IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2005 HCV 01132

IN THE MATTER OF WESTERN BROADCASTING SERVICES LIMITED.

AND

IN THE MATTER OF SECTION 204 (A) OF THE COMPANIES ACT

Mr. Emil George Q.C. and Miss Stacy-Ann Smith instructed by DunnCox for Mr. Edward Seaga.

Mr. Charles Piper instructed by Messrs Piper and Samuda for Western Broadcasting Services Limited.

APPLICATION TO DISMISS PETITION

Heard: 9TH & 17TH January 2006

BROOKS, J.

Western Broadcasting Services Limited (the company) has applied to this court to dismiss a petition filed by Mr. Edward Seaga for the company to be wound up. The petition contains an allegation that the company is indebted to Mr. Seaga in a sum in excess of $31.0 m. and that it has neglected to pay the debt. The company asserts that Mr. Seaga is well aware that it has a *bona fide* dispute as to the alleged debt and that the petition is therefore an improper attempt to pressure it to pay the sums claimed. As a

result, says the company, the petition ought to be struck out as being frivolous, vexatious and an abuse of the process of this court.

I propose to assess the company's application by examining three main issues, namely:

(1) whether there is evidence of the alleged or any debt;

(2) whether there is a *bona fide* dispute between the parties concerning a debt, and,

(3) whether a pending appeal against an order of the court concerning a debt owed by the company to Mr. Seaga constitutes evidence of a *bona fide* dispute.

To better understand the issues, it is necessary to provide an outline of the background leading up to the filing of the application.

BACKGROUND FACTS

The issues raised here have their genesis in an action brought by Mr. Seaga for damages for defamation of character. The company was the first-named of a number of defendants to that action and it embarked on settlement discussions with Mr. Seaga. The parties eventually appeared before the Honourable Mrs. Justice N. McIntosh and on 30th September 2003, that learned judge delivered an order which included the following terms:

> "1. That there is a binding agreement between the Claimant and the First Defendant in settlement of the Claim against the First Defendant only, in the following terms:
>
> ...(b) The First Defendant agrees to pay an amount of Twenty Million Dollars ($20,000,000.00) plus Attorneys-at- Law Costs to DunnCox as agreed between the Attorneys-at-Law.
>
> (c) Of the Twenty Million Dollars ($20,000,000.00), an amount of Three Million Dollars ($3,000,000.00) is payable in cash and the balance of Seventeen Million Dollars ($17,000,000.00) would be paid by way of the First Defendant and CVM Television Limited providing the Claimant with Volume Discount Advertising credit on both Hot 102 Radio Station and CVM –TV which advertising credit the Claimant could sell for cash to any third party."

The company appealed against the order to the Court of Appeal but its appeal was dismissed and the order confirmed. The company asserts, and it has not been contested, that the sum of $3.0m had been paid before the commencement of any proceedings.

By a Notice of Demand dated February 24, 2005, Mr. Seaga demanded the delivery up to him of assignable advertising credit notes to a value of $30,801,061.65. This figure was represented by two sub-totals:

1. $5,000,000.00 credit notes
   $1,750,000.00 additional credit notes
   $2,704,623.29 representing interest at 25% p.a.
   $9,454,623.29

   These credit notes to be issued by Hot 102.

2. $12,000,000.00 credit notes
   $3,240,000.00 additional credit notes
   $6,106,438.36 representing interest at 25% p.a.
   $21,346,438.36

   To be issued by CVM –TV

In addition Mr. Seaga demanded the payment of $840,411.60 calculated as follows:

$600,000.00 for legal costs
$240,411.60 representing interest at 25% p.a.
$840,411.60

The statutory demand allowed, in the alternative, for the company to pay the said sums by manager's cheque.

The company's Attorneys -at- Law, by letter dated March 11, wrote to Mr. Seaga's Attorneys -at- Law protesting the issue of the Notice of Demand and particularizing its reasons for the contest, including an assertion that there was no debt outstanding.

Some reconsideration seems to have taken place and by letter dated March 18, 2005, the company's Attorneys -at- Law wrote to Mr. Seaga's Attorneys -at- Law delivering to the latter, credit notes in the sum of $16,993,200.00 issued by the company and $346,200.00, by CVM Television Ltd. By letter dated March 21, 2005 the credit notes were rejected and returned as being for the incorrect sums and because they contained reference to unacceptable conditions.

The petition was filed on April 21, 2005. Subsequent to the filing the company sought from McIntosh, J. clarification of certain aspects of her

order. Clarification was made by an order dated June 13, 2005 in the following terms:

> "(1) The reference to Costs payable to Dunn Cox "**as agreed between the Attorneys-at-Law**" in paragraph 1(b) of the Formal Order granted by the Honourable Mrs. Justice Norma McIntosh on the 30th day of September 2003, is to be interpreted as meaning the sum of $600,000.00 mentioned at paragraph 2 of the Deed of Settlement exhibited as Exhibit "**AJD 1**" of the Affidavit of Abraham Dabdoub sworn to on the 23rd September, 2003 and filed herein on the 24th September 2003; ...
>
> (2) The reference to $17,000,000.00 to be paid "by way of the 1st Defendant and CVM Television Limited providing the Claimant with **Volume Discount Advertising credit** on both Hot 102 Radio Station and CVM – TV" is to be interpreted as meaning advertising credit to be calculated on the Volume Discount basis as set out in paragraphs 6(c) and 6(d) of the Deed of Settlement referred to in paragraph (1) above."

For completeness, and because their terms proved to be the source of still further contention, it should be noted that paragraphs 6(c) and 6(d) dealt with the delivery to Mr. Seaga of assignable credit notes by Hot 102 Radio Station ($5.0m) and CVM – TV ($12.0m) respectively to be utilized for the purchase of advertisement on their respective programming schedules. The Deed of Settlement did not include any reference to these sums attracting any payment of interest.

Having received the clarification, the company, again through its Attorneys -at- Law, and by letter dated August 4, 2005, paid over a sum of $732,953.00 in settlement of the legal costs mentioned in the clarification order (together with interest thereon) and issued new credit notes. These credit notes were in the sums of $5.0m (by the company) and $12.0m (by

CVM Television Ltd.) respectively. Again however the credit notes were rejected and returned as being encumbered by conditions which were unduly restrictive and therefore unacceptable to Mr. Seaga.

It is against this background that the present application comes to be heard. I now return to the issues to be assessed.

WHETHER THERE IS EVIDENCE OF A DEBT

Mr. Piper submitted that at the time when the petition was presented there was no debt, for at that time, he said, there was no indication from the court as to the amount of any costs that it had said had been agreed between the parties. Similarly Mr. Piper brought to the court's attention that clarification had also been sought and obtained in respect of the $17.0 m worth of volume discount advertising credit.

He referred to the affidavits of Mr. David McBean which have been filed in support of the application and indicated that the company has, before the petition was filed, paid the sum of $3.0m, and has, since the filing of the petition:

a. paid a sum of $732,953.00 as costs;

b. delivered two credit notes,

in compliance with the clarification order.

Thus, says Mr. Piper, there is no evidence of a debt being due and further, that there is no evidence (other than the assertion by Mr. Seaga to that effect) that the company is unable to pay its debts. On the contrary, says Mr. Piper, the evidence from the background facts is that the company is able and has paid its debts when due. On Mr. Piper's submission, the only issue between the parties on the facts is the dispute concerning the terms of the credit notes. In that context, submits, Mr. Piper, there is a genuine dispute that a debt exists and therefore there is no "neglect to pay" in the terms of Section 221(a) of the Company's Act, by the company. The dispute, argues Mr. Piper, is not a matter for determination by the court in these proceedings. He cited in support of his submissions, the cases of *In re Gold Hill Mine* [1882] 23 Ch. D. 210, *In re London and Paris Banking Corp.* (1875), 19 LR Eq. 444, and *Stonegate Securities Ltd. v. Gregory* [1980] 1 Ch 576.

These cases support the principle expressed by Mr. Piper. It is to be noted however, that in each, the claimant had proceeded to issue demand notices or to file their respective petitions before securing a judgment stipulating the debt which they had each alleged was owed. It was found that there was a genuine dispute in the first two of the three as to whether the

claimants were in fact creditors. In the third, the issue was whether the debt had yet become due.

The principle is also outlined by Derek French, the learned author of *Applications to Wind Up Companies*. He opines at paragraph 6.11.1 as follows:

> "The court is highly unwilling to hear a petition for the compulsory winding up of a company presented by a person claiming to be a creditor of the company if the company disputes the existence or size of the debt and/or the time at which it is due for payment....
> The primary reason for this attitude is that in most cases the court cannot make the winding-up order asked for until the dispute about the petitioner's debt is resolved but the procedure for hearing a winding-up petition is not suitable for resolving disputes about debts. In Re Laceward Ltd. [1981] 1 WLR 133, Slade J said, at p 136:
>
> > It is the well established practice of this court to refuse to allow petitions for the winding up of companies brought at the suit of alleged creditors, whose debts are disputed bona fide on substantial grounds. It has been said in several reported cases that the procedure of a winding-up petition is not an appropriate course by which to attempt to resolve such a dispute."

Mr. George Q.C. on behalf of Mr. Seaga submitted, and I find correctly so, that:

a. the order of McIntosh J. was a declaratory one, which established that the debt existed. It did not create the debt;

b. the clarification order is not a new judgment, it is a clarification of the original and refers to the date of the original;

c. the latter order states clearly what the costs are and what the debt is;

d. the company has attempted to pay the debt with credit notes, but has attached conditions unacceptable to Mr. Seaga.

No additional authorities were cited by Mr. George.

In *A Concise Law Dictionary* by P.G. Osbourne, the term "declaratory judgment" is defined as "a judgment which conclusively **declares the pre-existing rights** of the litigants without the appendage of any coercive decree..." (Emphasis supplied.) In *Words and Phrases Legally Defined,* (Butterworths 3rd Ed.) the learned editors define declaratory judgments and orders as "usually determinations of rights in the actual circumstances of which the court has cognisance, and give some particular relief capable of being enforced".

Based on the nature of the declaratory order, I find that there is no basis for the company to say that there is a *bona fide* dispute as to whether a debt exists.

IS THERE A *BONA FIDE* DISPUTE BETWEEN THE PARTIES CONCERNING THE EXISTING DEBT

Though I have found that there is a debt existing, it seems however that a factual dispute exists as to whether the conditions of the credit notes

issued in satisfaction of it are fair and reasonable. This affects the issue of whether Mr. Seaga is entitled to say that they are not to his satisfaction.

Section 221 of the Companies Act states:

"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 five hundred thousand dollars 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**; ..." (Emphasis supplied.)

To determine whether Mr. Seaga has reasonably rejected the credit notes issued by the company, I need but look, by example, at one of the conditions in question. That condition restricts the placement of advertisements to times between late nights and the wee hours of the morning. This condition, in my view, makes the credit notes virtually unassignable, as the market for advertisement during that period must by nature be very small. I find that Mr. Seaga is not being unreasonable in rejecting the credit notes as not being to his satisfaction. I find that this does not constitute a *bona fide* dispute, but is instead a ruse by the company to delay the resolution of the matter.

Two other disputes need to be addressed, but they may conveniently be dealt with together. They stem from the fact that Mr. Seaga has claimed additional advertising credit as well as interest on the sums of $12.0m and

$5.0m respectively. There is no basis for the latter claim. As previously mentioned, interest formed no part of the agreement which was found to exist and McIntosh, J. made no order as to interest. It is also my view that since the order did not create the debt, the sums do not constitute a judgment debt for the purposes of section 51(1) of the Judicature (Supreme Court) Act. This is the section which authorizes interest to be claimed on judgment debts.

I have not found an authority which specifically addresses this point but an inference may be drawn from the following quote from *The Declaratory Judgment* by Zamir and Woolf:

> "Where a person is entitled to a monetary remedy, for example, damages in contract or tort, or a judgment for a sum of money or for the repayment of a loan, he will rarely be satisfied with a mere declaratory judgment."

In any event there would be no justification for interest at the rate of 25% p.a. It is not in the agreement and the Judicature (Supreme Court) Act does not authorize it.

The company has refused to comply with the demand for interest. It has similarly refused to comply with the demand for the additional credit notes reflecting Volume Discount Bonuses. It is not immediately discernable to the reader of the Deed of Settlement and the original and clarification orders, what is the basis for this claim. Both orders speak only to the sum of

$17.0m and the Deed to the breakdown of that figure. A reading of paragraphs 6(c) and 6(d) do not aid an interpretation in favour of a claim for any additional credit notes. The former stipulates as follows:

> "(c) Delivery by CVM-TV of assignable Credit notes to the Value of TWELVE MILLION JAMAICAN DOLLARS ($12,000,000.00) to be utilized for the purchase of advertisement on CVM-TV at a cost in accordance with the CVM-TV Spot Volume Band as follows:-"

Thereunder is a column entitled "Contract Band", and the term "% Bonus" with a range of figures from a low of 5% to a high of 27%. Paragraph 6(d) is in similar terms, the only differences being the name of the entity (Hot 102), the value of the credit notes to be issued ($5.0m) and a high of 35% on the range. None of the parties have sought to explain this range of percentages in the affidavits which have been placed before me.

There appears to me to be some inconsistency on Mr. Seaga's part in connection with these claims. Although Mr. George has submitted that the clarification order "states clearly what the costs are and what the debt is", and Mr. Seaga's Attorneys -at- Law, in returning the credit notes in August 2005, (that is, after the clarification order) did not then complain that they were for the incorrect sums, it seems that Mr. Seaga continues to claim the $30.0m plus figure. I say this because, in an affidavit resisting the company's application, and sworn to on January 9, 2006, Miss Stacy-Ann

Smith on Mr. Seaga's behalf swore that this last set of credit notes were unacceptable as they were "also not for the correct amount".

Does the company's refusal to comply with these demands constitute a *bona fide* dispute which entitles the company to have the petition struck out? In Charlesworth and Cain's Company Law (11th Ed.) the learned authors have opined at p. 543 that "(w)here there is no doubt that the petitioner is a creditor for a sum which would otherwise entitle him to a winding-up order, a dispute as to the precise sum owed to him is not itself a sufficient answer to his petition where the company is commercially insolvent in that it does not have assets presently available to meet its current liabilities". They cite as authority for that proposition the case of *Re Tweeds Garages Ltd* [1962] 1 All E.R. 121.

In that case there was no real contest that the respondent company was indebted to the petitioner for a substantial sum, though there was a dispute as to the actual amount due. Plowman, J. at p. 124 expressed himself thus:

> "Moreover it seems to me that it would in many cases be quite unjust to refuse a winding-up order to a petitioner who is admittedly owed moneys which have not been paid merely because there is a dispute as to the precise amount owing.... In my judgment, where there is no doubt...that the petitioner is a creditor for a sum which would otherwise entitled (sic) him to a winding-up order, a dispute as to the precise sum which is owed to him is not of itself, a sufficient answer to his petition."

Plowman, J. had however found that Tweeds Garage was insolvent, and he went on to say later on page 124:

> "In the present case, being, as I have said, satisfied that the company is insolvent, I think that it would be wrong to put these petitioners to the trouble and expense of quantifying the precise amount which is owing to them in other proceedings and in all the circumstances of this case I propose to make the usual compulsory order."

There are two significant differences between the circumstances of this case and that of *Tweeds Garages*. Firstly, apart from the affidavit in support of the petition there is no evidence of any insolvency on the part of the company, and secondly the demand by Mr. Seaga does not necessarily require a payment of cash by the company. Though the company's advertising revenue could be affected by such a large amount (in value) of advertising for which the company would receive no payment, there is no evidence that that would necessarily entail a reduction in revenue, and even so, that such a reduction could not be absorbed by the company. In this regard I am more inclined to the view that the *Tweeds Garages* case is distinguishable.

I find that the circumstances of the instant case demand that although the company has acted unreasonably on the question of the conditions attached to the credit notes, Mr. Seaga should either reconsider the amount of his demand or seek further clarification from McIntosh, J. He may thereafter place himself in a position to enforce payment of the debt due to him.

Support for this position may be found in the passage quoted above from *Applications to Wind Up Companies,* as well as the following extract from that work:

> If the fact that the company is indebted to the petitioner is not disputed, but the amount to be paid and/or the time at which it is to be paid is disputed, then the petitioner's standing is not in question... However, usually the only evidence such a petitioner will have that the company is unable to pay its debts is that it has not paid the full amount of the petitioner's claim, and this will not be sufficient proof since the claim is disputed."

Support is also claimed from the judgment of Buckley L.J. in the *Stonegate* case (mentioned above) where the learned lord justice said at p. 587:

> "The whole of the doctrine of this part of the law is based on the view that winding-up proceedings are not suitable proceedings in which to determine a genuine dispute about whether the company does or does not owe the sum in question; and equally I think it must be true that winding-up proceedings are not suitable proceedings in which to determine whether that liability is an immediate liability or only a prospective or contingent liability. It might be that in some cases the point was so simple and straightforward that the winding-up court might be able to deal with it, but I feel certain that it cannot be right to say that, in a case where there is a dispute of that nature, the only course which the court to which application is made to restrain presentation of the petition can follow is to leave it to the Companies Court to resolve all the issues between the parties.

DOES A PENDING APPEAL AGAINST AN ORDER OF THE COURT CONCERNING A DEBT OWED BY THE COMPANY TO MR. SEAGA CONSTITUTE EVIDENCE OF A *BONA FIDE* DISPUTE

I ought not to conclude this judgment without reference to one further submission which Mr. Piper made. He informed the court that the judgment

of the Court of Appeal confirming the order of McIntosh J is the subject of an appeal to the Judicial Committee of the Privy Council. By that appeal, submitted Mr. Piper, the company "disputes the existence of any liability whatsoever to the petitioner". I find that the submission is without merit. There is a long established principle that judgments of the court are to be obeyed despite the view held of it by the persons affected thereby. In *Chuck v. Cremer* (1846) 1 Coop. temp Cott. 342, Lord Cottenham L.C. stated:

> "A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... That the course of a party knowing of an order, which was null or irregular, and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed."

In our jurisdiction, Cooke J.A. in *Bastion Holdings Ltd. v. Bardi Ltd. and anor.* SCCA 14/2003 (delivered 29/7/05), in supporting the principle in *Chuck v. Cremer,* opined that "a party who disagrees with the procedural framework must comply with any orders of the court made within the framework until it has been decided that the court was in error".

In the instant case the Court of Appeal, in affirming the order of McIntosh, J. did not grant any stay of proceedings. It is therefore untenable for the company to say that the appeal is evidence that there is a *bona fide* dispute as to the existence of the debt. That assertion flies in the face of the ruling of the court and should not be countenanced in any way.

CONCLUSION

The company in order to succeed in its application to strike out Mr. Seaga's petition, has to show that there is a *bona fide* dispute as to the debt which Mr. Seaga claims and hence Mr. Seaga is not a creditor for the purposes of presenting a winding up petition. The order of McIntosh, J. establishes that a debt exists, and unless this is set aside by a superior court the company is obliged to accept this order. However, the claim by Mr. Seaga for advertising credit for a value of in excess of $30.0m when the order declared the debt to be $17.0m provides the company with a credible basis for stating that it has a *bona fide* dispute concerning the debt. This dispute addresses the question of whether the company is insolvent.

The petition proceedings are not for the purposes of resolving such disputes. Although Mr. Seaga is clearly owed a debt and the company has sought to attach some untenable conditions to the credit notes which it has issued, it seems that he is obliged to review his position before he is entitled to present a petition for winding up.

The order, therefore, is that:

1. The Petition dated April 20, 2005 and filed in this action be and is hereby dismissed.

2. The costs of the application shall be paid by the petitioner upon their being taxed, if not agreed.