EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2014/0021

BETWEEN:

UNICORN WORLDWIDE HOLDINGS LIMITED

Appellant

and

BLUESTONE SECURITIES LIMITED

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

On written submissions:

Mr. Tom Lowe, QC with him, Mr. Kissock Laing for the Appellant
Mr. Philip Marshall, QC with him, Ms. Arabella di Iorio for the Respondent

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2015: September 30.

Civil appeal – Winding up proceedings – Whether learned judge erred in concluding that there was a real and substantial dispute concerning debt – Whether learned judge erred in dismissing winding up application

Held: dismissing the appeal and the counter appeal; awarding costs to the respondent on the appeal and making no order as to costs on the counter appeal, that:

1. A debt disputed on genuine and substantial grounds could not support a winding up petition. The application before the learned judge was an application to wind up and appoint liquidators of the respondent on the basis of a disputed debt due by the respondent. The respondent disputed the purported assignment of the debt, the instrument of assignment, that the debt had become due and whether circumstances which would give rise to accelerated payment of the debt existed on the facts of the case. These were the factors before the learned judge. Accordingly, the learned judge, having concluded that there was a real dispute in

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relation to the debt on which the application was founded, did not err in so concluding.

Tallington Lakes Ltd et al v Ancasta International Boat Sales Limited [2012] EWCA Civ. 1712 applied; **Sparkasse Bregenz Bank AG v In The Matter of Associated Capital Corporation** BVIHCVAP2002/0010 (delivered 18th June 2003, unreported) followed.

JUDGMENT

[1] **MICHEL JA**: This is an appeal against the judgment of Bannister J [Ag.] in which the learned judge struck out an application by the appellant to wind up and appoint liquidators of the respondent on the basis of a debt due by the respondent to another company, which company purportedly assigned the debt to the appellant, which then purportedly invoked an acceleration clause in the loan agreement so that the debt would be immediately due and payable by the respondent.

[2] The brief facts are as follows:

(a) In February 2014, the respondent entered into a loan agreement with a company called Minardi Investments Limited ("Minardi") pursuant to which Minardi loaned just over US$27.7M to the respondent.

(b) The debt was due to be repaid in February 2019, but the loan agreement contained an acceleration clause which allowed Minardi to declare a default and accelerate repayment of the debt in full.

(c) On 25th May 2014, Minardi entered into an agreement by virtue of which it purported to assign the debt to the appellant.

(d) On 30th May 2014, the appellant wrote to the respondent requesting payment of the debt in full within seven days.

(e) On 13th June 2014, the respondent not having repaid the debt, the appellant filed an originating application to wind up the respondent and appoint liquidators of the company.

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(f) On 18th June 2014, the respondent made application to restrain advertising of the appellant's originating application to wind up the company and to appoint liquidators and also applied to strike out the originating application.

(g) On 23rd June 2014, the learned judge made an order restraining advertisement of the appellant's winding up application pending the determination of the respondent's strike out application.

(h) On 24th September 2014, the learned judge struck out the appellant's originating application, principally on the basis that there was a real dispute as to whether the debt, which is the foundation of the appellant's application, was presently due to the appellant and that the court had no business on an application to appoint liquidators to resolve disputes of this sort, so the appellant's originating application was bound to fail and should therefore be struck out.

(i) On 21st October 2014, leave was granted to the appellant to appeal against the judgment and order of Bannister J [Ag.] dated 24th September 2014.

(j) On 12th November 2014, the appellant filed an appeal against the judgment and order of Bannister J [Ag.] and simultaneously filed a skeleton argument and authorities in support of the appeal.

[3] The appellant's grounds of appeal focussed essentially on alleged error by the judge in determining that there was any dispute concerning the debt which could not have been resolved on the application before him for the winding up of the respondent and the appointment of liquidators to conduct its affairs.

[4] On 18th November 2014, the respondent gave notice of opposition to the appellant's appeal and on 27th November the respondent filed a respondent's notice, with a skeleton argument and authorities. In its various filings, the respondent both defended the judge's ruling and counter appealed against it by offering alternative grounds on the basis of which the learned judge could arrive at

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the same conclusion that he did in striking out the appellant's application to wind up the respondent and appoint liquidators.

[5] Both parties later filed supplementary submissions to augment the submissions already filed by them.

[6] The extensive nature of the parties' submissions and authorities notwithstanding, there is really a single legal principle on which this case turns. The legal principle was expressed as follows by Richards JA in the English Court of Appeal in the case of **Tallington Lakes Ltd et al v Ancasta International Boat Sales Limited**,[1] "If the company can demonstrate that the alleged debt on which the petition is founded is genuinely disputed on substantial grounds, the court will strike out the petition."[2] The petition being referred to is a petition to wind up a company on the basis of an unpaid debt due by the company to the applicant.

[7] This very principle had earlier been enunciated in our own Court of Appeal by Chief Justice Byron in the case of **Sparkasse Bregenz Bank AG v In The Matter of Associated Capital Corporation**.[3] In paragraph 3 of the judgment, Chief Justice Byron stated that, "A debt disputed on genuine and substantial grounds could not support a winding up petition". The Chief Justice then went on to say that, "Invoking the process of the Court in relation to a debt which was known to be disputed on genuine and substantial grounds was an abuse of the process of the Court".

[8] On the facts of the present case, the respondent disputed the purported assignment of the debt to the appellant on the basis that the instrument by which it was purportedly assigned did not convey to the appellant any proprietary interest in the debt but only gave the appellant the right to sue the respondent for the debt, which did not therefore constitute a valid assignment. The respondent also disputed that the debt had become due, because under the loan agreement it

[1] [2012] EWCA Civ 1712.
[2] At para. 4.
[3] BVIHCVAP2002/0010 (delivered 18th June 2003, unreported).

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would become due in February 2019 and the circumstances which would give rise to accelerated payment of the debt did not exist on the facts of the case. The respondent even disputed the validity of the instrument of assignment based on the identity of the person who signed it on behalf of the assignor.

[9] These facts, which were before the learned judge, gave rise to a genuine and substantial dispute as to whether there was, at the time of the filing of the originating application, a debt then due and payable by the respondent to the appellant. The learned judge was therefore correct in finding, as he did, that there was a real dispute in relation to the debt on which the application to wind up the company and appoint liquidators was founded, so that the winding up application, if it went to a hearing, was bound to fail and so the application to strike it out must succeed.

[10] I can find no fault, therefore, with the judgment and order of the learned judge striking out the appellant's application to wind up the company and to appoint liquidators to conduct its affairs. The appeal is accordingly dismissed, with costs to the respondent in the sum of US$3,000.00.

[11] I find it unnecessary to deal specifically with the respondent's counter appeal, so far as it is, but if I am required to make a ruling on it for the sake of completeness, I would dismiss the respondent's counter appeal, with no order as to costs on the counter appeal.

Mario Michel
Justice of Appeal

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Gertel Thom
Justice of Appeal

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