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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E291/1988

IN THE MATTER OF BURKE SUCCESSORS LIMITED

A N D

IN THE MATTER OF THE COMPANIES ACT

A N D

IN THE MATTER OF premises 80 Half Way Tree Road, Kingston 10 in the parish of Saint Andrew

WINDING UP PETITION

R. Codlin for the Petitioner.
B. McCaulay, Q.C., and R. Francis for the Company.

Hearing on May 25, 26, 29, 1989 and June 23, 1989

REASONS FOR JUDGMENT

BINGHAM J:

On 29th May, 1989, after a hearing lasting some three days, I made an order that the Company Burke (Successors) Limited be wound up with certain consequential orders which flowed from this order. At the time of arriving at my decision I promised to put my reasons into writing and this I now do.

The Company in question was incorporated as a Private company on 23rd March, 1983 in accordance with the usual requirements of the Companies Act of Jamaica with registered offices at 80 Half Way Tree Road, in Saint Andrew. The nominal share capital of the company at the time of incorporation was stated to be $1000 divided into 1000 shares having a par value of $1.00 each.

The Petitioner, Carlton Beckford at paragraph 5 of the said petition presented in these proceedings for winding up the company, stated that "Olive Tibbets-Ramchand of 4 Duke Street, Kingston and James Gangasingh of the same address were the subscribers to the Memorandum of Association and that Delbert Perrier the Managing Director of the company and himself were the contributories (shareholders)."

Paragraph 3 of the Affidavit sworn to by Delbert Perrier and filed in opposition to the Petition for winding up states that, "the Petitioner, Carlton Beckford is not a contributory to the said company." He further deponed that the two aforementioned persons previously referred to as being the subscribers to the Memorandum of Association, were also the sole contributors. This if true

would be of crucial importance in considering the catalogue of events which have now lead up to the order which the petitioner sought and which has now been made.

Subsequent to the incorporation of the company, the petitioner, Carlton Beckford and Delbert Perrier, who if the former is to be believed were the two persons having a proprietory interest in the company, and if the latter's assertion is preferred no interest or benefit therein and even in the absence of any share qualification being given the exalted position of Managing Director. Both these gentlemen went to the National Commercial Bank Limited, a very well known financial institution, and procured two loans on behalf of the company, no doubt by way of capital injection into the operations of the company. These loans were secured by a personal guarantees executed by these two gentlemen.

The first loan of Three Million Dollars ($3,000,000) was secured on 20th June, 1984. This sum was obtained from the National Commercial Bank Trust Company.

The second loan was subsequently obtained from the Manor Park, Branch of the same bank for $700,000.

The assets of the company, according to a document lodged with the record in these proceedings comprised two buildings situated at 80 Half Way Tree Road which consists of:-

"1. Front Building

Ground floor Gas Station - 2000 square feet.

Upper Floors (3) office space.

Total - 10,300 square feet.

Back Building

Ground and First Floors - Sixteen (16) shops including 2 double and one triple.

Second Floor - 8,000 square feet office space.

Each building has its own Strata Title and can be sold as a separate unit."

From this narrative of events it may be reasonably inferred,,and this is bourne out by an examination of the articles of association, that this company was incorporated to construct these two buildings with as its main purpose the operating of:

a. a gas station.

b. the letting of shops and offices - all with the object of generating sufficient income to cover its operational expenses, to service the existing debt to the bank and in keeping with prudent business practices to realise a reasonable profit for the investors, as whoever these persons were, they were certainly, not operating " a sunday school" or some charitable organisation, but were in this venture to make money as is the object of all such commercial undertakings of a similar nature.

The performance of the company since its inception is a matter which on examination of the affidavits of the Petitioner on the one hand, and Delbert Perrier, on the other are at variance.

The Petitioner has sought to petition for winding up the company on two grounds namely:-

1. That he is a contributory (shareholder).
2. That he is a co-guarantor of loans secured on behalf of the company.

In so far as the petitioner sought to bring these proceedings in his capacity as a contributory, on the basis of the ground upon which the order is sought namely that the company is unable to pay its debts, it was argued by Learned Counsel for the company that the petitioner was precluded from presenting a petition in such a capacity on this ground; as being a shareholder he could not properly petition to wind up the company, but if he was dissatisfied with the manner in which the company's affairs were being conducted then the proper course was to summon a meeting of the shareholders and seek such redress at that meeting.

On the basis, however, that the petitioner is also a guarantor of the company's indebtedness to the bank and although he has stated in his petition to be a contributory and as such precluded from presenting a petition on one of the groundsstated in the petition, he qualifies to file same on the secondary ground on the basis that he is a guanrantor of the company's indebtedness and as such a contingent or prospective creditor within the terms of Section 205 (1) of the Companies Act and therefore although the term "creditor" is not defined

in the Act it has been judicially decided that it includes "any contingent or prospective creditor," which would include inter alia a guarantor of a debt owing by a company which debt has not yet been paid. In this regard a contingent creditor means "a person towards whom under an existing obligation the company may or will become subject to a present liability on the happening of some future event or at some future date." Re William Hockley Limited [1967] 1 WLR 555 at page 558 per Pennycuick J. (Emphasis supplied).

Paragraph 9 and 10 of the Petition in so far as they state:-

"9. That the company owns property at 80 Half Way Tree Road but the income therefrom is not even sufficient to service the annual interest on the debts, and at 20 % or more, the indebtedness of the company is well in excess of $6,000,000 and accruing at thousands of dollars per day.

10. That the company is unable to pay its debts and will be so unable unless it is wound up and the assets owned by the company are sold," both attest to the fact that the affairs of the company are being conducted in such a manner that the income being generated does not allow it to service the loans owed to the Trust Company and the bank and that this situation if allowed to continue unchecked would place such security being offered by the guarantors, which includes the petitioner, to the bank in jeopardy.

The Managing Director, Delbert Perrier, on the other hand in opposing the petition contends that the true state of affairs is that the company has been meeting its obligations under the loan and that it is able to pay its debts as they become due. Moreover, he swore in paragraph 10 of his affidavit of May 1989, "I deny that the total indebtedness of the company is in excess of $6,000,000 but admit that the total indebtedness of the company is about $2,400,000."

No current statement of company's affairs or Balance Sheets have been exhibited in support of the estimated sum stated to be the actual total indebtedness of the company. One would have expected that given the state of affairs referred to by the petitioner, that the deponent Perrier in opposing

the petition would have sought to adduce more cogent evidence to counter the facts alluded to in the petition. Moreover, such evidence would have been brought, such as for example, an affidavit from a responsible officer at the National Commercial Bank Trust Company Limited and the Manor Park Branch of the samew bank, these being the principal creditors, attesting to the company's performance relating to the liquidation of the loans over the period under review (1983 to the present date) would have been furnished to the Court. Alas! no such evidence was however, forthcoming.

From the affidavits when examined it is clear that paragraphs 9 and 10 of the petition which is supported by an affidavit from the petitioner veryfying the contents of the petition to be true do in fact represent an accurate picture of the true state of affairs of the company, and that the income being realised from its operations is in fact insufficient to meet its overall liabilities accruing from:-

1. Its operational expenses.
2. the outstanding loans due to the National Commercial Trust Company Limited and the National Commercial Bank, Manor Park Branch.

That the documentary evidence contained in the letters dated 24th May, 1989 and 26th May, 1989 from these two financial institutions far from supporting the facts deposed to in paragraph 10 of the affidavit sworn to by the Managing Director Delbert Perrier whose affidavit is in effect totally false and misleading.

The acid test as to the critèria in determining whether a company is unable to pay its debts and, therefore, on that basis ought to be wound up is given legislative sanction by Section 204 of the Companies Act which provides that:-

"204. A company shall be deemed to be unable to pay its debts ——

a. ....

b. ....

c. if it is proved to the satisfaction of the Court that the company is unable to pay its debts and <u>in determining whether a Company is unbale to pay its debts, the Court shall take into account the contingent and prospective liabilities of the Company.</u>

(Emphasis mine).

The uncontrovertible facts disclose that the original loans obtained in 1983 from the Trust Company and the Manor Park Branch of the bank totalled $3,700,000. The current indebtedness on these loans now amount to $6,401,039.61¢. It would not take anyone with much intelligence or common sense to conclude that hád the interest payments on these loans been properly met, the principal sum borrowed could not have escalated to the present levels now outstanding on each of these loans. This state of affairs has further to be examined against a background which reveals a situation in which there was a desperate attempt made to thwart the petition by a reduction of the loan to the Trust Company to its current balance by three payments made between January to March 1989. The petition had been filed from October 1988 and had come up for hearing on two previous occasions on 8th December, 1988 and 16th February, 1989. On the last of these two ocassions the records was endorsed "adjourned sine die pending settlement." Two of these payments which were of the size of $300,000 and $900,000 were made on 27th February, 1989 and 18th April, 1989. Support for this is to be found at paragraph 9 of Delbert Perrier's affidavit.

The only comment that I would venture to make in the light of the foregoing situation is that I shudder to think what would have been the company's position vis a vis the bank had not these two payments been forthcoming. The end result is obvious, The company's financial position is most precarious. It has [illegible] on the situation which is represented by its performance in servicing its indebtedness a very serious cash flow problem. The initial loan of $3,000,000 from the Trust Company which was secured for capital injection has dried up. Another $700,000 for a similar purpose has also dried up, and there has been on the face of it an almost total failure on the company's part to meet its obligations.

What ought a reasonable and prudent guarantor to do when faced with such a situation? He depones at paragraph 9 of his petition that the income being generated from the Company's operations is insufficient to meet its obligations. The response of Mr. Perrier is that the company's assets can attract a market value of $9,000,000 which sum is in excess of its current liabilities. As Mr. Codlin, however, quite rightly in my view contends even if this were so at the rate of interest which the loans are presently attracting

... that would not be sufficient to satisfy the sums now due to the bank within a very short period. Furthermore, although $9,000,000 may be the market value of these two buildings, in forclosure proceedings on a forced sale one can hardly speculate as to how much assets will then realise. One thing is certain and that is that they would not be appreciating in value. The petitioner, therefore, has every right to be concerned as to the possible risk of endangering the possible loss of his own security as a result of the instrument of guarantee and especially so in a situation in which it relates to a company in respect of which he is receiving no benefit. Not being the Captain of the vessel there is no reason why he ought not to abandon ship and given the surrounding circumstances of this company's performance one could hardly fault his decision in taking the course to petition to wind up the company's affairs.

The Court was also referred by Learned Counsel for the Company in support of his submissions on the question of the Locus Standi of the petitioner to petition for winding up, and in opposing the making of the order to the following authorities:-

1. Re British Equittable Bond and Mortgage Corporation Limited [1910] 1 Ch. 574.
2. Re Parent Trust and Finance Company Limited [1936] 3 AER 432.
3. The Weekly Notes 4th February 1949. Privy Council Cases - Chief Kwami vs. Chief Kwami Tawia.
4. Re Consolidated Gold Fields of New Zealand Limited [1953] 1 AER 79.
5. Privy Council Appeals 8/1985 Tay Bok Choon vs. Takanson Sdn Bhd.

On examination of these authorities, I am of the view that save and except for the first case referred to (Re British Equitable Bond and Mortgage Corporation) none of the other cases cited, with due respect to the submissions of Counsel, afford much assistance or relevance in determination of the questions arising for consideration in this matter. In so far as this case is of particular relevance in the determination of the locus standi issue Learnrd Counsel for the company has, far from seeking to distinguish Re Hockley Limited agreed with the reasoning adopted by the Court in that case.

It is my opinion that on the evidence contained in the petition supported as it is by the contents of the two letters from the National Commercial Mortgage and Trust Limited and National Commercial Bank (Manor Park) branch there is more than adequate and sufficient grounds under the provisions of Section 203

(e) when read together with Section 204 (c) of the Companies Act for the reliefs sought in the petition and on these facts I would hold that a winding up order ought to be granted.

The Question of Security for Costs

During the closing stages of the submissions by Mr. McCaulay the Courts attention was drawn to Section 205 (1) (e) of the Companies Act and it was contended that there had been a failure on the petitioner's part to comply with the provisions laid down by the Act and it was further submitted that the particular subsection created a condition precedent to a hearing of the petition. The view was also expressed by him that the point could be taken at any stage of the proceedings.

In this regard I would wish to make the following observations:-

1. There were certain preliminary steps taken before the Registrar of the Supreme Court prior to the hearing of the petition which had the effect of a Certificate of Compliance being issued by him.
2. When the petition was served upon the company it was open to Counsel for the company upon being made aware of the particular defect or omission to take out a summons applying for security for costs. (See proper procedure to be adopted in 13th Edition of Buckleys on the Companies Acts, page 467, marginal note intituted "Security for costs") No such course was resorted to in in this matter.
3. The company was represented at the hearing by Counsel and contested the matter.

It is my opinion that the conduct of Learned Counsel for the Company in which by his total participation in these proceedings, the company effectively waived such rights they had to raise such a question. They can be regarded as having by so acting as they did to have submitted to the jurisdiction of the Court.

Fof these reasons in my judgment I hold that although the relevant section of the Companies Act makes compliance by way of security for costs necessary prior to a hearing of a petition for winding up, this provision

may be construed as procedural in nature and a failure to observe same would not make the subsequent hearing void, and in any event such irregularity as there was, the respondents by their conduct before and during the hearing have waived such a condition.

Winding up order made accordingly.