IN THE COURT OF APPEAL

ST VINCENT

CIVIL APPEAL NO.11 of 1975

BETWEEN: METROCINT GENERAL INSURANCE COMPANY LIMITED
AND
EGERTON RICHARDS Appellants

AND

HOUSTON LEWIS
AND
OLIVER DA SILVA Petitioners/ Respondents

Before: The Honourable the Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Peterkin

E. Robertson for appellants.
G. Isaacs for respondents.

1975, September, May

J U D G M E N T

St. Bernard J.A.

This is an appeal from the decision of Berridge J. in which he ordered the winding up of the Metrocint General Insurance Company Limited on the ground that it was just and equitable so to do.

The Company was incorporated on 31st December, 1968, under the Companies Act, Cap.219 of the Revised Edition of the Laws of St. Vincent, as a public company limited by shares. The first-named petitioner is the holder of 50 shares at $5 each in the capital of the company, all of which have been fully paid up. They were allotted to him on 4th December 1969. The second-named petitioner is one of the subscribers to the Memorandum of Association of the Company for one share. The

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petition alleged that he was entitled to receive fully paid-up shares in the amount of 800 at $5 each for services rendered to the Company during its formation. The trial judge found this allegation to be proved, but that since the shares were not allotted to him, his claim thereto could only be determined in other proceeding.

Among the allegations made in the petition are the following:

"8. The subscribers to the Memorandum of Association of the Company appear to be the only members of the Company apart from your Petitioner, HOUSTON LEWIS of McKies Hill. Two of the subscribers, DOROTHY BLACK and BENJAMIN BLACK, have since died and Milton T. Mayers of Villa has not taken up any share in the company. The other subscribers to the Memorandum of Association are the second-named respondent, EGERTON RICHARDS who exercises sole control over the Company, his wife, NOREEN RICHARDS and his daughter, VENITA RICHARDS who presently resides in Canada.

9. No statement has been published by the Company in accordance with section 36 of the Companies Act Chapter 219

/and.....

the Company the second-named respondent assumed the role of Managing Director and made your Petitioner the Secretary of the Company. These appointments were never made or confirmed by the Company at a meeting of Directors or of the members of the Company.

15. The Company has not kept proper and consistent records of its profits and loss accounts owing to the instruction of the Managing Director. But the second-named Petitioner in his capacity as secretary to the Company has knowledge that large sums of money were paid into the Company as premiums on motor vehicles, collected by the Managing Director and probably deposited to the Company's account at its Barclays Bank D.C.O. Kingstown, St. Vincent.

18. Without any authority from the Company the Managing Director has awarded scholarship from funds of the Company and has made several donations to various organisations.

20. Your Petitioners summoned a General Meeting to discuss the state of the Company for the 14th December 1972 but

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the Managing Director refused to respond to the request saying that the Petitioners were jokers and he had no time with them.

21. Your Petitioners find it impossible to conduct a General Meeting or a meeting of the Directors, since three members personally present shall form a quorum in accordance with section 30 of the Articles of Association of the Company. The Managing Director and his wife Noreen Richards refused to hold or attend any meeting, Venita Richards lives in Canada and two members are now dead.

25. There has been violation of section 23 of the Articles of Association in that no general meetings have been held since the incorporation of the Company.

26. Remuneration has been paid to Directors of the Company without the amount being determined in accordance with section 46 of the Articles of the Company.

27. Contrary to section 53 of the Articles of Association Directors have been appointed to hold office in the Company.

28. There has been a violation of section 79 of <u>two</u> Articles of the Association

/of.....

of the Company in that true and correct accounts of all the commercial, financial and other affairs of the Company have not been kept.

29. The books of accounts and other books and documents of the Company have not been kept at the registered office of the Company in accordance with section 80 of the Articles of Association of the Company.

32. The Directors have violated section 83 of the Articles of Association in that they have never laid before the members in a General Meeting a Balance Sheet containing a summary of property and liabilities of the Company and also a report of the Directors as to the state and condition of the Company as to dividend.

38. If the Company is wound up there will be sufficient assets in the Company to satisfy the claims of all the share-holders.

39. In the circumstances it is just and equitable that the Company should be wound up."

40. The members are reduced in number

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to less than seven.

The learned trial judge made, among others, the following findings:-

(a) "The Company having been incorporated on the 31st December 1968, there was no compliance with sec.41 of the Act which requires the Company to hold a general meeting once at least in every year nor has there been an Annual General Meeting of the Company since its incorporation. No balance sheets of the Company were prepared for the years 1969 and 1970 nor was any explanation adduced for failure to do so.

An inspection of the Cash Book (Exh.E.R.3) discloses that it is a record kept in an unorthodox and unsophisticated manner and not in keeping with what one would expect from a company handling this volume of business."

(b) There is no record in the Cash Book of cash received from Egerton Richards, Noreen Richards, Venita Richards or any other member apart from Houston Lewis for the purchase of shares. The Sum of $31.25 was paid to

/Houston.....

Houston Lewis but whether this represented interest or interim dividend is of no great import suffice it to say that Art.73 makes the declaration of dividends discretionary on the part of the Director in general meeting. The fact remains, however, that no other dividends, interim or otherwise, appear to have been declared by the Director for the 4 year period ending the 31st December 1972. This appears to be somewhat irreconcilable with the award of scholarships, no matter how negigible their value. Art.57(g) empowers the directors, when in their opinion the occasion demands it, to sanction donations to "charity" within which term the award of scholarships fall. In the case of the scholarship to Wayne Harry it is conceded by both sides that he was a poor and indigent boy but in the case of Venita Richards I am of the view that the award of a scholarship to someone, herself the holder of 1000 shares and the daughter of parents holding between

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them 18,450 shares is a wanton dissipation of the funds of the Company.

(c) Both the Register of Members and Share Ledger and the Share Certificate Book but particularly the former are conspicuous for their vagueness in respect of the addresses of overseas shareholders. In the former some addresses are given merely as "England" or "USA" while in the latter the name of the town or city is sometimes stated. In this record despite the evidence of the Managing Director specific printed provision is made for "particulars of mortgages or charges" but for one reason or another no use was made of that particular section of the record.

Houston Lewis stated that he saw the Register of Members and Share Ledger for the first time at the trial while Oliver Da Silva stated that when he left the company on the 30th November 1972 three certificates only were issued from the share certificate book, one to Haywood Thomas and one to himself and I accept the testimony of the

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petitioners.

I am of the view that it was impossible in all the circumstances to conduct any form of meeting for which Art.30 provides that a quorum of three is necessary and further I consider that Houston Lewis was justified in declining to attend a meeting arranged by the Managing Director subsequent to the filing of the petition. The Company by resolution at a meeting of the 27th September 1972 increased its share capital to $1,000,000.00 in keeping with the provisions of Art.21, Section 60(2) of the Act provides that the minutes at which any resolution is passed shall be received as evidence in all legal proceedings. This does not necessarily mean that the Court accepts the record as accurate or authenaic and it is of significance that the record lists Iris Da Santos among those present at the meeting as a shareholder while she states that she holds no shares in the Company or in trust for anyone. Nowhere in the minutes of the Company's meetings,

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which for some obscure reason are signed by the secretary but appear to be prepared in the handwriting of the Managing Director, is there any record of approval of remuneration to the Directors of the Company pursuant to Article 46 despite the fact that remuneration to the Managing Director is now double that which it originally was.

(d)...a scrutiny of the share certificate book and the unusual yet unexplained sequence of dates of the certificates issued after that issued to Houston Lewis coupled with the fact that the Cash Book does not appear to disclose payment for shares by members other than Houston Lewis leads me to conclude that the entries in the share certificate book and the corresponding entries in the register of members are suspect ~~and~~ not bona fide, and that the majority of the members of the company over the two petitioners is so very slim as to be negligible."

It was conceded that there was no finding in regard to the allegations of fraud made in the petition.

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There are several grounds of appeal, but I propose to deal with the grounds stated at paragraph (6), (8) and (9) which read as follows:

> "(6) The learned trial judge failed to exercise his discretion judicially when he held that in all the circumstances it was just and equitable to wind up the Company.
>
> (8) The order of the learned judge is unreasonable and/or against the weight of the evidence and/or cannot be supported having regard to the allegations in the petition and to the proof thereof.
>
> (9) The learned trial judge was wrong in law in making a winding-up order against the appellant company without the petitioners being contributories and/or holders of fully paid up shares having alleged and proven that there were or would be a surplus of assets on the Company being wound up."

/Learned.....

Learned counsel, in regard to the second named respondent, Oliver Da Silva, submitted that, although he was a contributory, he could not bring winding-up proceedings until he had fulfilled his obligations to the Company and that there was no finding as to his payment for even one share. He stated that there was no allotment but only a decision to allot 50 shares at $5 each to Da Silva (for work done). These shares, he said, were never taken up. In support of his contention he cited the case of In Re Wala Wynaad Indian Gold Mining Co. (1882) 2 Ch. 849.

In regard to the first-named respondent, counsel submitted that a fully paid up shareholder was not entitled to present a petition unless he can allege and prove that there would be a surplus of assets available for distribution among the shareholders, or that the affairs of the Company required investigation in respects which were likely to produce such surplus. In support of this submission he cited the case of Re Othery Construction Ltd. (1966) 1 All E.R.145. Counsel contended that there was no evidence of surplus assets in this case. He also relied, among others, on the case of Re Rica Gold Washing Co. (1879) 11 Ch.36. He argued that, if the petition were for collateral purposes while there were other remedies available, then its presentation would be an abuse of the process of the Court.

In reply to these submissions, counsel for the respondent submitted that Da Silva said he paid for his share and, since he was a subscriber to the memorandum of association of the

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company, he was entitled under section 21 of Cap.219, upon the registration of the company, to have his name entered as a member on the register of members. He stated there was no register of members of the company up to the date of the filing of the petition. In respect of the 50 shares which Richards said were allotted to Da Silva, there could be no forfeiture since there were no meetings ever held by the company. He contended that Da Silva was entitled to petition the Court under section 73 of the Companies Act, Cap.219. Counsel conceded the proposition of law that a fully paid up shareholder could not ask for a winding-up order unless he alleged and proved that there would be surplus assets available for distribution or that the affairs of the company required investigation in respects which were likely to produce such surplus assets as would entitle them to share in the surplus. In this regard he stated that although the judge made no finding on this aspect of the case there was evidence before him on which he could have come to the conclusion that there would have been surplus assets. He referred the Court to page 25 of the record which reads:

> "Egerton Richards further stated that the company had made profits from its inception to 1973 but the money was invested mainly in Government Bonds, $65,000.00 and a property at Villa $125,000.00. The most recent revaluation of the shares of the company was $7.50 each."

He argued that owing to the number of irregularities

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found by the trial judge in carrying out the affairs of the company, the winding up order should be sustained. He pointed out several irregularities and directed the Court's attention to the fact that while the minutes of the meeting of 7th September 1972 showed that one Iris Da Santos, a shareholder director whose name was on the Register as holding 50 shares, was present and voted for a resolution for the increase of the share capital of the company to $1,000,000.00, she gave evidence on oath to the contrary.

With regard to the submission that where a fully paid up shareholder petitions for a compulsory winding up order he must show on the face of the petition a prima facie probability that there would be a surplus of assets available for distribution among shareholders, the legal position appears to be as set out in the cases of Re Rica Gold Washing Co. (1879) 11 Ch. D. 36, Re Othery Construction Ltd. (1966) 1 All E.R. 145, and in re Chesterfield Catering Co. Ltd. (The Times Dec. 5, 1975). There is nothing in the provisions of sections 70 and 73 of the Companies Act, Chapter 219 of the Revised Edition of the Laws of St. Vincent which state that before a fully paid up shareholder can petition for a winding up order he must allege and prove that there will be surplus assets available for distribution among the shareholders but it is to be noted that these provisions are similar to the relevant provisions of the English Company Acts and yet in every case for well nigh one hundred years, whenever a fully paid up shareholder sought a winding up order, under the just and equitable rule, and was unable to

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prove that upon the order being made, there would be a surplus of assets for distribution, it was held that he had no locus standi.

In this case the respondent Lewis petitioned the court as a fully paid up shareholder and the respondent Da Silva petitioned the court as someone having the right to have 800 shares at $5 each in the company allotted to him in consideration for work done in the promotion and formation of the Company. There is evidence that the respondent Da Silva was a subscriber to the Memorandum and there is evidence that he paid for one share which the judge appears to have accepted. In my opinion, he would be in the position of a fully paid up shareholder. If, however, I am wrong in this view, and his only claim is that he is entitled to have shares allotted to him in the manner set out in this paragraph then he would not have been entitled to join in the petition.

The petitioners alleged in the petition that if a winding up order was made there would be a surplus of assets available for distribution among the shareholders. At the trial however, no evidence was led which showed that there would be any such surplus and although the trial judge found several irregularities he made no finding in this regard. Counsel for the respondent submitted that there was evidence on which a proper finding could have been made. I disagree. The petitioners may have shown that the affairs of the Company are suspect. Indeed, the trial judge criticised severely the conduct of the Managing

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diredtor and made reference to the unsatisfactory nature of the register of members and generally about the conduct of the affairs of the company, and it may well be that, on a petition presented by a party having a locus standi to present it, this company ought to be wound up. But the petitioners have not shown by evidence that in the final analysis there will be a surplus of assets available for distribution amongst the shareholders, or that the affairs of the company require investigation in respects which are likely to produce such a surplus. No expert evidence has been called by the petitioners to show the present market value of any real property owned by the company or whether the assets could be realised at the sums at which they are valued. For what it is worth, the uncontroverted evidence of the company's accountant, Trevor Paynter, at the time of hearing of the petition, is to the effect, that the statement of operations for the year ending 31st December, 1973, showed the company to have sustained a loss of $4,576.23. Further to this, the evidence would seen to indicate that the burden of the complaint, certainly of the first named petitioner, was related more to his status as a director than to his status as a shareholder.

There was an allegation in the petition that the number of members of the company was reduced to below seven. This allegation was not proved. The judge stated that "the entries in the register of members are suspect and not bona fide and that the majority of members of the company over the two petitioners is so very slim as to be negligible." I do not know

/if.....

if this means that the number of members in the register is reduced below seven. I agree that the register is suspect but it contains fourteen names and the only person on the register who gave evidence was Iris Da Santos. I am unable to make any finding in this regard.

I would allow the appeal for the reasons stated above.

I agree

E.L. St. Bernard
(JUSTICE OF APPEAL)

I agree

N. Peterkin
(JUSTICE OF APPEAL)

I also agree

Maurice Davis
(CHIEF JUSTICE)