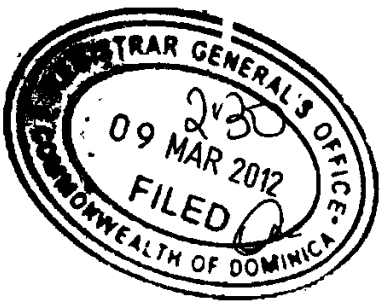

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA

SUIT NO. DOMHCV2009/0096

In the matter of the Arbitration Act Chap. 4:50 of the Revised Laws of the Commonwealth of Dominica
And
In the matter of the Arbitration between Calais Shipping Co. and Bronwen Energy Trading Ltd.

BETWEEN:

Calais Shipholding Co.	Claimants
And	
Bronwen Energy Trading Ltd	Defendants

Appearances:
Ms. Lisa de Freitas for the Claimant/Respondent
Mr. Roysdale Forde for the Defendant/Applicant

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2011: May 20
2012: March 9

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JUDGMENT

[1] **STEPHENSON- BROOKS J.:** On the 25th March 2009, the Claimants Calais Shipholding Co. (**"Calais"**)issued a Claim by way of Fixed Date Claim Form against the Defendant, Bronwen Energy Trading Ltd. (**"Bronwen"**). This Claim was supported by a duly notarised affidavit sworn to by Alan Curran dated 18th March 2009 and filed on the 25th March 2009. There were a number of exhibits attached to the affidavit evidencing the statements made by the Deponent and of Hazel Johnson dated and filed on the 25th March 2009, together with its exhibits.

[2] In the Fixed Date Claim Form, Calais applied to the Court for an Order pursuant to Section 34 of the Arbitration Act, Chapter 4:50 of the Revised Laws of the Commonwealth Dominica to enforce, in the same manner, as a Judgment or Order to the same effect three(3) awards dated the 13th day of July 2007, 18th July 2008 and the 27th October 2008.

[3] On the 6th May 2009, an Affidavit of Service of the Fixed Date Claim Form, Claim Form, Statement of Claim, Affidavit of Alan Curran, Affidavit of Hazel Johnson, Defence Form, Application to pay by instalments and Acknowledgement of Service sworn by Bailiff Rennick John on the said 6th May 2009 were filed. The said Affidavit stated that the stated documents were served by hand on the Bronwen's registered Office into the hands of one Mr Kenny Alleyne for and on behalf of Bronwen.

[4] On the 15th May 2009, Calais was granted leave to enforce the three arbitration awards in the same manner as a Judgment of the High Court and judgment was entered against Bronwen in terms of the said awards. Costs were also awarded in favour of Calais. This Order was filed and entered on the 19th May 2009.

[5] On the 28th May 2010, Calais filed a winding up petition for Bronwen to be wound up pursuant to the International Business Companies Act No. 10 of 1996 and the Companies Act No. 21 of 1994, on the ground that they obtained a Judgment against Bronwen which was duly served on them and subsequently demanded and which Judgment Bronwen has failed to satisfy and that in the circumstances it woud be just and equitable for the company to be wound up.

[6] This Petition was verified by the duly notarised Affidavits of Charles G Weller dated the 19th May 2010 and filed on the 28th May 2010, with exhibits attached.

[7] On the 23 August 2010, an Affidavit of Service of the Winding-up Petition, Affidavit verifying Petition and Affidavit of Service of Ivor Emanuel, Bailiff of Roseau of even date was filed, stating that he, on the 11th day of August 2010, served the said documents at the Defendants' registered office at Copthall by hand delivery to Mr Kenny Allyne for and on behalf of Bronwen. The Deponent stated also in his Affidavit that the documents indicated that Bronwen was required to attend before the Judge at the High Court of Justice on Friday 22nd October 2010, at 9:00 a.m.

[8] On the 6th October 2010, Calais filed an application of even date for the appointment of Mr Keiron Pinard-Byrne to be appointed Liquidator of Bronwen and for his fees to be fixed and approved. This application was supprted by two Affidavits. Firstly, the Affidavit of Hazel Johnson dated and filed the 6th October 2010 and by the Affidavit of Mr Pinard-Byrne speaking to his qualifications, ability and willingness to act as Liquidator dated and filed on the 8th October 2010 and exhibitting the Deponent's résumé.

[9] An Affidavit of publication of Winding-up Petition dated and filed the 12th October 2010, was filed with exhibits, stating that the winding- up Petition was published in the Dominica Official Gazette and the Chronicle Newspaper on the 2nd September 2010 and the 27th September 2010, respectively.

[10] On the 22nd October 2010, the application was heard and granted and the Order dated the 22nd October 2010 was filed on the 26th October 2010.

[11] On the 12th November 2010, a Motion to disharge or set aside the Winding- up Order and to discharge or set aside the appointment of the Liquidator was filed with an Affidavit in Support of the application of even date with exhibits.

[12] On the 5th January 2011, Bronwen filed an amended Motion dated the 13th December 2010, with an affidavit in support filed on even date adding therein to their application a prayer to set aside the winding-up for an Interim Order directed to the Liquidator restraining him from excercising all or any of the powers, functions and/or authority conferred on him by virtue of the order of court dated 22nd October 2010, pending the hearing and outcome of the motion.

[13] On the 16 February 2011, an Order of Court dated the 10th February 2011 was filed. The said Order granted leave to Calais to file and serve its Affidavit in Answer to the Affidavit in Support of the Motion filed by Bronwen. Bronwen was granted leave to file and serve an Affidavit in answer if necessary. Both parties were ordered to file detailed written submissions with authorities and the matter was fixed for arguments. All further proceedings in the winding-up was stayed until further or other order of the court.

[14] The parties filed their written submissions as ordered and each made brief amplified submissions to the Court and I now render my decision.

[15] The stated grounds for the application is:

(i) Non disclosure or suppression of the material facts;

(ii) That the winding -up Petition is bad in law on the grounds that the Affidavit sworn in support of the said Petition was not in compliance with rule 30 of the winding- up Rules;

(iii) That the winding-up Petition is incurably defective because Calais failed to adduce evidence of of the demand for the debt in question on Bronwen;

(iv) That there is no evidence that Bronwen is unable to pay its debts.

Does the court have the jurisdiction to set aside the winding up order?

[16] Learned Counsel for Calais Ms. Lisa de Freitas submited that the Court must determine whether upon the facts the Winding- up Order could be set aside on the grounds as stated by Bronwen. Learned counsel in her submissions quoted Fraser and Stewart on Company Law of Canada that:-

"After a winding up order has been made and become effective, the proper way to attack it is by appeal not by application to rescind it directed

to the judge who made the order ... nor by motion to set aside the order ... A judge has not power to rescind his winding up order, at all where he has no additional material before it and it is not apparent that he was previously misled or that any fact was suppressed."[1]

[17] Counsel further submitted that:

"if a winding up order has not been appealed against, a contributory or other person who is not a stranger to the winding up-procedure cannot call into question its validity on any proceeding in the winding up."[2]

[18] Miss de Freitas submitted that the Applicant must therefore bring additional material before the Court and show that the Court was misled or that there was a suppression of certain facts in order for the Motion to be successful. Counsel submitted that there was no material non disclosure on the part of Calais Shipping neither was there any attempt to mislead the court in anyway and that in these circumstances the only avenue available to the Applicants Bronwen was for them to appeal the Winding- up Order.

[19] Learned Counsel Ms. de Freitas submitted that in all the circumstances of the case at bar there is no jurisdiction to set aside the Winding- up Order and that Bronwen is unable to challenge the validity of the Winding- up Order and their application ought to be dismissed with costs to Calais Shipping. For reasons which will become apparent later in this Judgment, I do not agree with Learned Counsel's, Miss de Freitas, submission in this regard. I find that Bronwen can make the application that is before the Court and that the Court is seised with the jurisdiction to review the matter to ascertain whether or not the Order could be set aside on the grounds of fraud, material non disclosure or other improper means on the part of Calais Shipping.

[1] Frasier & Stewart Company Law of Canada, Harry Sutherland sixth Ed Page 927
[2] Ibid p928

[20] Learned Counsel for Bronwen, Mr Roysdale Forde, submitted in response to Calais Shipping's argument that the Court has the jurisdiction to set aside the winding- up which has been procured by fraud or other improper means. That this jursidiction is excercised the Court pursuant to its inherant jurisdiction. Counsel sumitted that:

> *"once the order is entered the court has no jurisdiction to cancel it except in special circumstances, for example where it was obtained by fraud or concealment of material facts"*[3].

[21] Mr Forde further submitted that the question whether the Court can stay an Order of winding- up was discussed in **Bridon New Zealand –v- Tent World**[4] and Thomas J in that case ruled that Rule 486 of the Rules of the High Court of New Zealand should not be lightly excluded in winding- up proceedings. He said that the application of the rule meant that;

> *"a party was entitled to his or her day in Court, and that when they do not appear at the hearing the judgment which is entered against them may mean that there has been a miscarriage of justice"* he went on to say *" I can see no sound reason why this principle should not be equally applicatble to a propertly constituted winding-up proceedings ..."*[5]

[22] In the ***Bridon New Zealand Case*** the proceedings were not properly served on the Company in that, they were served on a defunct address and therefore the application was never brought to the attention of the Company. This not the case here, as at no time, or no where in their submissions or in the evidence presented to the Court does Bronwen claim that they were not served or in fact that the address where all the documents were served was not their address.

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[3] Ibid page 837
[4] [1992] 3 NZLR 725
[5] Ibid page 728

[23] I am of the view that the **Bridon New Zealand Case** is to be distinguished from the case at bar in that Bronwen was served to the satisfaction of the court and by choice they (Bronwen) did not enter an appearance and/or chose not to participate in the application for the registration of the judgment or the Winding up Order. I am of the view that the considerations that would have been relevant in the **Bridon case** to wit that they did not have an opportuity to take part in the proceedings are not relevant to this case. Further, in the **Bridon case** the company was not insolvent in that, upon receiving notice of the proceedings, the judgment debt which formed the basis of the claim was paid up in full; therefore, this is certainly not, in my view a situation where Bronwen is being denied its day in Court but rather a situation whereby Bronwen **chose not to** (emphasis mine) take part in the proceedings which were properly served on them. I am therefore unable to agree with Learned Counsel, Mr Forde, that Bronwen is being "lightly excluded from the Court".

[24] This leaves the question was the Winding-up Order in the case at bar obtained by fraud or other improper means? If this is so in applying the decision of **Kim Maxwell Ltd**[6], the Court can pursuant to its inherant jurisdiction set aside its Winding- up Order.

[25] I will now examine the arguments presented by Bronwen for the Winding- up Order to be set aside.

Non disclosure of material facts:

[26] Learned Counsel on behalf of Bronwen contends that Calais Shipping deliberately failed to make disclosure of the following facts which was material to their application:

(a) That it had applied to the High Court of England for leave to enforce the Arbitration Awards[7]; and that the said award was registered as a judgment in England which operated to merge the awards into a judgment and could no longer be treated as an award and as such the Courts in Dominica were not competent to enter

[6] (1992) 1 NZLR 69

[7] Paragraph 9 of the affidavit in support of motion dated November 12th 2010. ("November 12 Affidavit")

judgment in terms of the awards as was done.[8] Bronwen also states that Calais when it applied to have the awards registered as a judgment here in Dominica failed to disclose to the Court that the said awards were registered as a Judgment in England on the 18th September 2008 by Mr Justice Steele.[9] That in doing so the Court was misled into believing that the Arbitration Awards were not yet an Order of Court[10];

(b) That its had sought to have the English Court Judgment registered in Nigeria under the reciprocal Enforcement of Judgment Act of Nigeria which application was refused by the Federal High Court of Nigeria[11]; Bronwen contends in its affidavit that this amounted to a nondisclosure and suppression of the existence of the judgment.

(c) That the Federal Court of Nigeria ruled that Clause 10 of the Charter Party was void. Learned counsel for Bronwen contended that Calais in their application reproduced clause 10 of the Charter Party as the basis for the Arbitration Awards which clause was found to be null and void by the Federal Court of Nigeria on the grounds that it ousted that court's jurisdiction as set out in Section 20 of the Admiralty Jurisdiction Act of Nigeria and was therefore on no legal validity[12]. Bronwen contended in their affidavit that the Nigerian Act is in the same terms as that of Dominica Counsel submitted that therefore by extension the said clause would also be invalid in Dominica.

(d) Further that Calais Shipping was obliged by order of the Court of Appeal of Nigeria to lodge $1,993,000.00 (*One million, nine hundred and ninety three thousand dollars)*[13] which up to the 24th day of February 2010 they had fail to do.

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[8] Order of Dominican Court dated 15th May 2009

[9] See also aapplication to register awards made on 25th March 2009 by way of Fixed Date Claim Form supported by affidavit of even date sworn to by Hazel Johnson.

[10] Affidavit of November 12th 2010 para 10

[11] Ibid para 14

[12] Ibid para 16 and exhibit "DGS – 7"

[13] Ibid paras 17-21

[27] Mr Forde submitted that the issue of non disclosure or suppression of material facts is material to the application for the appointment of a liquidator. In support of his submission learned Counsel cited the case of **Pac –Asian Service Pte Ltd –v- European Asian Bank**[14] where the Court of Appeal of Singapore held, that an Ex-parte Order for the appointment of a Liquidator imposed a duty on the Petitioner to make full and frank disclosure of all material facts as in an application for Mareva Injunction. Counsel relied on the dicta of Wee Chong CJ when he said

> *"This sequence of thrust and parry highlights one salient point – the first Weir affidavit was a far from satisfactory one in the light of the legal principles that we have discussed. It could not, in view of its accuracies and no disclosures form the basis for the appointment of provisional liquidators"*[15]

[28] Miss Lisa de Freitas, Learned Counsel for Calais Shipping challenged this submission and stated that Calais' position is that all material facts were disclosed- that is that there was a valid Judgment by His Lordship Justice Cumberbatch which required the Applicant/Respondent to pay certain sums of money to the Petitioner and that the said judgment was duly and properly served on Bronwen.

[29] That the said judgment was not satisfied, appealed against, neither was their participation by Bronwen in the proceedings before the Learned Judge, as would appear from the Court record. That in these circumstances the Petitioner was entitled to rely on that unsatisfied judgment debt which was due and outstanding to the Calais Shipping at the time of the Petition and the hearing of same. Counsel further submitted that there was no argument on behalf of Bronwen that the proceedings were never served on them.

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[14] [1988] L.R.C. (Comm) 688

[15] Ibid page 700

[30] Miss de Freitas submitted that Bronwen did not enter an appearance to the application neither did they seek to have that judgment set aside or to appeal same. It was submitted that a successful litigant is entitled to the fruits of his judgment and that Bronwen is seeking now, to render the order of Justice Cumberbatch null and void by circumventing the established procedure and without making the proper and necessary application. Further, that unless and until the order of Justice Cumberbatch dated 15th May 2009, is set aside the proper way, Calais is entitled to act upon and enforce the Judgment in any and every way provided by law. I agree with Learned Counsel's submission in this regard.

[31] Miss de Freitas further submitted that, regarding the issue of non disclosure, the test in the **Pac Asian case** relied on by Mr Forde related to an application for the appointment of a provisional Liquidator and that is why it was compared to an application for a Mareva injunction i.e. the standard of disclosure. In that case it was an Ex-parte application for the appointment of provisional Liquidator. Counsel submitted that in the case at bar the applicant was served and they have not averred that they were not served; and they did not participate in the winding-up proceedings by choice. Learned Counsel also submitted that the case cited would therefore not apply in these circumstances and that there was at all material times full disclosure of material facts and that there was no material non disclosure that would give this court the jurisdiction to set aside the Winding- up Order.

The materiality of the non disclosures and suppression of facts:

[32] Counsel, Mr Forde, submitted that the instances of non disclosure and or suppression of facts by Calais are deliberate and material to the issues that the Court had to take into consideration in determining whether or not to grant the Winding-up order in the Petition.

[33] Mr. Forde submitted that Clause 10 of the Charter Party referred to and which was reproduced in the Calais Petition as a basis of the arbitration award which award was subsequently registered as a judgment was found by the Courts of Nigeria to be null, void and of no legal validity. That the Petitioner, Calais failed to inform the Court in Dominica of this ruling and Counsel submitted that this amounted to suppression of facts which was material to the validity of the basis of the Judgment obtained by Calais. That the failure to disclose the ruling of the Nigerian Courts in the petition was material to the validity of the judgment herein.

[34] While there may be some validity in Counsel's argument regarding the "possible" validity of the judgment and the awards here in Dominica based on the similarity of the Nigerian Law and Dominica Law as submitted by Mr Forde, I am of the view that this in not the forum for the Applicant to make that submission. This submission should have and would have properly been made either before the Judge's order was made in Dominica or upon appeal of the said order. I note, once again, that the applications were duly served on Bronwen and they failed and/ or refused to participate in the matter at that stage and they cannot now, at this stage, seek to make submissions that could have properly been made then. I am therefore unable to agree with learned Counsel Mr Forde in this regard.

Failure to comply with the requirements of sections 377 and 378 of the Companies Act.

[35] Counsel, Mr Forde, challenged the Winding- up Order on the ground that the Petitioners "Calais" has failed to comply with the requirements of Section 377 of the Companies Act (of the Commonwealth of Dominica Act 21 0f 1991) which provides the circumstances which a Company could be wound up.

> "A company may be wound up by the Court if - ...
>
> (c) the company is unable to pay its debts."

[36] Section 378 (1)(a) of the said Companies Act speaks to the definition of inability to pay debts.

> " (a) a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five thousand dollars then due, has served on the company, by leaving it at the registered office of the company, a demand under his hand or under the hand of his agent lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound it to the reasonable satisfaction of the creditor.
>
> (b) execution or other process issued on a judgment decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
>
> (c) or it is proved to the satisfaction of the court that the company is unable to pay its debts as they become due.
>
> ..."

[37] What are the failures alleged by the Applicants? Learned Counsel, Mr Forde, submitted that the Calais must show that a sum exceeding five thousand dollars is due to it. Counsel made reference to paragraphs 19 through 21 of the Petition which stated that Calais failed to comply with an Order of the 15th May 2009 and also to comply with a demand to satisfy the judgment debt. Learned Counsel also acknowledged that Calais is relying on the Judgment obtained against Bronwen as constituting the sum due to it.

[38] Counsel submitted that the Court pursuant to sections 377 and 378(1) of the Companies Act is required to be satisfied that there is a sum due to the Petitioner. Counsel further submitted that there is no sum due to the Petitioner as the Judgment was not registrable under the Laws of Dominica. I am unable to agree with Learned Counsel in this regard as this is not the right forum to

attack the judgment or for the judgment to be deemed null and void. The Judgment obtained by Calais Shipping is a valid one and will remain so until set aside at the proper time and place. The application by Bronwen therefore fails on this ground.

[39] Section 378 of the Companies Act (supra) provides that "the demand for the debt must have been served on the registered office of the company". Bronwen claims that Calais failed to do that, as the demand was not served on the registered office as is required.

[40] Counsel further submitted that there should have been strict compliance with the requirements of the Act as it regards the serve of the demand as failure to do this would make the Petition to wind up to be incurably defective.

[41] Counsel, Mr Forde, also submitted that the affidavits as filed by Calais could not and did not speak to the service of the demand of Bronwen, and submits that in the circumstances the Petition as filed by Calais is defective as there was no proof of service as is required by the Law.

[42] Counsel Ms de Freitas responded that there was evidence presented to Court in the Petition that the demand was served on Bronwen at paragraphs 20 and 21 of the Petition.[16] Based on this evidence there was sufficient evidence of the service of the demand on the Applicants .

[43] Counsel further submitted that Bronwen was relying on the averments of Mr Duncan Stowe on the basis of hearsay evidence; that Mr Stowe failed to state who he contacted and that he makes a sweeping statement in his Affidavit that the Registered Agents were contacted. That the

[16] Paragraphs 20 and 21 of Calais Petition states *" On the 12th day of June 2009, your petitioner caused to be served on the Company by at its registered office at Copthall, Dominica, a demand requiring the company to satisfy the judgment debt at the Chamber of de Fraitas de Freitas and Johnson. ... Over 21 days has elapsed since your petitioner served the said demand but the Company by has neglected to pay or to satisfy the said judgment debt or any part thereof or to make any offer to your petition to secure the same."*

Registered Agents are located here in Dominica and have not been brought to give first hand evidence. Ms de Freitas urged the court that Calais were put in a position which it could not properly challenge the evidence by way of cross examination or otherwise as the primary maker of the statement is unknown and as such the Court should not rely on the evidence presented to the Court through Mr Stowe. I agree with Miss de Freitas in this regard and I am unable to agree with Mr Forde's submission regarding the service of the demand as there is no proper evidence presented to this Court that there was no service of the demand on the registered office for Bronwen. I accept that the said registered office is located here in Dominica and that no one has come forward from that office to deny that they were served with the demand. I find that Mr Stowe could not properly give evidence in this regard.

Conclusion:

[44] Having read the various affidavits, the written submissions with authorities and having listened to arguments presented by both Learned counsel on both sides, I have arrived at the following conclusions:

i. That this Court has the jurisdiction to entertain this application and to make an order setting aside the said liquidation order.

ii. That the demand for the alleged debt owed by Bronwen to Calais was duly served on the registered office for Bronwen at Copthall Dominica and that there isn't sufficent evidence to the contrary.

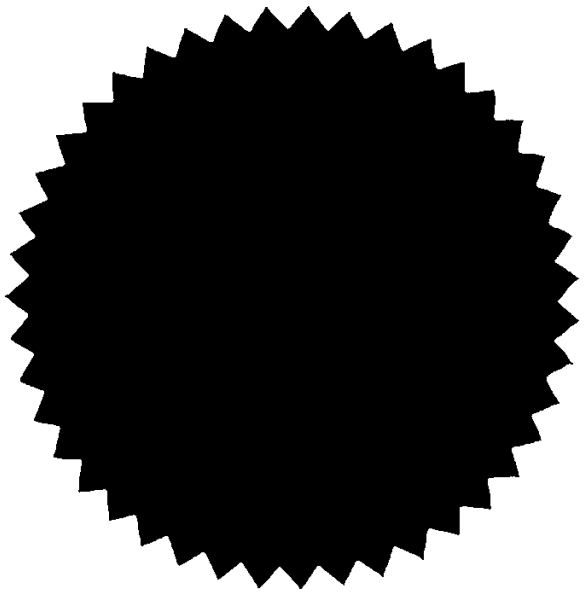
iii. That there was no failure on the part of Calais to make full and frank disclosure of material facts nor was there any non disclosure or suppression of material on the part of Calais in these liquidation proceedings.

iv. That if the Winding-up Petition was bad in Law and the affidavit verifying the Petition was non compliant with Rule 30 of the Winding up rules that

this application should have been made at the time of the application for the liquidation order which application Calais sought to make inter parties and to which Bronwen failed to and or refused to take part in the said proceedings.

[45] Based on the above it is hereby ordered that the application by Bronwen is dismissed with costs awarded to Calais.

[46] I would now invite counsel on either side to make written submissions regarding costs if said costs are not agreed between them to be filed within 21 days hereof.



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Birnie Stephenson-Brooks

High Court Judge