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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E236 OF 1998

IN THE MATTER of Shim's Wholesale Liquors
(1978) Limited (In Receivership)

AND

IN THE MATTER of the Companies Act

PETITION FOR WINDING UP

Paul Beswick and Terrence Ballantyne instructed by Miss Althea Grant
of Ballantyne Beswick and Company for the Petitioner
Hugh Small, Q.C. and Andre Earle instructed by Jeffrey Daley of
Rattray, Patterson and Rattray for the Debenture Holder
Alexander Williams and Benito Palomino for the Supporting Creditor,
Douglas Chambers

Heard: February 22, 1999 and March 24, 1999.

CORAM: WOLFE C.J.

On October 13, 1998, in a written Judgment, I said:

"The evidence adduced in this petition entitles the petitioner, in my view, to an order to wind up the company ex debito justitiae but I am further of the view that an exception arises which would justify my ordering that the petition must stand over."

In consequence of the above, I ordered as follows:

"I am therefore of the view that the petition should stand over until the 7th January, 1999, when the report of the Receiver should be available and a clearer picture of the company's affairs known."

On the 22nd January, 1999, the Receiver having filed his report in accordance with section 328(2) of The Companies Act, Mr. Beswick for the Petitioner now moves the Court to order that the Company be wound up as prayed.

The Receiver Kirt Millwood was cross examined by Mr. Beswick.

The financial report submitted indicates that from the period September 1997 to November, 1998, the Company suffered an accumulated loss of \$2,938,252.51.

Legal and professional expenses incurred by the Company for the period September to December 1997 amounted to \$2,954,630.68.

From January 1998 to November 1998 Legal and Professional expenses incurred amounted to \$1,418,042.00.

With respect to the amount owed to the Petitioner, the evidence of the Receiver is:

"Due to the current trading situation the company is not in a position to pay the agreed amount. We did submit a smaller amount but it was returned. This was in June 1998."

The amount owing to the Petitioner is as set out on page 2 of the written judgment delivered on October 13, 1998 and referred to supra.

An arrangement was entered into between the Petitioner and the Company to pay the Judgment Debt but save for one payment of \$250,000.00 the agreement has not been honoured. In the meantime, other creditors have been paid large-sums of money since the filing of the winding up petition.

In addition to its indebtedness of approximately \$13,000,000.00 to the petitioner the Company is indebted to the Debenture Holders, Dehring Bunting and Golding Limited in the sum of approximately \$35,000,000.00.

Further the Company is indebted to Bank of Nova Scotia Jamaica Ltd. in respect of an undisclosed sum of money, by way of overdraft facility.

National Investment Bank of Jamaica is owed approximately \$4,000,000.00.

Statutory deductions amounting to approximately \$3,000,000.00 is owing for the period 1996 to 1998.

An amount of \$487,871.45 is owing to the Supporting Creditor, a former Receiver of the Company.

The Receiver admits that the Company is insolvent. The total liability of the Company as at November 1998, stands at \$64,513,410.00 whereas the total assets of the company amounts to \$42,426,949.00.

There is a deficit of \$22,086,462.00.

It is clear to me having read the affidavits herein and having listened to the viva voce evidence of the Receiver that the task of turning around the operations to make the company a viable entity, thereby being able to pay its debts, is a herculean one.

The plans which the Receiver testified of are no more than mere hopes. There is nothing concrete or specific about these plans which would lead me to accept that they are realizable.

The Receiver Mr. Kirt Milwood stated categorically during his evidence that due to the financial position of the company, suppliers are insisting on being paid within a certain time frame.

In an effort to ensure that the supply line is not disconnected, suppliers are treated on a priority basis in preference to even secured creditors.

I am satisfied that the likelihood of the petitioner being paid the amount which is owing to him, over a considerable period, is remote due to the financial crisis which the company is experiencing.

Bearing in mind the dictum of *Lord Cranworth In Bowes v. Hope Life Insurance and Gurantee Co. (1865) 11 H.L. Cas 389* at 401, referred to at p 8 of the Judgment delivered on October 13, 1999, I am of the view that in all the circumstances of this case, the company ought to be wound up and accordingly, I so order.

Pursuant to Section 217 of the Companies Act, the Trustee as defined by section 214 of the said Act is hereby appointed the liquidator.