

The petitioner in reliance on the statutory provision seeks to have the Respondent wound up. In the petition it expresses itself thus:

"5. As at the 22nd day of February, 1996 the company was indebted to the Petitioner in the sum of US\$156,513.35 together with interest thereon at the rate of 11% per annum from the 21st of June, 1995 to the date of payment being the sum due and owing as at the 22nd of February, 1996 in respect of the third of three payments due and owing by the company in connection with certain trade financing provided to the company by First Trade International Bank and Trust Limited ("First Trade"), a Bahamian Bank. The benefit of the company's repayment obligations to First Trade in respect of the said financing was assigned by Deed to the Petitioner (dated 4th August, 1995) of which the company has at all material times had notice and pursuant to which the company paid to the Petitioner the first two of the said three payments.

6. In respect of the company's debt referred to at paragraph 5 hereof, by letter dated the 22nd day of February, 1996 the Petitioner delivered to the company's registered office, a demand for the indebtedness set out at paragraph 5 hereof requiring the company to pay the said sum.

7. Over three (3) weeks have now elapsed since the Petitioner served the aforesaid demand but the company has neglected to pay or satisfy the said sum or any part thereof or to secure or compound the same to the reasonable satisfaction of the Petitioner.

8. The Company is unable to pay its debts.

9. In the circumstances, it is just and proper that the company should be wound up."

The Petitioner has put itself squarely within the words of the statute, but these words and in particular the word 'neglect' has been the subject of judicial interpretation.

It is now and has for over a century been clear that if a party contests a debt on non-frivolous grounds there is no neglect. In the language of Jessup MR, in Re London and Paris Banking Corporation (1874) 19 LR Eq. 444 he held at page 446 that there is no neglect if there is a bona fide dispute. He held further that there is no neglect if there is a reasonable excuse.

In Re Lympne Investments [1972] 2 All ER 385, at page 389, Megarry, J. said there is no neglect if the reason for not doing an act is a "genuine and strenuous contention, based on substantial grounds, that the person is not liable to do that act at all". A challenge to liability is a challenge to the basis of the debt. The Court frowns on any attempt to use these actions in terrorem.

Hoffman, J in Re A Company (No 0012209 of 1991) [1992] 2 All ER 797 disparaged the situation where petitions were presented against solvent companies as a way of putting pressure on them.

En passant, it cannot be said that in this particular case the Jamaica Broilers Group is insolvent nor can it be said that the sum claimed is a huge amount. I would like to add to these expressions by these learned judges that the evidence adduced by the Petitioner should be straightforward and characterized by clarity. Further, these facts should sit comfortably in the lap of settled applicable law.

So now the question arises, has the Respondent neglected to pay? Is there an undisputed debt? The answer must be sought in a review of the circumstances resulting in these proceedings. Because of what is considered my role to be in these proceedings I am going to be cautious in proceeding to give an outline.

It seems sufficiently certain that in 1995 the Jamaica Broilers Group wished to purchase grain from abroad. It is also without dispute that in this commercial transaction First Trade was the advising or confirming bank; that is sufficiently clear. It would seem also that after the inception of this commercial transaction First Trade floundered in the waters of insolvency. This led to First Trade having the Petitioner, Towerbank securing the services of the First Union Bank of Florida to carry out the function of the confirming or advising Bank. Perhaps for reasons not unrelated to the

financial woes of First Trade, Towerbank was given the authority to collect money on its behalf. I have purposely used the word "authority" and not "assignment", the reasons for which I will demonstrate hereafter.

Towerbank gave notice of this "assignment" to the Jamaica Broilers Group, which accepted apparently the arrangement and pursuant thereto paid two instalments of some US\$153,000.00 each and there was one left outstanding.

At this stage perhaps it would be interesting to note that there is some relationship between First Trade and Towerbank. The Petitioner is a related company to First Trade. As at October 27, 1994, the 210,399 shares of First Trade were held by Manuel Varela (1 share) and Transnational Group Limited (210,398) shares. As at the same date the Petitioner was the holder of the fifth largest block of shares in Transnational Group Limited.

It is the third payment that is the bone of contention; hence these proceedings. I think that that is a sufficient outline for my purposes.

I wish to deal first with the question of privity of contract. The argument posited is as follows. Quite bluntly, Jamaica Broilers Group owes First Trade nothing, so there is nothing that can be assigned, if assignment there be. What is the basis of this contention? The basis for this is that the commercial arrangements were between Capital and Credit Merchant Bank and First Trade. Capital and Credit was the issuing bank, and First Trade the advising and confirming Bank. At this point it may be useful to note that Capital and Credit Merchant Bank is an associate company of the Jamaica Broilers Group.

Towerbank contends that the commercial arrangement was between First Trade and Jamaica Broilers Group itself. So there are the contended allegations.

Documentary evidence was presented by both sides to support these allegations. It is not my duty to resolve this. It is not my role here. What the Applicant/Respondent is saying is that "I am disputing this debt, that I owe you nothing at all". As I have said, documents were produced.

It is my duty now to determine whether this contention was frivolous or whether it is bona fide and on substantial grounds. I have no difficulty at all in holding that this is a bona fide contention.

The Applicant/Respondent also puts forward that the necessary prerequisite in law in respect of the assignment is lacking, this being that it should be evidenced in writing. The Petitioner contends that there is no such requirement. Essentially what the Applicant/Respondent is saying is that before you can exercise any rights under the assignment, it is to be evidenced in writing. Again I have to determine whether or not this is frivolous or bona fide and on substantial grounds and as in the former situation I have no difficulty in holding that this is bona fide.

The Petitioner in respect of these two points argues that estoppel would prevail. Again, in the role in which I have cast myself in these proceedings, that is not a matter for me to decide.

The question of set-off is inextricably intertwined with the question of privity and assignment. It should be quite clear by now that I have come to the conclusion that in these circumstances it cannot be said that there has been a 'neglect', within the meaning of the law.

The sole question left for me to determine is whether the bringing of this petition is an abuse of the process of the court. At all material times prior to the filing of the petition, the Petitioner well knew that the Applicant/Respondent was questioning the debt on the grounds of privity and was questioning the validity of the assignment. The Petitioner well knew that the debt was disputed. The Petitioner well knew of the grounds and any reasonable Petitioner must have recognized that these grounds were not frivolous. They were bona fide.

At this stage I would like to rely on a passage from Holt Southey Ltd. v Catnic Components Ltd., an authority cited by Petitioner and reported at [1970] 2 All ER 276, at page 277, Goulding, J.

quoted a passage from Ungood-Thomas, J. in Mann v Goldstein [1968] 2 All ER 769. The passage reads,

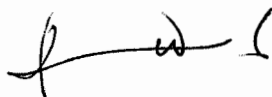
“ When the debt is disputed by the company on some substantial ground (and not just on some ground which is frivolous or without substance and which the court should, therefore, ignore) and the company is solvent, the court will restrain the prosecution of the petition to wind up the company. As Sir Richard Malins, V.-C., said in Cadiz Waterworks Co. V. Barnett (1874) LR 19 Eq 182 at 194, of a winding-up application, "...it is not a remedy intended by the legislature, or that ought ever to be applied, to enforce payment of a debt where these circumstances exist -solvency and a disputed debt." As Sir George Jessel, M.R. said in the judgment from which I have already quoted [a judgment in Niger Merchants v Capper (1877) 18 ChD 557n at 559], the right course is to bring an action in debt ...” (*emphasis mine*). So to pursue a winding up petition in those circumstances is an abuse of the process of the court”.

Based upon my reasoning that the Petitioner well knew of the circumstances why the debt was being disputed, and based upon the fact that the Jamaica Broilers Group is solvent and that is well-known and it cannot be said otherwise, it is the view of this court that the action should be struck out and it is so struck out.

It is the further view of this court that in these circumstances to bring the Petition was an abuse of the process of the court and the filing of this Petition was calculated to embarrass the Respondent, the Jamaica Broilers Group.

Costs to the Applicant/Respondent.

Leave granted to appeal, if necessary.



COOKE, J.