BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 4 OF 1999

BETWEEN:

COLONY CREDICOM L.P.

and

COLORADO CREDICOM

Appellants

and

CREDICOM N V CONTRIBUTOR

Respondent

Before:

The Hon. C.M. Dennis Byron	Chief Justice
The Hon. Satrohan Singh	Justice of Appeal
The Hon. Albert Redhead	Justice of Appeal

Appearances:

Mr. Joseph Archibald, Q.C. for the Appellants
Mr. Paul Webster with him
Mr. Gerard Farara, Q.C. for the Respondent
Miss T. Small with him

1999: September 30;
October 1;
December 6.

JUDGMENT

[1] REDHEAD J.A: This is an appeal from a decision of Moore J. in which he granted an indefinite stay order of a petition brought by the appellants for a compulsory winding-up order of Credicom Asia Limited [hereinafter called the Company] incorporated pursuant to

the provisions of the International Business Companies Act Chapter 291 of the British Virgin Islands.

[2] The Company is a holding company whose only assets are shares in subsidiaries, including three British Virgin Islands Corporations which currently own direct and indirect interests in four groups of assets.

[3] The Company owns a 91.91 controlling interest in Argent Holdings Limited. Argent is a British Virgin Islands Company and Argent's controlling interest in Silverlink Holding Limited which is another British Virgin Islands Company in turn owns and operates a chain of luxury hotels, commonly known as Amanresorts

[4] The Company owns 100% of the shares in La hotel corporation, another British Virgin Islands Company that owns and operates L'Ermitage Hotel in Beverly Hills, California.

[5] The appellants are shareholders in the Company. The respondent, Credicom NV, (NV) a Belgian Company with its main office in Paris France is the other shareholder of the Company.

[6] The company is indebted to the amount exceeding US$190 million of that amount the appellants loaned the Company US$18 million to the company pursuant to a promissory note on 30th December, 1997.

[7] This loan together with US$4million was due and payable by the company on 31st March, 1998. The Company has failed to pay the Promissory note at maturity. The full amount of US $22 million plus interest remains outstanding.

[8] The Company did not file a Notice of Opposition to the Petition neither was it represented in the court below nor in this court.

[9] The only opposition to the petition came from the respondent NV which is the other shareholder of the Company and which is said to be controlled by Clement Vaturi a resident of Paris and Chairman of the Company, Credicom Asia.

[10] It is the appellants' case as I have said above that the Company is indebted to the appellants in an amount exceeding US$190 million which is overdue and unpaid. Both the appellants and the respondent acknowledge that the indebtedness cannot be paid unless the assets of the company are liquidated, but according to the appellants they are unable to agree how this should be done.

[11] As a result of that deadlock and the absence of mutual trust and confidence between the appellants and NV, the ability of Credicom Asia, the Company and the subsidiaries to function and to make appropriate and necessary business decision has ceased and the assets of the Company are at risk.

[12] In response to the appellants' petition for compulsory winding-up of the Company the respondent filed a Notice of Motion to dismiss the petition on the grounds that:

(1) that the Petitioners and Credicom NV, Credicom Asia Limited and others agreed and contracted in writing that any dispute which may occur in connection with Credicom Asia Limited, including a dispute as to whether a liquidation of Credicom Asia Limited was appropriate or required or to be effected, would be resolved within the specific terms of the contract document which expressly provided for discussions/negotiations between the parties, contractually provided for mediation and failing that, under the laws of the state of New York and under the exclusive jurisdiction of the courts of the State of New York. It is not open to or permissible, it alleged for the petitioners to commence compulsory liquidation proceedings before the British Virgin Islands High Court.

(2) the winding-up petition brought by the Petitioners is contrary to and in violation of the express contractual terms agreed upon by the parties as to the resolution of dispute, including disputes as to liquidation of Credicom

(3) further or in the alternative, the British Virgin Islands is not the forum conveniens for the bringing of proceedings for the liquidation of Credicom Asia Limited.

(4) further or in the alternative, the winding-up petition is an abuse of the process of this court.

(5) damages

(6) further or other relief.

[13] The learned trial judge did not grant the appellants' application for winding-up of the Company neither did he dismiss the application on the respondent's motion but rather he granted a stay holding that the contract documents in the instant case contain a New York choice of law clause where exclusive jurisdiction was granted to the courts of New York.

[14] That factor alone, according to the learned trial judge and based upon authorities entitled him in the exercise of his judicial discretion to grant a stay.

[15] The appellants are dissatisfied with this decision and have appealed to this court.

[16] The appellants, in their Amended Notice of Appeal, file nine [9] grounds of Appeal. To encapsulate the appellants' grounds of appeal, the appellants are complaining that:

> "1. The learned trial judge failed to address the appellants' fundamental argument that the New York jurisdiction clause question is narrowly limited to the "interpretation or enforcement" of the private contracts and does not, by its terms, even purport to apply to a compulsory statutory winding up brought on statutory grounds under the Companies Act.
>
> 2. The learned trial judge failed to address, or misapplied, the legal authorities that establish the filing up of a winding-up action does not, in law, constitute the enforcement of contractual rights.
>
> 3. The learned trial judge failed to appreciate, or give any weight to the fact that the appellants were seeking to enforce statutory rights under the Companies Act and not contractual rights.

4. The learned trial judge failed to consider or give proper weight to, the fact that Credicom Asia, the very company against whom the stay was sought did not oppose the petition.

5. The learned trial judge failed to consider and give effect to the rule of law that NV bears the burden of proof to establish that the New York jurisdiction clause applies to a compulsory statutory winding-up brought on statutory grounds under the Companies Act and failed to find, on the evidence, that NV had not discharged that burden."

[17] Learned Senior Counsel, Mr. Farara argued that the parties in the summary of terms of 30th December, by clauses 7(e), 8(a), (c) & (d) had provided for liquidation and by providing for voluntary liquidation, by implication they had expressly waived judicial liquidation. (my emphasis).

[18] I have difficulty with that argument because in my view it is a contradiction in terms to say that one impliedly did something expressly because to my mind this is what this submission is saying.

[19] In fact there was this summary of terms of the bridge loan from the two appellants to the respondent, Credicom Asia in the sum of US$18 million and which the defendant promised to repay US$22 million in 90 days i.e. by 31st March, 1998.

[20] This loan was advanced to Credicom Asia in anticipation of the sale by the defendant of its hotel assets.

[21] This agreement is a lengthy one. However, I shall refer briefly to the clauses on which Mr. Farara, Queen's Counsel, relies for a waiver by the appellants not to insist on judicial liquidation:

"7(e) Credicom Asia will (I) cause the proceeds of the sale of Silverlink to be treated as a liquidation distribution from Argent……."

"8(a) ……Provided, however, that in a combination sale, NV shall not have the right to match the terms if the price of all three assets is at least equal to US$139,750,000 . Pursuant to the foregoing, Colony Colorado will proceed with an orderly and professional liquidation (in the form of sales), refinancing or other

disposals of the Hotel subsidiaries (or their assets) within a period of six months of the final maturity date (the "Liquidation period")……."

"8(b) the proceeds from the liquidation of the Hotel subsidiaries and any other repayment of the IMFIN loan and any other funds will be applied first to pay off the c/c loan……."

"8(c) If (A) the Hotel subsidiaries are not substantially liquidated by the close of liquidation Period or (B) the proceeds of the liquidation of the hotel subsidiaries and/or the proceeds from the repayment of the Imfin loan and/or any other funds provided by NV are insufficient to pay Colony/Colorado (i) the c/c loan, (ii) the previously unreinbursed expenses of Colony/Colorado.

……. Colony/ Colorado shall have the option to put to Credicom Asia their shares of Credicom Asia and their limited partnership interests in Kislev for a price (the "Put Price")…… The exercise of such put shall be effective by Colony/Colorado giving written notice (the "Put Notice") to Credicom Asia within 30 days of the earlier of the closing of the liquidation period……."

"8(d) If Credicom Asia fails to purchase from Colony\Colorado their shares of Credicom Asia and their limited partnership interest in kislev upon the exercise of the put as provided in paragraph 8.c, during the period set forth therein, (i) the Board of Directors and the shareholders of Credicom Asia shall resolve to place Credicom Asia into liquidation."

[22] Article 11 provides for the a memorandum of the stockholders agreement and the Article of Association for the priority liquidation rights of Colony Colorado as contained in the summary of terms.

[23] In my view it would be readily observed that all the clauses dealing with liquidation except 8(d) and 11 speak to what is to happen to the proceeds of sale or how it is to be dealt with. There being no sale of the assets, there could be no dispute with regard to dealing with the assets.

[24] What does 8(d) say? This clause says quite clearly that if the defendant's Company fails to purchase from the appellants their shares in the defendant's Company and the limited partnership interest in Kislev then the Board of Directors and the shareholders of the defendant's Company resolve to place the defendant into liquidation.

[25] It is obvious from the facts of the case that the defendant's company was not liquidated as per clause 8(d) or at all.

[26] All clauses to which I have referred are predicated upon the assumption that liquidation of the Company had taken place except clause 8(d). Liquidation having taken place there is direction as to how the proceeds of the liquidation should be dealt with.

[27] The allegation of the appellants is that there was no resolution by the Board of Directors and shareholders of Credicom Asia, the defendant Company, to put the company into liquidation as per clause 8(d) because of, say the appellants, the inability of Credicom Asia and its subsidiaries to function and make appropriate and necessary business decisions has virtually frozen. Moreover, Learned Queen's Counsel, Mr. Archibald in his skeleton arguments contended:

> "Vaturi is Chairman of Credicom Asia and controls half of its board of directors…….Vaturi informed the appellants that he was not in favour of liquidation and that he would not co-operate in a voluntary liquidation……."

[28] This has not been denied by the respondent. Nowhere in the summary of terms agreement is there a stipulation such as, for instance, in the event of a failure of "voluntary liquidation" then the law of the State of New York will govern any dispute arising out of this Agreement or any similar stipulation.

[29] It is in that light in my opinion that the liquidation clauses must be looked at.

[30] Learned Queen's Counsel, Mr. Farara argued that not only the summary of terms must be looked at but also the Amended Stockholders Agreement of 29th October, 1996.

[31] He referred particularly to clause 6.8. Consent to jurisdiction clause which stipulates inter alia:-

> "The parties hereto hereby submit to the exclusive jurisdiction of the federal district courts in the Southern District of New York, in respect of the interpretation and enforcement of the agreement provisions of this Agreement and any related agreement……." {my emphasis}.

[32] He referred also to clause 6.7 – Choice of Law clause which reads in part as follows:-

> "The substantial laws of the State of New York shall govern the interpretation, validity and terms of this Agreement, regardless of the law that might be applied under applicable principles of conflicts of laws……." {my emphasis}

[33] I also refer to Section 6.2 – Specific Performance:-

> "Each of the stockholders acknowledges and agrees that in the event of any breach of this agreement, the non breaching party or parties would be irreparably harmed and could not make whole by monetary damages. The stockholders hereby agree that in addition to any other remedy to which they may be entitled at law or in equity, they shall be entitled to compel specific performance of this agreement in any action instituted in any court of the United States or any State thereof having subject matter jurisdiction for such action."

[34] The first question I address is whether the parties by the contractual documents – Stockholders Agreement and Summary of Terms Agreement – or either of them have waived their statutory right to statutory liquidation. It is clear from the documents that there was no such express waiver of the right to statutory liquidation. It is beyond doubt that there is express provision for voluntary winding-up of Credicom Asia, the Company, in the summary of Terms Document

[35] Under 6.2 of the Stockholders Agreement - Specific Performance - This provides, inter alia for that in any event of a breach of this agreement…….. The Stockholders agree that in addition to any other remedy which they may be entitled at law or in equity, they shall be entitled to compel specific performance of this Agreement……."

[36] By reference to paragraph 13 of the Summary of Terms S.6.2 of the Stockholders Agreement is incorporated into the Summary of Terms Agreement.

[37] Mr. Archibald, Learned Queen's Counsel, argued that S.6.2 of the Agreement is of the greatest importance because of its specific wording……..preserved to the appellants their statutory rights to seek a winding-up under the relevant BV1 statutory provisions, Section 97 of Cap. 285 and Sections 115 and S.166 of Cap. 285 In other words, Section 6.2 confirms that the parties contractual rights specified in the Agreement and in addition to and not in substitution for any other right the parties may have in law or in equity. It is one such right which the parties reserved in law was the right to apply for a statutory winding-up under the laws of the British Virgin Islands "Credicom Asia's Country of incorporation" with this submission I am entirely in agreement .

[38] Mr. Farara, Learned Queen's Counsel, forcefully argued that the appellants argument that S.6.2 "entitled at law or in equity" of the Agreement is of the greatest importance is a "fig leaf" {my expression} because this is a routine reference. All that the parties were doing was stating the "boilerplate" obvious by specifically providing for the special equitable remedy…….. this was in addition to what the parties were entitled to in law or equity, so submitted, Mr. Farara.

[39] I am not persuaded in the least by this submission.

[40] Moreover, Robert Stelzl, in an affidavit sworn on the 23rd April, 1999 by paragraph 17 he is on oath as saying:

> "There is nothing in any of the documents or agreements which waives Colony/Colorado as a creditor or shareholder to commence winding-up proceedings pursuant to the Companies Act. The fact is that Colony/Colorado was never asked, and never agreed to waive such rights."

[41] Mr. Archibald, Queen's Counsel, drew attention to the fact that Stelzl's uncontradicted evidence is confirmed by, among other things, the memorandum of Credicom Asia of 13th September 1996, at paragraph 10(a) (bundle B p.162) where it is stated the right to

"liquidation, dissolution or winding-up of the affairs of the Company voluntary or involuntary……."

[42] Mr. Archibald further submitted, rightly in my view, that a waiver by the appellants of statutory rights to bring winding-up proceedings for the benefit of all creditors, including themselves, cannot be assumed or presumed in anyway, except in the clearest and most categoric terms. This is true of whether New York law or British Virgin law applies.

[43] Mr. Archibald contended on the basis of the expert opinion of Mr. Ringer that even if the jurisdiction clause applies to compulsory winding-up of the Company New York courts would not accept jurisdiction to wind up Credicom Asia because the company was not incorporated in New York, has no assets in New York, does not carry on business in New York and is not authorized to do so.

[44] He also argued that there is no reported decision of any New York court ever assuming jurisdiction to wind-up a company which is incorporated in a foreign jurisdiction and which has no assets and does not carry on business in New York.

[45] I now go on to consider the question of choice of law or forum non conveniens Mr. Farara, Learned Queen's Counsel, has placed a lot of emphasis on sections 6.7 and 6.8 of the Stockholders Agreement in support of the respondent's case that the parties have selected a New York forum and New York law to decide issues relating to whether or not liquidation should occur and therefore they must honour the agreement section 6.7 provides:-

> "The substantive laws of the State of New York shall govern the interpretation, validity and performance of the terms of this Agreement……"
>
> "Section 6.8
> The parties hereto hereby submit to the exclusive jurisdiction of the federal district courts in the southern jurisdiction, to the jurisdiction of the court of the State of New York, in respect of the interpretation and enforcement of the provisions of this Agreement and any related agreement……."

[46] Mr. Farara in his skeleton arguments submitted:

> "These contractual provisions span the entire contractual map. They cover any breach. They cover any breach of any term, any defect in performance and question of enforcement of any aspect of the contract any question that might come up interpreting the many faceted terms of the contract."

[47] Mr. Farara referred to a number of American Authorities including:-

Ehrlich v Stein 143 A.D. 2D 908,907,533 NY S.2d 517,518:-

In that case the Shareholders entered into an agreement providing for arbitration of disputes that might "arise in connection with, for a breach or an account of performance of (the) agreement." There arose a dispute concerning one shareholder's stock. That shareholder disagreed with the other shareholder's interpretation of the agreement with respect to the value and with respect to his obligation to sell his shares. The other shareholders rather than seek arbitration of the dispute, sought dissolution of the Company. The court held the dissolution proceeding had to be stayed, and the dispute as to whether and on what terms the shareholder should sever his corporate ties had to be arbitrated.

[48] The court emphasized that:

> "The fact that the dispute might otherwise serve as a predicate for judicial dissolution does not narrow the scope of the arbitration clause."

[49] Mr. Farara contended that the decisions he referred to apply whether the liquidation is judicial or contractual.

[50] In my judgment Section 6.7 and 6.8 of the stockholders' Agreement are very limited in their scope. The former speaks to the interpretation, validity and performance of the terms of the Agreement. The latter speaks to the interpretation and enforcement of the Agreement.

[51] If the Appellants have a statutory right to liquidate the Company and they have not waived that right, it is beyond my comprehension how the question of either interpretation, validity, enforcement or performance is even remotely relevant in anyway.

[52] The facts of Enrlich case (supra) are far different from that of the present case. In the former so far as I am able to distill the facts.

[53] The shareholders entered into an agreement which provided for arbitration of disputes that might arise. A dispute did arise but the majority of shareholders wished to liquidate the Company rather than comply with their contractual obligation to go to arbitration for the resolution of the dispute.

[54] In the instant case there is no contractual obligation that the appellants must litigate any dispute before they seek a winding up petition of the Company.

[55] In my judgment, the appellants' statutory rights to seek a winding-up order under the statutory provisions of the Laws of the British Virgin Islands namely; Section 97 of Cap. 285 and Sections 115 and 166 of Cap. 285 remains inviolate. They have never waived that right.

[56] Moreover, the respondent is seeking to enforce an exclusive jurisdiction Clause, it has the onus of proof to establish that the Clause is applicable to the dispute. This it has failed to do. (See Halsbury's Laws Vol. 8(1) paragraph 1088).

[57] By bringing an application for a winding-up of the Company the British Virgin Islands Court is not called upon to interpret the summary of Terms or any other Agreement.

[58] The British Virgin Islands Court must only satisfy itself that it has jurisdiction to hear the petition and there could be no doubt about that. (See section 116 of the Companies Act). In my view, the task of the British Virgin Islands Court having satisfied itself that it has jurisdiction, the simple question that calls for determination, is whether the defendant

company owes debts to the appellants and is unable to pay those debts or as Mr. Archibald, Learned Queen's Counsel, has graphically put it "the company is dead in the water". (See Re Tele-Art Inc. & Nam Tai Electronics Inc. and Bank of China, Re Southard and Co. 1979 1 W.L.R 1198 at 1208).

[59] In exercising its statutory option to liquidate the Company, I am firmly of the view that the appellants are seeking to enforce statutory rights and not contractual rights therefore they are not seeking to enforce payment of a debt due from the Company.

[60] In Re: International Tin Council 1987 ALL ER 896 at 906:

Millet J, said:

> "I am not satisfied that in this context, that the presentation and hearing of a winding-up petition, as distinct from the proof of debt in the winding up, are properly to be classified as falling within the enforcement jurisdiction at all. It is fallacious to suppose that, because the petitioner is not seeking to establish its debt, the Court is exercising its enforcement jurisdiction. Even if the petitioner has previously resorted to litigation to establish his debt, the presentation of a petition marks the commencement of an entirely new lis. The issue at the hearing is not whether the petitioner and other creditors, some of whom have not yet established their claims, should be wound up or allowed to try to trade out of its difficulties."

[61] At page 906 he the said:

> "But it is not necessary to decide this, for in my judgment the winding up process is plainly not a method of enforcing a judgment or arbitration award."

[62] I make the observation that in my opinion in a contract where the parties agree to submit to arbitration as in Ehrlich (Supra) in the event of a dispute arising, the court will more readily ensure that the parties honour that agreement by refusing to entertain any litigation brought by any one of the parties to an arbitration agreement unless the arbitration clause is adhered to. The reason being, in my view, is that arbitration is at least an attempt to bring about a resolution of the dispute without the intervention of the courts. In my view, therefore, it must be the policy of the law to encourage and even insist that arbitration clause in a contract must be adhered to.

[63] On the other hand, a clause or clauses in a contract that one party to that contract on the occurrence or non-occurrence of certain events would liquidate assets, without more, as is the instant case, would not call for an intervention on that issue, i.e. the issue of the liquidation, unless that issue was before the court. By that I mean if the parties were to go before the court on another issue the court would not order the parties to "exhaust the liquidation clause" before the other issue is litigated. This must not be taken to mean that I am saying that the innocent party cannot go to court and seek, for instance, specific performance of the agreement.

[64] The observation which I made above is to indicate that in my view there is nothing in the contract of voluntary winding up which would compel or force the appellants to litigate that issue before the Court of New York or any other court for that matter before pursuing any other remedy which they have. In this case one such remedy is statutory winding up.

[65] Learned Queen's Counsel, Mr. Archibald, submitted that the learned trial judge erred in law in that he failed to consider or alternately misapplied the necessary considerations and factors which in law must be considered and applied in any determination of forum non conveniens

[66] He contended that the principles which a court must consider in deciding whether to stay proceedings on the ground of forum non conveniens were set out by the leading case of:

Spiliada Maratime Corp v Cansulex Ltd. The Spiliada 1980 3AER. 843 AT 854-856

Lord Goff, with his usual clarity and preciseness enunciated five principles:

> (a) "the basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action i.e. in which the case may be tried more suitably for the interest of all the parties and the ends of justice…….
> (b) In general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay…….
> (c) The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the plaintiff has exhypothesi, founded jurisdiction as of right in accordance with the law of this country, of itself give the plaintiff an advantage in the sense that the English Court will not lightly disturb jurisdiction so established…….

> (d) Since the question is whether there exists some other forum is clearly more appropriate for the trial of the action, the court will look to see what factors there are which point in the direction of the forum……
> (e) If the court concludes at that stage that there is no other available forum which prima facie is clearly more appropriate for trial of the action, it will ordinarily refuse a stay……..
> (f) If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason by which justice requires that a stay should nevertheless be granted. In this inquiry, the court will consider the circumstances of the case, including circumstances, which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence that the plaintiff will not obtain justice in the foreign jurisdiction….."

[67] From the record I accept, as there could be no doubt about these things, that the company does not carry on business in New York, has no assets there, has no officers or directors in New York. There are no documents or witnesses in New York.

[68] The company is a British Virgin Islands company, has its registered office in the British Virgin Islands and is governed by the laws of the British Virgin Islands.

[69] Legally a New York Court could not authorize the sale of the company's assets in the British Virgin Islands free and clear of claims of third party creditors.

[70] Finally on this point it is beyond argument that a New York Court could not give directions to the British Virgin Islands Companies Registry binding on the Registry and could not supervise any directions given by it.

[71] Any purported order therefore granted by the New York Court in that regard would be in futility. In my view, therefore, there could be no other forum but the British Virgin Islands Court with competent jurisdiction to liquidate the company

[72] I am therefore persuaded by the argument of Learned Queen's Counsel, Mr. Archibald, when he said that NV does not genuinely desire liquidation in New York or elsewhere. The evidence filed by NV confirms the fact that a state of deadlock exists and there is a

complete absence of trust and confidence among the parties. Moreover, neither Credicom Asia nor NV has denied the existence of the debt due and owing to the appellants. Mr. Archibald further argued that NV'S motion to dismiss is merely another attempt by NV to delay the company's obligation to repay the massive debt that it owes the appellants. If the jurisdiction objection succeeds the parties will not be able to liquidate the company because no other court has jurisdiction, according to Mr. Archibald. He submitted that the inescapable conclusion is that NV and Valturi are not acing in good faith.

[73] Should the company be liquidated?

[74] Mr. Archibald submitted that a grave injustice would be done to the appellants if the company is not wound up. He argued that apart from the inability of the company to pay its debts there is in addition to a total lack of confidence in the respondent Valturi and the Company.

[75] As indicative of their loss of confidence Learned Queen's Counsel pointed to the following:-

(a) Vautri's and NV's refusal to co-operate in a voluntary liquidation.

(b) Vautri's conviction for criminal fraud in a public trial in Paris. Mr. Archibald contended that this conviction, as upheld on appeal, has destroyed the appellants confidence in Vaturi as a fit and proper person with whom the appellants can do commercial

business, particularly as he was found guilty of:-

(i) falsifying commercial or bank documents

(ii) issuing false commercial or bank documents

(iii) Abusive use of goods or credit of shareholding company by one of its managers for one of its own personal gain

(c) Vautri was condemned to imprisonment for two years (suspended) and fined 4814 million francs"

[76] In Ebrahimi v Westbourne Gallaries Ltd. 1973 AC 368 at page 383 Lord Cross of Chelsea said:

> "People do not become partners unless they have confidence in one another and it is of the essence of the relationship that mutual confidence is maintained. If neither has any longer confidence in the other so that they cannot work together in the way they originally contemplated, then the relationship should be ended – unless indeed, the party who wishes to end it has been solely responsible for the situation which has arisen."

(See also Loch v John Blackwood 1924 A.C. 734).

[77] In the premises I agree with Mr. Archibald that the learned trial judge failed to give any weight to the fact that the Appellants were seeking to enforce statutory rights under the Companies Act.

[78] The appeal is therefore allowed. The Stay granted by the learned trial judge is hereby set aside. The Motion to dismiss filed by the respondent is hereby dismissed.

[79] It is therefore directed that the petition for the compulsory winding-up of the Company, Credicom Asia Limited, be remitted to the High Court of the British Virgin Islands for the hearing of the application for the compulsory winding-up of the said Company at the earliest available opportunity.

[80] Costs to the appellants in this court and the court below fit for two Counsel.

Albert J. Redhead
Justice of Appeal

I Concur

Dennis Byron
Chief Justice

I Concur

Satrohan Singh
Justice of Appeal