

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
SUIT NO. E - 362 OF 1997

In the matter of Kirkwood
Manufacturing Company Limited (in
liquidation).

And

In the matter of the Companies Act

Mr. Lijyasu Monty Kandekore, Trustee in Bankruptcy, in person

**Company – Winding Up - Application for Dissolution – no statement of
arrangements or preliminary report filed**

12th and 19th June 2007

BROOKS, J.

This is an application by the Trustee in Bankruptcy to be formally appointed the Liquidator of Kirkwood Manufacturing Company Limited, and for the company to be dissolved.

A petition to wind up Kirkwood was filed on 13th October, 1997. The petition was filed by Heritage Forest Products Inc. which averred that Kirkwood was indebted to it and was unable to pay the debt. On 22nd October, 1998 this Court made an order that Kirkwood be wound up. The Trustee, by virtue of his office, became the provisional liquidator.

Upon the order for liquidation being made, the Companies Act placed certain responsibilities on the Trustee. He was however, unable to fulfil all

of them because of an inability to contact Kirkwood's officers. He has however determined that Kirkwood's only asset is cash in the sums of J\$24,375.42 and US\$84.22 respectively. (He has since taken possession of these sums.) This is against a background of creditors' claims against Kirkwood amounting to over J\$24.0m and US\$90,896.00. The creditors have since each decided not to pursue their respective claims.

The Trustee now wishes for the court to waive the requirements for the filing of a statement of affairs and a Statutory Preliminary Report, and for the dissolution to be ordered despite the absence of these documents. The main question to be resolved is whether this may be properly done?

The assessment of the question requires an examination of the relevant provisions of both the Companies Act, 1967 as well as its 2004 successor. The latter Act was passed during the course of Kirkwood's liquidation.

Which requirements of the Act have not been fulfilled?

Section 215 of the 1967 Act (section 232 of the 2004 act) required the directors or certain other persons specified in the section, to provide a statement of affairs to the Trustee. The statement of affairs should show the following information in respect of the company:

“...the particulars of its assets, debts and liabilities, the names, residences, and occupations of its creditors, the securities held by them respectively, the dates

when the securities were respectively given, and such...other information as may be prescribed or as the Trustee may require.

Upon receiving that statement the Trustee is required to submit a preliminary report to the court. Section 216 of the 1967 Act which established that requirement has its equivalent in section 233 of the 2004 Act. The preliminary report should contain information as to the capital structure of the company and the causes of failure of the company, if it has in fact failed. The difficulty is that the Trustee has not received the statement of affairs despite his requests for the submission.

The Trustee has also failed to hold separate meetings of creditors and contributors to have a liquidator appointed (Section 219 of the 1967 act and section 236 of the 2004 act). That failure has not been specifically explained, but an explanation could perhaps be implied by the paucity of the available funds and the eventual position of the creditors as have been outlined above. The last mentioned sections stipulate that where no liquidator is appointed, the Trustee shall be the liquidator of the company.

Are the failures fatal to the application?

There does not seem to be a great deal of case law dealing with circumstances such as these. I am however of the view that neither failure is critical to the winding up of this company. In the case of section 236, the meetings of creditors and of contributors are not for the purposes of

appointing the liquidator, but for the purpose of determining whether an application ought to be made to the court for a liquidator to be appointed. It is the court which makes the order for such an appointment and in the absence of an appointment the Trustee remains the liquidator by virtue of his office.

The failure to file the preliminary report pursuant to section 233 is made otiose to the extent that the Trustee has outlined, in his affidavit in support of the application, the steps taken to collect the assets, the details concerning the debts, and the stance of the respective creditors. A search at the office of the Registrar of Companies should have been able to provide the details concerning the issued capital, but I am of the view that, the stance of the creditors has made the further effort unnecessary.

Conclusion

In light of the limited funds forming Kirkwood's assets, it is my view that the effort and expense involved in complying with the requirements of sections 233 and 236 of the act are not justified. The Trustee, being the statutorily appointed liquidator, is empowered to take the necessary steps to wind up the company in the event that there has been no other liquidator appointed.

I therefore find that the Trustees request, that the statutory requirements be waived, is reasonable. The contributors should however be informed of these developments.

The order therefore, is as follows:

1. The Trustee in Bankruptcy and Provisional Liquidator of Kirkwood Manufacturing Company Limited (hereinafter called "the Trustee") be formally appointed Liquidator of that company pursuant to Section 234 of the Companies Act 2004;
2. The filing of the Statement of Affairs of Kirkwood Manufacturing Company Limited be waived;
3. The Trustee be released of the responsibility of filing the Statutory Preliminary Report as required by Section 233(1) of the Companies Act;
4. Kirkwood Manufacturing Company Limited be dissolved in accordance with section 269 of the Companies Act;
5. The Trustee's costs of the application and the winding up be paid, to the extent that it is possible, from the assets of Kirkwood Manufacturing Company Limited;
6. The Trustee shall serve the formal order hereof on each of the contributors of the company. Service shall be effected by registered post.