BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 7 OF 1998

BETWEEN

TELE-ART INC **APPELLANT**

AND

NAM TAI ELECTRONICS INC **RESPONDENT**

AND

BANK OF CHINA **APPELLANT**

Before: The Honourable Mr. Satrohan Singh **Justice of Appeal**
The Honourable Mr. Albert Redhead **Justice of Appeal**
The Honourable Mr. Albert Matthew **Justice of Appeal (Ag.)**

Appearances: Mr. Gerard Farara Q.C., Mrs Anne Louise Robinson with him for the appellant Tele-Art Inc.
Mr. Robin Potts Q.C., Mr. John Carrington with him for the respondent Nam Tai Electronics Inc.

[January 13: 25 1999]

JUDGMENT

SATROHAN SINGH JA:

On November 10, 1993, default judgment was entered against Tele-Art (the appellant) in favour of Irish Development Authority in the Court below for the sum $807,099.12. Subsequently, an authority known as FORFAS became the successor corporation to the Irish Development Authority by virtue of the Industrial Development Act 1993 of Ireland. On December 1994 Forfas made a demand of the appellant for the payment of the judgment debt but to no avail and the judgment debt remained unsatisfied.

On May 13, 1997, Nam Tai Electronics Inc. (the respondent) and Forfas executed a deed of assignment whereby all the rights of Forfas in the judgment debt

were assigned to the respondent for a consideration of $400,000. Written notice of this assignment was given to the appellant on May 23, 1997. By letter of June 3, 1997, the respondent reminded the appellant of the assignment and advised that unless the outstanding debt and accrued interest were paid, liquidation would commence against the appellant. This second demand went unheeded by the appellant as a consequence of which this winding up petition was brought against the appellant.

Benjamin J heard the petition and on July 17, 1998 found that the appellant was unable to pay its debts and that the respondent was entitled **ex debito justitiae** to an order for the winding up of the appellant corporation. The appellant has appealed from that judgment. The appeal does not challenge the facts that the appellant owed the debt, that demands for payment were made and that the debt has remained unpaid. Mr. Farara for the appellant challenges the locus standi of the respondent to bring the petition and contends also for abuse of process based on improper motive in the respondent when he brought winding up proceedings against the appellant.

LOCUS STANDI

Addressing the issue of Locus Standi, Mr. Farara contended that under the **Common Law**, the assignee of a debt is a mere equitable assignee and as such, he cannot institute proceedings in his own name but must do so in the name of the assignor. Queen=s Counsel Mr Potts responded by referring the Court to **S 116** and **S 117** of the **Companies Act Cap 285 of the Laws of the British Virgin Islands**.

It is axiomatic that at Common Law an assignee of a debt was an equitable assignee and the assignment was not a legal chose in action since at Common Law a

debt cannot be transferred. Therefore, at common law such an assignee would lack standing if he sought to undertake legal proceedings in relation to that debt in his own

name. Since the legal ownership of the debt would still reside in the assignor, proceedings could only be brought in the name of the assignor **[See Anson on the Law of Contract 26th ed 1986] at p 390 -].**

However, the nub of the argument on the issue centred itself around the disputed interpretation of **S 116** (a) and **S 117** of the Companies Act (supra) which according to Mr. Potts gave to an equitable assignee, standing to bring winding up proceedings in his own name. Mr. Farara disagreed with Mr. Potts. **S 116 (a)** reads as follows:

> AA company under this **Act** shall be deemed to be unable to pay its debts -
>
> (a) whenever a creditor by assignment or otherwise, to whom the company is indebted, **at law or in equity**, in a sum exceeding two hundred and forty dollars then due, has served on the company, by leaving the same at the principal place of business of the company, or by delivering to the secretary or some director or principal officer of the company, or by otherwise serving the same in such manner as the Court may approve or direct, **a demand** under his hand requiring the company to pay the sum so due, and the company has, for the space of three weeks succeeding the service of such demand, neglected to pay such sum or to secure or compound for the same to the reasonable satisfaction of the creditor.@

and **S 117** provides:

> AAny application to the Court for the winding up of a company under this **Act** shall be by petition; and such petition may be presented by the company, or by one or more **creditor** or **creditors**....@

These provisions of the **Companies Act**, represent the statutory authority for the institution of winding up proceedings in this jurisdiction by virtue of S 97 of the International Business Companies Act. The contention of Mr. Farara was that whereas **S 116** powered a creditor who was an equitable assignee of a debt, to **demand** the repayment of a debt in his own name, **S 117**, because it did not specifically refer to a creditor who was merely an equitable assignee of a debt as was

done in **S 116**, did not give power to such an equitable assignee to initiate winding up proceedings and therefore such a creditor would have no locus standi to institute winding up proceedings against a debtor. Learned Counsel referred to the case of in **Re: Steel Wing Co. Ltd (1921) 1 Ch. 34**: In my opinion, this case does not assist.

It is my considered opinion that Acreditor@ in **S 117** is not limited to a creditor at law only but includes a creditor in equity. Having identified in S 116 that for the purpose of the demand, creditor included a creditor at law or in equity, it is my view that the legislators, if they intended in **S 117** that Acreditor@ did not include an equitable assignee, they would have said so. To hold otherwise or to accept Mr. Farara=s interpretation would be to introduce ambiguity in **S 117** where there is none and legal confusion in the winding up procedure. **S 116 (a)** in my opinion, sought to define creditor for the purposes of winding up proceedings under the **Companies Act**.

Whatever moisture that may have been present in Mr. Farara=s submission, dissipated itself further when regard is had to **Re: Montgomery Moore Ship Collision-Doors Syndicate June 27, 1903,**The Weekly Notes p 121, where Byrne J seems to be in agreement with this interpretation. The **Companies Act** of the British Virgin Islands follows the first **Companies Act** of England in **1862**. And, **Ss 116** and **117** of the **BVI=s Companies Act** are identical to **Ss 80** and **82** of the **English 1862 Companies Act**. **The Montgomery Moore Ship Collision** case was concerned with a similar issue as the instant one as it related to **Ss 80** and **82**: It was held in that

case by Byrne J that Ahaving regard to **S 80 sub-section 1**, referring to a creditor by assignment or otherwise, to whom the Company is indebted at law or in equity, the creditor entitled to petition under **S 82** included a creditor by equitable assignment and that the petitioner was entitled to a winding up order.@ This opinion of Byrne J supports my opinion and I accept it as a true statement of the law.

For these reasons, it is my firm opinion that an assignee of a debt owed by a Company has standing to petition as a creditor for the Company to be wound up: **[See French=s Application to Wind Up Companies (1993) at p 97 and Re: Cheshive Patent Salt Co. Ltd (1863) 1 New Rep. 533**. Accordingly, the appellant=s challenge to the respondent=s standing in the petition must fail.

IMPROPER MOTIVE: ABUSE OF PROCESS

The submission of Mr. Farara for the appellant on the issue of improper motive was that it was inter alia, as a result of the respondents Aconfiscating@ shares beneficially owned by the appellant in the respondent that the appellant was unable to pay the debt. The allegation was that this Aconfiscation@ as Mr. Farara puts it or Adetention@ as Mr. Potts puts it, of these shares was a deliberate act on the part of the respondent to embarrass the appellant and consequently secure its demise.

On the factual aspect of this submission, there was no evidence in the transcript which could support the motive aspect of this allegation. Also, it was common ground before us that even if the appellant had access to the shares, there would still not be enough to satisfy the debt.

The law as it relates to this concept of improper motive and abuse is settled. It is the essence of every winding up petition that there must be an existing debt, a demand for payment and a failure on the part of the debtor to meet that demand.

Then, provided the petitioner follows the procedure provided and approaches the Court in the normal manner and he has a genuine wish to wind up the Company, it would not be an abuse of the process of the Court even if he does so with venom, antagonism or from some ulterior motive. The law in these circumstances would not recognize him as acting mala fide but will consider him as acting bona fide in accordance with the process.

As Benjamin J stated, AHowever ignoble or reprehensive the petitioner=s conduct might have been,@ the real issue is whether the petitioner had sufficient grounds based on a claim of substance. Once this is established the Court should not be concerned with the petitioner=s past conduct with the Company. To do so would be to confuse motive which is past, with purpose which is future. There would be no abuse of process unless it can be shown that the petitioner did not really want its debt but had some ulterior motive and that the winding up petition was a mere sham. **[See Mann v Goldstein (1968) 1 W.L.R. 1091: Bryanston Finance v De Vries (No. 2.) (1976) 1 Ch. 63: Re: A Company (1983) BCLC 492.**

In my judgment, the appellant did not satisfy the factual or legal aspect of this abuse concept. This disabled the Judge from making a finding in his favour. I agree with Benjamin J=s reasoning and conclusion on this issue. I would therefore uphold his ruling of no improper motive and consequently no abuse of the process of the Court.

In my judgment therefore, the Learned Trial Judge was quite proper in making the winding up order which he made. The respondent, on the evidence in the transcript was entitled to the winding up order ex debito justitiae. Queen=s Counsel Potts has successfully repelled the arguments of Queen=s Counsel Farara. The appeal is devoid of merit. The appeal is dismissed. The order of the Trial Judge is

affirmed. The appellant is ordered to pay the respondent=s costs of the appeal from its assets. The Bank of China, styled the intervening creditor in the proceedings, as it did in the Court below, took no part in this appeal. I would accordingly ignore it.@

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Satrohan Singh
Justice of Appeal

I concur

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Albert Redhead
Justice of Appeal

I concur

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Albert Matthew
Justice of Appeal (Ag.)