

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E.236 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 Ballentyne instructed by
Miss Althea Grant of Ballentyne, Beswick & Company
for the Petitioner.

Andre Earle instructed by Rattray, Patterson and Rattray
for the Debenture Holder.

Alexander Williams and Benito Palomino for the
Supporting Creditor, Douglas Chambers.

Heard: July 30, 31, October 13, 1998.

CORAM: WOLFE, C.J.

This petition is at the instance of Carlton Rodney of Waterford in the
parish of St. Catherine.

Shim's Wholesale Liquors (1978) Limited was incorporated on the 9th day
of October, 1978, under the Companies Act as a Private Company Limited by
shares. Its registered office and principal place of business are both situated at
113 Orange Street in the parish of Kingston.

The nominal capital of the Company is Nine Hundred and Eighty Thousand Dollars (\$980,000.00) divided into 980,000 ordinary shares of One Dollar (\$1.00) each.

The Company is indebted to the petitioner in the sum of four million, seven hundred and thirty three thousand, five hundred and eighty-nine dollars and ten cents (J\$4,733,589.10) with interest thereon of two hundred thousand, five hundred and seventeen dollars and ten cents (J\$200,517.10). There is also owing to the petitioner by the company the sum of one hundred and thirty eight thousand, seven hundred and fifty dollars in United States currency (US\$138,750.00) with interest thereon of thirty seven thousand five hundred dollars (U.S. \$37,500.00).

Interest is payable on both sums at the rate of nine per centum per annum from the 11th day of February 1990 and the 6th day of May, 1992, respectively, with costs to be agreed or taxed.

This indebtedness arises out of a judgment of the Supreme Court of Judicature handed down on the 10th day of September, 1997 in Suit C.L. R018 of 1992. The claim was grounded in negligence resulting in injuries and loss to the petitioner.

In an effort to reap the fruits of his judgment the petitioner caused a writ of seizure and sale to be issued pursuant to the said judgment but the writ was returned NULLA BONA, as all the goods and chattels of the company were

subject to a debenture which was taken out after the action for negligence was instituted.

An arrangement was entered into between the petitioner and the company for the payment of the judgment debt. The company failed to honour the agreement save and except for one payment in the sum of two hundred and fifty thousand dollars (\$250,000.00).

The petitioner contends that the company is insolvent and unable to pay its debts and moves the Court in the circumstances to wind up the company on the ground that it is just and equitable so to do.

The affidavit verifying the petition was duly sworn to on May 1, 1998 and both petition and the affidavit verifying same were duly served upon the company on May 14, 1998. The petition was also served upon the company by Registered Mail of May 18, 1998.

The petition was advertised in the Daily Gleaner of Wednesday, May 20, 1998 and the Jamaica Gazette Extraordinary No. 44 dated Wednesday, June 3, 1998.

There is no dispute that the debenture exists.

The company was placed into receivership by the debenture holder on September 11, 1997, when Douglas Chambers, Chartered Accountant, was appointed the Receiver. Douglas Chambers and the supporting creditor are one and the same person.

Mr. Chambers swore on oath that the company is indebted to him in the sum of four hundred and eighty-seven thousand, eight hundred and seventy one dollars and forty five cents (\$487,871.45). He has also been sued by Messrs. Moo Young Butler Associates Ltd. to recover the sum of four hundred and twenty-eight thousand and ninety-three dollars and fifty cents (\$428,093.50) in respect of work done on behalf of the company during the time that he was the Receiver.

Section 203 of The Companies Act 1965 decrees as follows:

“A company may be wound up by the Court if -

(a) - (d)

(e) the company is unable to pay its debts;

(f) the Court is of the opinion that it is just and equitable that the company should be wound up.”

Section 204 of the Act stipulates -

“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 or 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 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."

The basis of this petition is that the company is unable to pay its debts and that it is just and equitable that the company should be wound up pursuant to sections 203 (e) and (f).

There is no dispute that the petitioner had caused a writ of seizure and sale to be issued in an attempt to recover the fruits of his judgment and that the writ was returned Nulla Bona. There is also evidence that the company has been unable to pay the receiver his fees for services rendered and that it has been sued by Moo Young Butler Associates Ltd. in respect of a sum due for services rendered.

So there are in fact grounds upon which the Court could properly order the Company to be wound up, as being unable to pay its debts. It was laid

down in *Bowes v. Hope Life Insurance and Gurantee Co.* (1865) 11 HL Cas 389 at 401 that a creditor who cannot obtain payment is entitled as of right to a winding up order.

Mr. Andre Earle for the Debenture Holder submitted that the Court in the exercise of its discretion should not grant a winding up order for the undermentioned reasons:

- (a) The Company's assets will fetch a higher value if they are kept in tact and the company is sold as a going concern thereby enabling the company to meet its liabilities. A forced sale he submits would greatly depreciate the value of the company and the proceeds of sale would be inadequate to meet all of its liabilities.
- (b) An additional layer of costs would unnecessarily be incurred with the appointment of a liquidator. Judging from the claim of the previous Receiver the costs of liquidation would be enormous. Expenses incurred by the previous Receiver between September 1997 and December 1997 amounted to \$1,500,000.00. Further it should be borne in mind that the liquidator's remuneration, fees, costs and expenses rank ahead of the preferential creditors and unsecured creditors including the petitioner. (See sections 279 and 285 of The Companies Act.)

- (c) Section 328 (2) of The Companies Act places a statutory obligation on the Receiver and Manager appointed under any instrument to render accounts to the Registrar of Companies after the expiration of 12 months from the date of his appointment. It is submitted that the statutory period is the minimum period in which a Receiver could reasonably be expected to resuscitate a company and therefore the Court in exercise of its discretion should afford the Receiver the minimum period before granting a winding up order.
- (d) If the company is placed in liquidation, this would sound the death knell as suppliers and customers would be reluctant to trade with the company. This Mr. Earle submits would leave more creditors without any hope of recovering the debts owed to them.
- (e) Liquidation would destroy the goodwill which exists in the name "SHIMS", a valuable asset in the recovery programme.
- (f) The effect of winding up the Company must be viewed not only from the stand point of the creditor's debt being satisfied but must be viewed globally as to the effect it

would have on the economy of the country. Loss of jobs by workers.

- (g) The effect of liquidation would be to close down an entity which has the capacity to be revived and begin to generate profit.

The learned author of Halsbury's Laws of England 4th Edition vol. 7 at paragraph 1033 states as follows:

"A creditor who cannot obtain payment is entitled as of right to a winding up order, subject only to the court's power on the hearing of petition to give effect to the wishes of the majority, although the matter is always in the court's discretion, reported cases being merely guides. If however, the company is not already in liquidation, and the only fact that emerges is that it is insolvent opposing creditors must give reasons for their opposition if the court is to take it serious."

In *Bowes v. Hope Life Insurance and Guarantee Co.* (1865) 11 HL Cas. 389 at 401 Lord Cranworth, dealing with the above point, opined:

"the real question here is, whether the Master of the Rolls, before whom the matter originally came had before him a case in which there was such a clear proof of a valid debt, both at law and in equity, that he had no other course to take but immediately to direct the winding up; because I agree with what has been said that it is not a discretionary matter with the Court when a debt is established, and not satisfied to say whether the company shall be wound up or not; that is to say, if there be a valid debt established, both at law and in equity. One does not like to say positively that no case could occur in which it would be right to refuse it; but, ordinarily speaking, it is the duty of the Court to direct the winding up."

As I indicated earlier on in this judgment, there is no dispute that a debt is owing to the petitioner and that execution has failed to satisfy that debt. If I may borrow the words of the noble and learned Lord Cranworth, “the debt has been established and not satisfied”.

In re Western of Canada Oil Lands and Works Company (1873) L.R. 17 Eq. 1, Sir George Jessel M.R. stated the rule thus:

“that a creditor of a company who cannot get paid and presents a petition for winding up, is entitled *ex debito justitiae* to a winding up order; but at the same time it is not to be said that this is a rule without exception, or that the Court has no power to direct the petition to stand over.”

On the state of the authorities all the reasons advanced by Mr. Earle, for the respondent, save one are of no avail. They have their genesis more in emotion than in law.

It must be further noted that the Court may not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal or in excess of those assets or that the company has no assets. See section 206 (1) of The Companies Act, also re St. Thomas' Dock Co. (1876) 2 Ch. D116 at p. 122.

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.

Mr. Earle did raise the point that The Companies Act, section 328 (2) requires the receiver to give a report of the status of the company within 12 months from the date of his appointment.

The Receiver, Mr. Kirt Millwood was appointed on December 23, 1997. His report pursuant to section 328 (2) is due in December 1998.

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 clear picture of the company's financial affairs known.

Accordingly, I so Order.