IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

CIVIL SUIT NO.: 563 OF 1999

In the matter of Windward Properties Limited
AND
In the matter of the Companies Act 1994

Appearances:

Mr. Bertram Commissiong Q.C.; Miss Mira Commissiong with him for the Petitioner/Creditor.

Mr. Henry Forde Q.C.; Mr. Emery Robertson with him for Windward Properties Limited

[5th June, 2000; 23rd January, 2001]

JUDGMENT

[1] **Adams J.:** This is a petition before me brought by a Private Foundation from Denmark, through its Chairman Poul Jorgensen of 8 Skorkarerveg Ulborg, Denmark, and the address of which is its registered office in Ulborg, Denmark.

[2] The foundation was set up by Danish teachers with the laudable objective of opening an institution for industrial research development and production within the fields of agriculture,

manufacturing, trade, transport including shipping, and matters pertaining to the environment.

[3] Eventually in pursuance of the Foundation's objectives, a local company was set up known as Windward Properties Limited, for the purpose of purchasing a place described as Orange Hill Estates, a group of estates of some 3,300 acres on the northern part of the island.

[4] It suffices to say that those estates not long after their purchase by Windward Properties Limited on behalf of the Foundation were acquired by Government and the Foundation's plans fell apart with one of the consequences being the launching of this petition seeking the winding up of Windward Properties Limited.

[5] For convenience I set out hereunder paragraphs (5), (6) and (7) of the Petition.

> "(5) The company is indebted to your petitioner in the sum of $5,203,636.00 being the balance of money advanced to the Company for the purchase of the said Orange Hill Estates and which the company agreed to repay on demand. By inadvertence there was not deducted from the sum owing the payment of $1,485,000.00 which the company made to you petitioner in May of 1997.
>
> (6) On the 16th September, 1997 your Petitioner served on the company by leaving it at the office of Mr. O.R.

Sylvester Q.C. of O.R. Sylvester & Company a demand for payment signed by Poul Jorgensen the Chairman of the Foundation which demand was in the following terms:

Mr. Othneil Sylvester Q.C.
Windward Properties Ltd
Marcole Plaza
P.O. Box 951, Kingstown
St. Vincent
West Indies

In the light of our discussions on Tuesday 14th September 1999 in your Chambers the Private Foundation Faellersge now formally demand immediate payment of EC$6,688,636.00. Please make the payment to the account Faellersge with the Danish Bank Giro Bank Copenhagen Account No. 9530 424 04-08568. This demand for immediate payment replaces the call for prompt payment dated 25th August, 1999.

Yours sincerely

The Private Foundation
Faellergse
Poul Jorgensen
Chairman of the Board

(7) Over three weeks have now gone since your petitioner served the said demand but the company has neglected to pay or satisfied the said sum or any part thereof or to make any offer to your petitioner to secure or compound the same. By letter from Messrs O.R. Sylvester & Company dated 18th September 1999, the company falsely denied that it was indebted to you petitioner."

[6] After averring in paragraph (8) of the petition that the company was unable to pay its debts and that the company could no longer attain the objective for which it was incorporated the petitioner asked that apart from the company's liability to pay its debts as a ground for granting the petition, I should find that it was just and equitable to wind up the company.

[7] At the outset of the hearing of this petition Mr. Robertson for the defendant company hereinafter referred to as "Windward" took preliminary objection to the petition.

[8] Mr. Robertson's first objection was that the Petitioner in this case has no locus standi to present a petition. If that is so Mr. Robertson contends then of course the petition ought to be dismissed.

[9] Mr. Robertson bases his contention on the principle that the debt which the Foundation alleges is owed to it by the defendant company, is in fact the subject of substantial dispute. Mr. Robertson submits

that the petitioner will not qualify as a creditor, once that dispute exists. The substantial dispute, he argues, disqualifies the petitioner as a creditor. As is so frequently the case, while the principles governing a particular issue may be easy to appreciate, it is the application of the principle to particular facts that invites difficulty.

[10] I have however read the following documents presented in the course of this hearing and have come to the conclusion that there is no bona fide dispute as to the debt owed to the petitioner. The documents to which I refer are RT15 (a promissory note from the company to the Petitioner) and RJ16. PJ25 (which indicates money lent by Petitioner to Windwards), PJ31; and PJ21 (which indicates the banking destination of the sum of money referred to therein).

[11] Let me observe in passing that my apprehension of the learning on this issue of "indebtedness" is that the indebtedness which by virtue of a substantial dispute disqualifies a person from being a creditor must relate almost invariably to the existence of the debt and not its quantum. In other words if there is a substantial ground for disputing the existence of a debt then the petition must be dismissed. In my view while Mr. Robertson puts forward the argument that there is no debt, the documents to which I have referred suggest otherwise. If there is an argument about the quantum of the debt that does not matter, provided such quantum is of the size required by the relevant Act. To ground the petition under our Companies Act, the debt must be not less than five thousand dollars.

[12] As I indicated in the earlier paragraphs of this judgment the petitioner qualifies as a creditor and one needs to go on to consider whether there are grounds on which this creditor's petition can succeed in obtaining a winding up order.

[13] Mr. Robertson has argued that from paragraphs (5), (6) and (7) of the Petition set out above it is apparent that the Petitioner was seeking to comply with the provisions of section 378 of The Companies Act 1994. That section deems a person unable to pay his debts if a notice demanding payment is sent to him containing certain information and telling the debtor of the three courses of action he may take in relation to the debt if he is to avoid the conclusion that he is unable to pay his debts and run the risk of the pernicious consequences in law that may follow that conclusion.

[14] Because of the consequences which follow a finding that a debtor is unable to pay his debts Mr. Robertson contends, the notice which culminates in such a finding must comply with the provisions of the section of the Companies Act dealing with such notice - see case of Hollands Printing v San Michele 1992 3 NZLR 469.

[15] When one looks at the petition in this case and more particularly paragraphs (6) and (7) thereof, one discerns an obvious but inadequate attempt to comply with the relevant section 378 of the local Companies Act of 1994. There is a total omission to include in

the notice that the debtor is given three options by which he may avoid the embarrassing consequences to himself. Those options are found in the words of the section, that is, that he must either pay the debt or "secure or compound for it to the reasonable satisfaction of the creditor."

[16] Mr. Commissiong has in response to the allegation that his notice of demand was inadequate argued that provided the notice was substantially in accordance with the section requiring it all was well. Counsel cited in support of his contention the case of Stonegate Securities v Gregory 1980 1 AER p 241.

[17] The case of Stonegate Securities does indicate that the notice with which it was concerned did not provide the debtor with all the language used in the "notice" section (which is in pari materia with our section 378), but I take note of the circumstance that the notice in Stonegate Securities referred the debtor to the provisions of the section under which the debtor was to act. It may well be that a notice which refers the debtor to the provisions under which he is required to act avoids the need for citing verbatim the words of the "notice" section. No reference having been made to the relevant section in the letter of demand sent to the company in the instant case, I consider as was said in the case (cited above) of Hollands Printing that it would be unfair to the debtor, and cannot ground a petition on the basis that the company is unable to pay its debts.

[18] But in my view it matters not whether the ground of inability to pay debts has been established or not, since I am satisfied that the circumstances prevailing in respect of this case demand that it be wound up on the other ground that it is just and equitable so to do. The power of the Court to order winding up of a company on the ground that it is just and equitable so to do may be exercised in any circumstances where there is something in the management and conduct of the company which shows the Court that it should no longer be allowed to continue and that the concern ought to be wound up.

[19] Winding up on this ground has been ordered where the main object of the company had been completely achieved; vide Re Amalgamated Syndicate or had become impossible vide German Date Coffee or was fraudulent vide Re Brismead and Sons (where the name of the company was intended to mislead) or where as in Re Yenidje Tobacco Company, the two shareholders, who were also directors were not on speaking terms owing to disagreement, or where a preponderance of voting power was permanently vested in a board in whom the minority shareholders had justifiably no confidence vide Loch v John Blackwood Ltd. In this matter before me the affidavit of one of the shareholders, a Barrister-at-Law who admittedly was involved in the formation of company in his professional capacity, on the 20th January swore an affidavit in which he averred:

> "(1) I am a shareholder of Windward Property Ltd in liquidation and one of the shareholders who participated

in the passing of the special resolution to wind up the company and act as Counsel in its litigation regarding the acquisition of Orange Hill Estate ....." (underlining mine)

and went on to depose in the fifth paragraph of the said affidavit as follows:

"(5) While the purpose for which the company was established was lawful its use was to circumvent the Aliens Land Holding Act Cap. 96 of the Laws of St. Vincent and the Grenadines and which as events developed was in itself illegal." (underlining mine).

[20] This company Windwards had been formed for a specific purpose, and that was to purchase on behalf of a private foundation certain lands. That objective was frustrated when Government acquired the land after it was bought by the Company acting on behalf of the Foundation. It is trite law that the objective of the company having been frustrated, winding up of the company becomes just and equitable. In addition, it seems to me that the documents filed for the purpose of the hearing of this position reveal a history of the company, that makes its presence on the Register of Companies an embarrassment.

[21] In the premises this Court adjudges that the company known as Windward Properties Ltd. should on the ground that it is just and equitable be wound up and I so order.

Odel Adams

HIGH COURT JUDGE