SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

(CIVIL)
A.D. 1996

Suit No.654 of 1992

Between:

EUSEZIE CLAIRMONT

Petitioner

vs

(1) SOUTHERN BUILDERS ENTERPRISES LTD
(2) SERVILLUS JEFFREY

Respondents

Mr. D. Theodore for Petitioner

Mr. H Deterville for Respondents

1996: April 29 and 30;
June 21;
July 19.

JUDGMENT

On December 23, 1992 the Petitioner filed a petition praying that Southern Enterprises Limited be wound up because it is just and equitable to do so or in the alternative any other order as to the Court shall seem just.

Section 189 (6) of the Commercial Code states that a company may be wound up by the Court if the Court is of the opinion that it is just and equitable that the company should be wound up.

At the end of his examination in chief the Petitioner stated:

> *"I am asking the Court for an order to wind up the Respondent Company or any order the Court thinks fit."*

There were other interlocutory proceedings which necessitated a decision of the Court of Appeal and as a result the answer

to the petition was filed approximately two years later, on November 18, 1994. The answer was amended during the hearing on June 21, 1994 without objection from learned Counsel for the Petitioner. The effect of the answer was that the application to wind up the company should not be allowed and that the second Respondent should pay to the Petitioner the fair value of the latter's shares.

The Petitioner filed a reply to the answer on December 2, 1994. In that reply the Petitioner answering paragraph 32 of the Respondents' answer that he is acting unreasonable in not pursuing his accepted offer to sell his shares, denied that he was acting unreasonably and said that the unfulfilled condition of his offer to inspect the books of the company before the auditor's valuation, was a reasonable condition intended to ensure a fair valuation of the company's financial position and the payment of a fair price for his shares.

The pleadings in this case were unduly extensive as was the evidence and addresses on a relatively simple matter. My judgment will be relatively short.

In their submissions both sides referred to the well known case of **EBRAHIMI v WESTBOURNE GALLERIES LTD [1972] 2 AER 492** especially as it relates to the phrase *"just and equitable."*

In addition, learned Counsel for the Respondents referred to **RE A COMPANY [1983] 2 AER 854** and **Civil Appeal No.4 of 1990 CASTAWAYS HOTEL LIMITED v UNIVERSITY OF DOMINICA (SCHOOL OF MEDICINE AND HEALTH SCIENCES) LTD** decided on September 14, 1992.

Learned Counsel for the Petitioner referred to a passage stated to come from the **14th Edition of Charlesworth and Morse on Company Law, pages 456 - 457**. The passage states:

"With regard to a bona fidie offer being made by the other members under the articles for the petitioner's shares, that is, at a valuation by an independent valuer, the Court of Appeal in Re Abbey Leisure Ltd, overruling the judge below and other earlier decisions, decided that this was not an automatic reason for striking out the winding up petition. There was nothing unreasonable in the petitioner refusing to accept the risk that a valuer's decision might apply a discount for his minority shareholding, since the machinery in a winding up to determine claims against the company was preferable to their worth being estimated by an accountant."

I have had regard to these authorities even though my decision is not based on any specific passage.

Let me turn to a short history of the company. It appears that Clairmont and Jeffrey were good friends who desired to enter into a business relationship and so they decided to form a company for that purpose. The company was incorporated on May 30, 1989. Nothing happened after incorporation until the company on February 14, 1991 purchased a piece of land at Vieux-Fort measuring 18,821 square feet.

On June 7, 1991 on the strength of its deed the company executed a hypothec in favour of the National Commercial Bank for a loan of $350,000. The company intended to construct a building.

It must be stated that the company was formed on the basis that Clairmont would have 49 percent of the shares and Jeffrey would have 51 percent. They purchased the land with each contributing that percentage of the purchase price and they executed a guarantee to the Bank that they would repay the loan in the said proportion of 49 percent by Clairmont and 51

percent by Jeffrey.

The next event was the construction of the building which is presently the main asset of the company. None of the shareholders is able to state definitely when the building commenced and when it was completed. Having heard them both I have come to the conclusion that the building commenced before the company obtained the loan from the National Commercial Bank and I put this as around February to March 1991 and that it was concluded by January 1992. I come to that conclusion having regard to the report of Gardner Trim dated January 17, 1992 and to a statement in item 5 in the minutes of the company for a meeting held on February 18, 1992.

There was a little dispute as to whether or not the Petitioner was the building contractor. I do not think this is very material to the issue. Nevertheless I am not persuaded that Clairmont was the contractor. In any event I hold that the company is not indebted to him for any such services even though I did not perceive that he was pressing for any such payment.

The next event was the starting up of the business activities which took the form of a mini market and petrol station. I find that the operations began on or about November 1, 1992. It is doubtful as to whether the Petitioner took part in the business operations because before November 1, 1992 the relations between the shareholders were severely strained. This was so much the case because the Petitioner had sought to block the entrance to the mini market and the first Respondent had to seek injunctive relief which it got on November 27, 1992. On that day the Petitioner gave an undertaking that he would not in any way block the entrance to the building.

However it would appear that despite this the Petitioner continued to make loan repayments up to May 18, 1993. The Petitioner exhibited cheques to the effect that he had made thirteen payments between February 1992 and May 1993 amounting to approximately $38,217.56.

On the totality of the evidence I do not find that this business has been a profitable one. It seem to be hardly able to make the repayments. Since May 1993 Servillus Jeffrey has been meeting the full repayments and as at April 27, 1996 the loan balance was $292,046.22. I do not think the company has been able to pay dividends or salaries to the shareholders or directors.

I now turn to determine what was the cause of the breakdown in the relationship between two close friends. The Petitioner in examination-in-chief puts it this way:

> *"After completion of the building things began to go wrong. Jeffrey and I began not speaking to one another from that time. There was no incident that caused the break. After the building was completed Jeffrey did not speak to me any more."*

This explains why it was necessary to get Gardner Trim to make a valuation in January of 1992.

I find that from that time the Petitioner withdrew himself from the activities of the company and Jeffrey remained in control up to the present time. He purportedly made decisions all by himself in my view contrary to Article 14 of the Articles of Association which would seem to require a quorum of two persons to transact business. He purported to have meetings of the company without adequate notice to Clairmont who for the most part remained away.

I have come to the conclusion that both shareholders were responsible for the breakdown of the commercial relationship. If there was any animosity as referred to in paragraph 24 of the petition it was on both sides. They developed animosity one to another.

Surely, things cannot continue this way and something must be done with the company and the issues are whether it is just and equitable to wind it up or whether there is some other remedy which is available to the Petitioner.

Article 192 (5) of the Commercial Code is as follows:

> *"(5) Where the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the Court, if it is of opinion, -*
>
> *(a) that the petitioners are entitled to relief either by winding up the company or by some other means; and*
>
> *(b) that in the absence of any other remedy it would be just and equitable that the company should be wound up;*
>
> *shall make a winding up order, unless it is also of the opinion both that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy."*

The Petitioner himself may have thought that some other remedy was available when he asked Gardner Trim to value the property. In addition to this on June 15, 1992 through his solicitor, Mrs Veronica Barnard, he gave notice to the second Respondent of the offer to sell his shares in the company and he set a price of $223,086.96.

On July 2, 1992 a reply came from Deterville John and Company on behalf of Jeffrey accepting his offer not at the price stated but at a fair value of the shares as determined by approved auditors. The letter gave the names of four auditors practising in Saint Lucia and advised the Petitioner to choose one of the four.

On July 28, 1992 Mrs Barnard wrote to Mr Deterville. The letter stated that the Petitioner would prefer Messrs. Coopers and Lybrand, which was one of the four firms referred to above, to do the valuation. Then the letter states what is a bone of contention to be referred to later -

> *"My client however, wishes to be informed of the date by which such appointment shall be made and wishes also to be given the opportunity to inspect the books prior to the said appointment."*

The Respondent appeared not to have heeded the above, referred to by learned Counsel for the Petitioner as the unfulfilled condition, but proceeded to deal with Coopers and Lybrand on the lines indicated above.

The next bit of correspondence was a letter from an apparently new firm of Deterville and Associates dated July 19, 1994 to Mrs Bernard indicating that the value of the Petitioner's shares was valued by Coopers and Lybrand at $122,500.00. There was an attachment to this letter of a communication from Coopers and Lybrand to Jeffrey dated May 16, 1994 putting a value on the company of $254.00 or $12.50 a share effective from December 31, 1992.

I understand the Petitioner to be resiling from his earlier position essentially because of the unfulfilled condition referred to earlier.

It was in this context that learned Counsel for the Respondents referred to the Castaways' case mentioned earlier. It seems clear that if the Respondents had informed the Petitioner of the date on which Coopers and Lybrand was appointed and if he was given an opportunity to inspect the books of the company before the appointment, the doctrine of estoppel in the Castaways case might more easily be applied.

One may ask whether the Petitioner's wishes were so material that the doctrine of estoppel might still not be able to apply. I am not going into that for it is not necessary for my decision. I shall give the benefit to the Petitioner. The Petitioner has asked me both in his pleadings and his evidence in chief to order a winding up of the company or such other remedy as the Court thinks fit.

I find as a fact that the business is the sole source of living of the second Respondent. The Petitioner could not deny that upon cross-examination. On the other hand it is accepted by all that the Petitioner is involved in a successful company in Vieux-Fort known as Playboy Enterprises Ltd so much so that he is called *"Playboy"* in Vieux-Fort.

The second Respondent has been paying the loan of $5,230.00 per month to date and as I have said the arrears at the end of April this year was approximately $292,000. The monthly income from the property at the moment is less than the monthly loan payments.

I must have regard to the bona fides of the Petitioner. He admitted under cross-examination that it was when the process was going on to value the shares that he filed the petition to wind up the company and he intimated that unless he gets a value that suits his investment he will not accept it.

It is my view that in all the circumstances the Petitioner is acting unreasonably in seeking to have the company wound up. I think another appropriate remedy is to have another valuation of the company shares and the shares of the Petitioner.

I therefore refuse to grant the order to wind up the company. I thought of asking one of the remaining auditors named in the letter dated July 2, 1994 to undertake the valuation but in a quite recent winding up matter both Counsel agreed to the appointment of Jeffrey Stewart of Stewart and Associates to be the liquidator. So as to depart from the past I am going to ask this person to effect a valuation of the Petitioner's shares in the company and make a report to me within six weeks. The costs of the report shall be paid by the first Respondent in the first instance.

Unless Counsel will together draft an appropriate letter to Jeffrey Stewart then I shall ask the Clerk of Court to do so and sign it on behalf of the Court.

This matter is adjourned to Chambers on October 2, 1996 for report.

A.N.J. MATTHEW
PUISNE JUDGE