like this we are bound to say that circumstances which would justify the winding up of a partnership between these two by action are circumstances which should induce the Court to exercise its jurisdiction under the just and equitable clause and to wind up the company."

The principles identified in the **Yenidje** case are very apposite with respect to the instant case.

Mr. Wood has argued extensively that in the present case the Court must look to see who was at fault to bring about whatever deadlock existed and sought to uphold the findings of Ellis J 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 exists remedies other than a winding up order;
>
> 3. Those other remedies were advanced to the Petitioner;
>
> 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 learned trial judge therefore proceeded to dismiss the petition.

The evidence is overwhelming that there is a deadlock as to the conduct of the Company's affairs. The question is whether that deadlock can be solved within the Articles of the Company. Structured as the Company is, and in the circumstances of this petition in our view the deadlock is impossible to be broken under the terms of the Articles of Association of the Company. This is so because the contending parties are both Directors and a deadlock between them can only be broken by the casting vote of Mr. Levy which could not in fact resolve the issues between both parties.

The other remedies advanced to the petitioner by Mr. Levy are as follows:

> (A) An offer by Mr. Levy to sell his shares to Dr. Sahoy or alternatively for Dr. Sahoy to buy Mr. Levy's shares.

It is necessary to quote the details of this offer. In a letter to Dr. Sahoy from Mr. Levy dated 17th July, 1995 the proposal is put as follows:

> 1) I will be prepared to sell my share in the Company to you for the sum of $300,000.00 and in addition,

you would be required to pay my attorneys the sum of $100,000.00 for legal fees incurred, both the aforesaid sums to be paid within thirty (30) days of receipt of written acceptance of this offer;

2) Alternatively to (1) above, I would be prepared to purchase your share in the Company for the sum of $300,000.00 and in addition to pay to your attorneys the sum of $100,000.00 for legal fees incurred, both the aforesaid sums to be paid within thirty (30) days of acceptance in writing of this offer.

3) My offer and any agreement to purchase your share as set out in paragraph (2) hereof is also conditional upon the Company obtaining from the Board of Directors of the Medical Associates Hospital, of which you are the Chairman, a written commitment that the Company's lease of premises at the hospital, now used as the Company's sole place of business, will be renewed at the end of the current term which expires in the month of September 1995 for a period of five years. Of course, it will be expected that you will use your good offices to obtain such a commitment by the date fixed for the making of payment to you, failing which, the agreement to purchase your share will cease and determine, time to be of the essence;

4) The share which is to be transferred under either paragraphs (1) or (2) hereof will be transferred to nominees to be named by the purchaser;

5) The purchaser of the share will indemnify the vendor for any outstanding debt, liability, expense or other obligation due by the Company;

6) I will also be prepared to agree to the appointment of Dr. Charmaine Webb, who presently does medicals for the Company, as a third Director for the Company, in light of your allegations that there exists irreconcilable differences between us. I will be prepared to implement this appointment immediately irrespective of whether we arrive at agreement upon the other items of this offer.

7) Your Petition is rescheduled for hearing on 20th July,1995 and I would ask for your prompt response to this offer which remains good for the next three (3) days, whereupon same is to be treated as withdrawn."

It is clear that this offer with acceptance fixed within a time frame of three (3) days is conditional upon several matters which would not be within the full authority of Dr. Sahoy to obtain. In our view, this could not therefore be identified as an alternative remedy to the winding up of the Company.

> (B) The second proposition put forward to appoint Dr. Charmine Webb as the third director of the Company arises out of the provisions in the following Articles of the Company:
>
> (a) Article 81 provides that the number of Directors shall not be less than two nor more than four.
>
> (b) Article 99 enables the Directors to appoint any person to be a Director in addition to the existing Directors.
>
> (c) Articles 112 and 114 give the authority to the Directors on a majority to appoint a Managing Director to whom they may entrust any of the powers exercisable by them upon such terms and conditions as they think fit.

It is to be noted that Article 103 provides as does Article 65 that in the case of an equality of votes, the Chairman shall have a second or casting vote. This is to be borne in mind as Mr. Levy was the Chairman. The appointee therefore as a third Director would, if not agreed, be in fact Mr. Levy's appointee.

In the circumstances of this case a deadlock between Dr. Sahoy and Mr. Levy could not be resolved by the exercise of an option which makes Mr. Levy the person finally to determine the resolution.

In our view therefore, the solutions projected by the learned trial judge are not sustainable.

Section 206(2) of the Companies Act provides that the Court "shall make a winding up order, unless it is also of the opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy".

In our view there was no other satisfactory remedy available to the petitioner and therefore the question of acting unreasonably or otherwise is irrelevant for the determination of the winding up. The learned trial judge was therefore in error in resting his decision upon a conclusion of Dr. Sahoy having acted unreasonably.

In the circumstances therefore, the appeal should be allowed and an Order made for the winding up of the Company by the Court. It is further added that each party, Dr. Sahoy and Mr. Levy should pay his own costs both in the Supreme Court and in the Court of Appeal.

PATTERSON, J.A.

I entirely agree and do not wish to add anything.

BINGHAM, J. A.

I also agree.