EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA
COMMERCIAL DIVISION

CLAIM NO. SLUHCV2013/0932

IN THE MATTER OF a Petition for Winding up of the Respondent and the appointment of a Liquidator of the Respondent

and

IN THE MATTER OF sections 387 and 399 of the Companies Act Cap.13.01 of the Revised Laws of Saint Lucia

BETWEEN:

THE BANK OF NOVA SCOTIA

Petitioner

and

PIZZA! PIZZA! LIMITED

Respondent

Appearances:

Mr. Michael DuBoulay for the Petitioner
Mr. Mr Collin Foster for the Respondent
Ms Kit-Juelle Frank-Amoroso for the National Insurance Corporation as Interested Creditor
Ms Patricia Augustin for Crown Foods Limited as Interested Creditor
Mr Sahleem Charles for Food Express Limited as Interested Creditor

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2016: May 31, July 20, September 27
November 24

Winding up petition brought pursuant to section 387 of the Companies Act - whether debt is disputed on genuine and substantial grounds - whether judgments obtained by consent orders made pursuant to CPR 47.2 are invalid - whether respondent is unable to pay its debts and is insolvent – whether it is just and equitable in the circumstances to wind up the respondent company.

This action was instituted by The Bank of Nova Scotia ("the petitioner"), for winding up Pizza! Pizza! Limited ("the respondent") on the grounds that (i) the petitioner is a creditor of the respondent whose judgment debts are due and remain unsatisfied; (ii) the respondent is unable to pay its debts and is insolvent; and (iii) that it is just and equitable in the circumstances, to wind up the respondent.

The respondent opposes the action and claims that:- (i) the debts are disputed on genuine and substantial grounds because four consent orders on which they are premised are invalid; (ii) the petitioner is not a creditor of the respondent and has no locus standi to bring this petition; (iii) the debts are ambiguous and the interest rate charged in the orders is erroneous and unlawful; (iv) that the respondent is solvent; (v) the winding-up petition is harsh and oppressive and amounts to no more than an attempt by the petitioner to pressure the respondent into payment of the debts; and (vi) the action constitutes an abuse of the court process.

This court finds that the petition ought to succeed for the following reasons:-

1. At the time the petition was filed the judgment debts were due and payable and the respondent has not made out a prima facie case that a bona fide dispute exists on genuine and substantial grounds.

2. The consent orders which contain the judgment debts are valid, having complied with CPR 42.7 and duly registered as judgments. No steps have been taken to set aside, discharge or vary these orders.

3. The respondent is unable to pay its debts as they fall due, its remaining assets are insufficient to cover its liabilities and it is therefore insolvent.

4. In the circumstances it is just and equitable that the respondent company be wound up.

5. However the court will exercise its discretion to suspend the effective date of a winding up order, to allow the respondent a further period of 3 months within which to make a concerted effort to fully liquidate the judgment debts, failing which the winding up order shall take effect.

JUDGMENT

INTRODUCTION

[1] ST ROSE-ALBERTINI, J. [Ag]: In January 2012 the petitioner bank filed four debt recovery claims[1] in the civil court, naming the respondent as a defendant in all four claims, together with four co-defendants; namely (i) Sinead Investments Limited; (ii) Charthouse Restaurant Limited (iii) The Charthouse Limited and (iv) the sole surviving director of the

[1] Claim Numbers: SLUHCV2012/0044, SLUHCV2012/0045, SLUHCV2012/0046, SLUHCV2012/0047

defendants Indira Ashworth ("Mrs Ashworth"). The claims were not defended and four consent orders[2] signed on behalf of the parties were approved by the court on May 21, 2012. The orders each contained entry of judgment against all the defendants, conditions for payment and penal notices. Interim monthly installments were to commence from May 30, 2012 and continue for five successive months with the remaining balance of the debts to be paid in full by October 31, 2012. In default of any one installment the entire balance inclusive of interest and costs would immediately become due and payable.

[2] The orders were signed by the legal practitioners representing the parties, as well as Mrs Ashworth in her personal capacity and as director of the defendant companies. These orders were subsequently registered at the Office of Deeds and Mortgages as judgments against the defendants.

[3] The respondent did not comply with any of the interim or final payments set out in the orders. Consequently applications for committal proceedings[3] were filed in each claim. At that time the judgment debts collectively stood at **$1,042,166.13** and were due for immediate payment.

[4] This led to further court orders[4] on March 10, 2014 in each of the claims, for an initial payment of $8,000.00 followed by successive monthly installment payments of $10,000.00 "*until all arrears are settled*". The respondent commenced payments and when the interim installments in the consent orders were paid the committal applications were discontinued.

[5] However the final lump sum payment in the consent orders which fell due on October 31, 2012 remained outstanding, resulting in this petition being filed on November 5, 2013 pursuant to sections 385 (c) and (e) of the Companies Act[5] ("the Act"). On the same day similar petitions were also filed to wind up the respondent's co-defendants Sinead Investments Limited and Charthouse Restaurant Limited. At that time Sinead Investments

[2] Exhibits SL2, SL3, SL4 and SL5 contained in Affidavit of Serge L"Africain filed on November 5, 2013
[3] Filed on November 5, 2013 pursuant to CPR 53.7
[4] Exhibits IA1, IA2, IA3 and IA 4 contained in Affidavit of Indira Ashworth filed on April 11, 2016
[5] Cap 13.01 of the Revised Laws of Saint Lucia

had already ceased operations, while Charthouse Restaurant was still in operation and subsequently closed sometime in 2014.

[6] The petitions were duly advertised in the Voice Newspaper and the Official Gazette on diverse dates. Following the advertisements the National Insurance Corporation (NIC), Crown Foods Limited ("CFL") and Food Express Limited ("FEL") filed notices of intention to appear at the hearing, in support of the petition. These creditors, with the exception of NIC had previously obtained registered judgments against the respondent, in separate civil proceedings. The NIC is a preferred creditor by virtue of section 74 of the NIC Act[6].

[7] When the petition first came on for hearing in December 2013 the respondent was ordered inter alia, to file financial statements to substantiate its claims of solvency. Several adjournments ensued to facilitate this process and at a hearing on November 24, 2014, at which all creditors were present, the court ordered a combination of lump sum and monthly installment payments, with respect to the debts of NIC, CFL and EFL[7]. The matter was subsequently transferred to the Commercial Division in March 2016, for continuation of the winding up proceedings.

THE ISSUES

[8] The issues for determination are:-

(1) Whether the respondent has made out a prima facie case that a bona fide dispute exists on genuine and substantial grounds, in relation to the debts, to warrant dismissing the petition.

(2) If the debts are not disputed, whether the respondent is insolvent and should be wound up.

(3) Whether in all of the circumstances it is just and equitable that the respondent be wound up.

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[6] Cap 16.01 of the Revised Laws of Saint Lucia

[7] Orders at pages 332 to 335 of Application Bundle

THE LAW

[9] The petition is brought under section 387 of the Act, which provides that:-

387. (1) An application to the court for the winding-up of a company shall be by petition presented, subject to the provisions of this section, either by—

(a) the company;

(b) a creditor, including a contingent or prospective creditor, of the company;

(c) a contributory; or

(d) the trustee in bankruptcy to, or personal representative of, a creditor or contributory;

or any 2 or more of those parties.

[10] The grounds for the petition are found in section 385 (c) and (e) of the Act which states as follows:-

'385. A company may be wound up by the Court if—

(a) ……..;

(b) ……..;

(c) the company is unable to pay its debts;

(d) ……; or

(e) the Court is of the opinion that it is just and equitable that the company should be wound up"

[11] If the respondent can persuade the court that there is a bona fide dispute concerning the existence of the debts upon which the petition is founded and that the dispute is on genuine and substantial grounds, the petition must of necessity be dismissed as an abuse of process and it would be immaterial whether the respondent is insolvent. That is so because it is not generally the function of the court on a winding up petition to resolve disputed debt claims and a petitioner would have no standing to bring such petition, if in fact its status as a creditor has not been previously established. Conversely the court will refrain from dismissing a petition, if it is satisfied that the debt in question is disputed merely on some ground which is frivolous or without substance and which the court would be justified to disregard.

[12] In considering this issue the court must give consideration to the soundness of the dispute being raised and must determine whether it is bona fide or whether it is insubstantial or merely trumped up. An honest belief that a dispute exists is not enough in itself and it must be shown that there is certainty and substance to the dispute, sufficient to warrant dismissing the petition[8].

[13] The court must conduct its own preliminary investigation of the facts to determine whether the dispute really exists but is not generally required to resolve it. Although in certain circumstances a disputed debt petition will not be prevented from proceeding if the court decides that it would be proper for the dispute to be determined in the winding up proceedings[9].

[14] Once the court decides that there is not a substantial dispute the petition must continue even if other proceedings are continuing in another court[10]. In addition if liability for the debt is certain and the dispute simply concerns quantum of the debt and evidence of insolvency exists, the petition will be granted.[11]

[15] Section 386 of the Act outlines the circumstances in which a company is deemed insolvent and it states:-

> *"386. (1) A company is deemed to be unable to pay its debts if—*
>
> *(a) a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding $5,000 then due, has served on the company, by leaving it at the registered office of the company, a demand under his or her hand or under the hand of his or her agent lawfully authorised requiring the company to pay the sum so due, and the company has for 3 weeks thereafter neglected to pay the sum, or to secure or compound for 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) it is proved to the satisfaction of the court that the company is unable to pay its debts as they become due.*

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[8] Blackstone's Civil Practice 2016 at paragraph 82..29
[9] Re Claybridge Shipping Co SA[1997]1 BCLC 572 at page 579 para (c) to (g);
[10] James Dolman & Co Ltd v Pedley [2003] EWCA Civ 1686
[11] Tweeds Garage Limited (1961) 1 CH 406

(2) A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities."

[16] Failure to pay a judgment debt which has repeatedly been requested is conclusive evidence that a company is unable to pay its debt and a judgment creditor would have the requisite standing to maintain a winding up petition. However the fact that a company is solvent will not of itself be sufficient grounds for dismissal of the petition, if an undisputed debt continues to remain unpaid[12]

[17] The question whether it is 'just and equitable' to wind-up a company must be answered on the facts which exist at the time of the hearing[13]. The words just and equitable are accorded the widest meaning and do not limit the jurisdiction of the Court. It is a question of fact, and each case must be assessed on its own merit[14].

[18] On hearing a petition the court has jurisdiction to adjourn the hearing conditionally or unconditionally, or make an interim order, or any other order as it thinks fit[15]

ANALYSIS

[19] The petitioner's evidence is contained in three affidavits deposed by two of its employees. It asserts that four registered judgments were obtained by the petitioner against the respondent in 2012. The respondent consented to these judgments and having been duly registered they render the respondent jointly and severally liable for each of the judgment debts contained therein. The parties agreed that the respondent be allowed a period of six month to seek financing to liquidate the debts. In the interim installment payments would be made and by October 31, 2012 the judgment debts were to be fully liquidated. One year later no payments had been made; the judgments remained wholly unsatisfied and were

[12] Taylors Industrial Flooring ltd v M & H Plant Hire (Manchester) Ltd (1990) BCC 44; Cornhill Insurance plc v Improvement Services Ltd [1986] 1 WLR 114
[13] Re Fildes Bros Ltd -[1970] 1 All ER 923 at 927 at para d and f
[14] Loch and Another v John Blackwood Limited [1924] A.C. 783
[15].Section 388 of the Act

increasing with annual accrual of interest. In addition the petitioner discovered that the respondent was indebted to other creditors by way of registered judgments and owned no immovable property or other substantial assets to cover its liabilities.

[20] When the respondent failed to pay the judgment debts the petitioner instituted committal proceedings in the civil claims, resulting in further orders for monthly installments. Certain sums were paid and the committal applications were withdrawn. However a substantial balance of the debts remained outstanding.

[21] The petitioner later on deposed that despite payments in the sum of $150,000.00 the debts continue to increase and are now higher than when the petition was filed. To compound the situation unaudited financial statements filed by the respondent to show its financial position as at December 31, 2012 and 2013 revealed that the respondent had incurred substantial losses in both periods and was in a dire financial dilemma.

[22] The petitioner further deposed that it has always acted in good faith by meeting with the respondent and providing all information and clarification requested in relation to the debts. Despite these efforts and the substantial delay in these proceedings the respondent has failed to settle the judgment debts.

[23] The petitioner maintains that despite the numerous opportunities provided for settlement, the respondent has not been able to satisfy the debts, is insolvent and should be wound up. Additionally the consent orders which contain the judgments, on which this petition is premised having not been varied, set aside or discharged, remains intact in the civil claims. Additionally as the judgments have been duly registered, as required by law, in the absence of an application by the respondent to set aside these orders some four years later, there can be no reason for disputing the validity of the consent orders or liability for the debts.

[24] The following arguments are advanced by the respondent for opposing the petition:- i) that the judgment debts are in dispute because the consent orders have not complied with the requirements of a simple contract and are therefore illegal, invalid and unenforceable; ii) at

the time of making the consent orders the sole director of the respondent was and continues to remain confused about the nature and quantum of the debts and did not have the benefit of independent counsel in the civil claims, iii) the consent orders attached liability to the respondent for debts owed by affiliated companies (which are separate legal entities), without complying with the contractual requirements for doing so and for this reason the orders are also invalid; iv) that the respondent is solvent and has consistently been making payments to the petitioner and its other creditors pursuant to the court orders; v) that these sums have satisfied the debt owed by the respondent, which debt is particularized in only one of the consent orders[16]; vi) the respondent currently operates as a going concern and employs 27 employees who will experience severe hardship, as their livelihood depend on its continuity; and vii) that the orders made on the applications for committal which require monthly payments until all arrears are settled, has had the effect of demolishing the consent orders containing the judgments.

[25] The respondent contends further that this petition has been brought as a means of pressuring the respondent to pay the judgment debts and as such it is unjust, and oppressive. It amounts to an abuse of the court process, particularly as the petitioner still has the option of proceeding by way of judgment summons in the civil claims, which it ought to have pursued, instead of a petition for winding up.

[26] It was argued that a winding up order would deny the respondent the opportunity to continue its efforts to maintain its operations as a going concern, an outcome which it claims would be more beneficial to the petitioner and the other creditors.

[27] The respondent's evidence was contained in a witness statement and two affidavits deposed by Mrs Ashworth. In her witness statement[17] the debts were not disputed. She stated that she has every intention of settling the debts and agreed to the consent orders albeit that she did not have independent legal counsel when she entered into the loan facilities with the petitioner and now considers the legal advice she received thereafter to be unhelpful.

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[16] SLUHCV2012/0047 - The Bank of Nova Scotia v 1. Pizza! Pizza! Limited, et al
[17] Filed on December 11, 2013

[28] She stated that the particulars of the debts were not clearly or adequately particularized in the civil claims to allow her to fully comprehend the assertions against the respondent, the co-defendants and herself. That the petitioner was uncooperative and at no time took up her invitation to meet informally to discuss a voluntary arrangement for payment of the debts.

[29] She states that she is the owner of a substantial immovable property registered as Parcel No. 1255 B 114, situated at Rodney Bay, on which the respondent's business operation takes place.. As director of the respondent and the other defendant companies she intends to commence a restructuring program and has obtained a valuation of the property for that purpose and the property is valued at $9.9 million. That the respondent is a successful and solvent company, about to turn the corner on any negative trading suffered in the past and for these reasons the petition should be restrained by the court.

[30] She deposed in her first affidavit[18] that she has made vigorous efforts to expedite and adhere to the court orders. In that regard she regularly advanced payments to the petitioner, totaling to date $150,000.00, which the petitioner failed to disclose in evidence. She has also made payments to the interested creditors. Further that the non-compliance with the consent orders was due to a negative trading period and since then the respondent's management accounts projected a profit of $20,000.00 for the year ended December 31, 2013. She states that currently the respondent is a successful company and able to pay its debts and the petitioner failed to establish that it is insolvent.

[31] She deposed that although settlement discussions held with the petitioner as recently as March 29, 2016 proved unsuccessful, the respondent remained open to progressive, constructive and meaningful discussions to arrive at terms and conditions for settlement of the debts.

[32] In her second affidavit[19] she reiterated that the respondent is a solvent company and still operates as going concern. Any debt owed to the petitioner by the respondent has already

[18] Filed on April 11, 2016
[19] Filed on April 26, 2016

been satisfied; therefore the petitioner is not a creditor of the respondent. Further that the respondent is a separate legal entity and cannot be held responsible for debts in any other capacity or of any other person, which it did not sanction or agree to.

[33] Counsel for the respondent Mr Foster relying on the authority of ***Mann & Another v Goldstein and Another***[20] argued that the petition must fail because the orders on which it is premised do not conform to the formalities of a simple contract and that makes them invalid. He submits that at the time when Mrs Ashworth agreed to the consent orders she did not have the benefit of independent legal advice and was confused about the basis of the petitioner's claims in the civil proceedings.

[34] He argued that there is no real contract between the parties as the respondent is a separate legal person and the petitioner did not ascertain that a board resolution was obtained to assume liability for the debts of the co-defendants. Mr Foster argued further that Mrs Ashworth (sole director of the respondent) had no capacity to bind the respondent in relation to the consent orders without the express authority of a company resolution, attached to these consent orders. That it was the duty of the petitioner to enquire into these matters before consenting to the orders and not having done so the orders lack clarity, are ambiguous and effectively made the respondent guarantee the debts of third parties, without going through the necessary legal formalities.

[35] He relied on dicta of Lord Denning MR in ***Siebe Gorman & Co. Ltd v Pneupac Ltd***[21] as a basis for claiming that the orders are invalid and stated the position as follows:-

> *"…….It should be clearly understood by the profession that, when an order is expressed to be made 'by consent', it is ambiguous. One meaning is this: the words 'by consent' may evidence a real contract between the parties. In such a case a court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: the words 'by consent' may mean the parties hereto not objecting. In such a case there is no real contract*

[20] [1968] 1 WLR 1091
[21] [1982] 1 WLR 185 at page 380

between the parties. The order can be varied or altered by the court in the same circumstances as any other order that is made by the court without the consent of the parties. In every case it is necessary to discover which meaning is used".

[36] He submits further that the debts are disputed because the interest rate stated in the consent orders is possibly illegal based on the principle laid down in ***Cook v Fowler***[22]***,*** so that the petitioner would only be entitled to the contractual rate of interest until such time as a breach occurs. Thereafter once a claim has been filed, the petitioner is only entitled to damages for breach of contract, calculated at the equivalent of the statutory rate of 6 percent, on the debt due. He went on to say that the principle has been formally adopted in this jurisdiction in the case of ***1st National Bank of St Lucia Limited v Michael & Gwendoline Rocton***[23]***,*** which is currently on appeal.

[37] He argued that having made payments of $150,000.00, the petitioner has failed to specify in its evidence whether these sums were applied solely to the respondent's loan account or whether they were distributed between the various loan accounts of all the defendants. In any event if the respondent failed to comply with the court orders the petitioner should seek to enforce them in the same manner as any other court order, in the civil proceedings and for this reasons the winding up petition is an attempt to pressure the respondent into payment of the debts. That makes it draconian and an abuse of the court processes. On this point he relied on the authority of ***Re Ringinfo Ltd***[24].

[38] Ultimately, he says, a winding up order would also result in immediate unemployment of the respondent's employees thereby causing great injury, without any counterbalance of advantage. Such an outcome is to be viewed as undesirable, as it is not in keeping with the rescue culture of modern English insolvency laws, which take into account concern for the livelihood and well-being of those dependent upon an enterprise.

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[22] (1874) L.R. 7 H. L. 27
[23] SLUHCV2012/0505 - Judgment of Belle J delivered on July 13, 2016 (unreported)
[24] [2002] 1 BCLC 201

[39] Counsel for the petitioner Mr Duboulay argued that all of the consent orders conform to the formalities of CPR 42.7. They expressly state that the orders are "By Consent", they are signed by the respective legal practitioners, approved by the court, filed at the court office and duly registered as judgments.

[40] CPR 42.7 which deals with the formalities for consent orders state that:-

> *"42.7 (1) Subject to paragraphs (2) to (5), a consent order or judgment must be –*
> *(a) drawn in the terms agreed;*
> *(b) expressed as being "By Consent";*
> *(c) signed by the legal practitioner acting for each party to whom the order relates; and*
> *(d) filed at the court office for sealing."*

[41] The orders are exhibited in the affidavit of Serge L'Africain Credit Solutions Manager of the petitioner[25] They are all signed by Mr Leslie Prospere as Counsel for the defendants (including the respondent) and by Mr Michael Du Boulay as Counsel for the claimant (petitioner bank), as required by CPR 42.7 (1) (c). In addition the orders were also signed by Mrs Ashworth in her personal capacity and as director for all the defendants (including the respondent).

[42] Mr DuBoulay argued further that it is over four years since the consent orders were made and the judgments duly registered. Committal proceedings were pursued in the civil claims on the basis of these orders and subsequently discontinued after the respondent made the interim payments to the petitioner. Numerous adjournments were granted to facilitate settlement discussions. The petition was filed over two and a half years ago. Throughout this time the respondent has taken no steps to file an application to discharge, vary or set aside the orders so as to canvass any reasonable defence in the civil claims. To date the orders remain intact and must be obeyed.

[43] He submits that having registered the consent orders as judgments the respondent is estopped by virtue of Article 1171 of the Civil Code[26] from challenging the veracity of the

[25] Affidavit filed on November 5, 2013
[26] Cap 4.02 of the Revised Edition of the Laws of Saint Lucia

judgments as they have not been set aside and no real reason is advanced for disputing their validity or the existence of the debts. Article 1171 provides as follows:-

> *"The authority of a final judgment (res judicata) supplies a presumption incapable of contradiction in respect of that which has been the object of the judgment, when the demand is founded on the same cause, is between the same parties acting in the same qualities, and is for the same thing as in the action adjudged upon."*

[44] In advancing this argument he relied on rulings given in ***Igors Kippers et al v Stanford International Bank Limited***[27] and ***Halstead (Donald) v Attorney-General of Antigua & Barbuda***[28] In ***Igors Kippers*** Edwards JA applied the dicta of Rommer L.J.in ***Hadkinson v Hadkinson***[29] stating thus:-

> "*It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void"*

[45] In ***Halstead (Donald)*** Floissac CJ applied dictum from two English decisions[30] in arriving at the position that where an appellant had obtained judgment against a respondent by way of a consent order, such order determines that rights of action existed and it becomes a judgment given on those rights of action. He cited the observations of Lord Blanesburgh delivering the judgment of the Privy Council in ***Kinch v Walcott*** in which his Lordship stated:-

> *"……an order by consent, not discharged by mutual agreement and remaining unreduced, is as effective as an order of the court made otherwise and not discharged on appeal. A party bound by a consent order,…….must, when once*

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[27] HCVAP 2010/025 delivered on March 14, 2012 (unreported) at paragraph 30
[28] (1995) 50 WIR 98 at pages 109 to 111
[29] [1952] 2 ALL E.R. 568 at 569
[30] Khan v Golechha International Ltd. [1980] 2 ALL ER 259 at page 266 and Kinch v Walcott [1929] AC 482 at page 493

it has been completed, obey it, unless and until he can get it set aside in proceedings duly constituted for that purpose. In other words, the only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by another order of the court; the second stands unless and until it is discharged on appeal."

[46] Mr DuBoulay submits that the Learned Chief Justice went on to accept that a consent order which was never discharged, abandoned or set aside remains valid and effective and must be obeyed. Once that is so the consent order may create a promissory estoppel of the kind described by the Learned authors of ***Halsbury's Laws of England***[31] in the following way:-

"Where one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualifications which he himself has so introduced."

[47] He submits that based on the foregoing principles the effect of the consent orders is that the respondent accepted that it was jointly and severally liable for the debts which were due and promised to pay such sums by interim installments and to fully liquidate all the debts by a particular date. Not having taken any steps to set aside the judgments four years later, the respondent is estopped from challenging the authenticity of the orders in the instant proceedings.

[48] Moreover, he says, the respondent now seeks to look behind the judgments to manufacture fictitious disputes merely for convenience and is estopped from doing so. If

[31] 4th Edition at paragraph 1514

the respondent was able to pay the debt it would have done so over the last 4 years. The fact that it has not done so is proof that it is unable to pay its debts is insolvent and in the circumstances it is just and equitable that it be wound up.

Is there a bona fide dispute of the debts on genuine and substantial grounds

[49] The respondent's dispute is that the consent orders are invalid and the interest rate charged on the judgment debts is unreasonable. The court must look carefully at the nature of this dispute and be persuaded that it is substantial[32]. In other words can it be said that the only reasonable conclusion to be drawn from the evidence is that there is uncertainty about the respondent's liability for the debts and that such uncertainty can only be resolved by cross examination in proceedings in another action.

[50] The test to be applied in determining whether a debt is disputed in winding up proceedings is summarized in the Eastern Caribbean Court of Appeal decision of ***Sparkasse Bregenz Bank v Associated Capital Corporation[33]***. It is outlined by Byron CJ (as he then was), at paragraph 3 of the judgment, where he said the following:-

> *"The law governing the making of winding up orders is well settled and could easily be set out at this stage. The Court will order a winding up for failure to pay a due and undisputed debt over the statutory limit, without other evidence of insolvency. If the debt is disputed, the reason given must be substantial and it is not enough for a thoroughly bad reason to be put forward honestly. But if the dispute is simply as to the amount of the debt and there is evidence of insolvency the company could be wound up. To fall within the principle, the dispute must be genuine in both a subjective and objective sense. That means that the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the Court should ignore. There must be so much doubt and question about the liability to pay the debt that the Court sees that there is a question to be decided. The onus is on the company to bring forward a prima facie case which satisfies the Court that there is something which ought to be tried either before the Court itself or in an action or by some other proceeding. A creditor who has served a statutory notice on the company is not entitled to a winding up order if the company bona fide disputes the debt and there is no evidence of the insolvency of the company. If the existence of the debt on which*

[32] Akai Holding Limited v Brinlow Investments Limited BVIHCV 2006/0134, unreported at paragraph 31 et seq
[33] BVIHCVAP2002/0010 (delivered June 18, 2003, unreported at para. 3)

the winding up petition is founded is disputed on grounds showing a substantial defence requiring investigation, the petitioner would not have established that he was a creditor and thus would not be entitled to present the petition, accordingly the presentation of such a petition would be an abuse of the process of the Court. The process of the Companies Court could not be used in cases where there were issues of disputed fact. Such questions must be resolved in actions. A debt disputed on genuine and substantial grounds could not support a winding up petition. 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."

[51] If it is accepted that the respondent's evidence discloses triable issues in relation to the debts then the hearing of the petition would not be the appropriate forum for determining such disputes. If it is that the disputes raised should be tried whether by the court itself or by an action in some other proceeding, this will generally suffice as a substantial dispute, to warrant dismissing the petition.

[52] The respondent's disputes concerning the debts first surfaced very late in the proceedings, after having taken the position in affidavits that it intends to settle the debts and has made vigorous efforts to do so. The facts show a history of discussion and negotiations for settlement, with the respondent continuously engaging the petitioner and the interested creditors on proposals for liquidating the debts. In my view such conduct does not accord with the actions of one who has an honest belief that a real and genuine dispute exists or that the debts are not due and one is aggrieved by such a claim. For if that was the case the proper course would have been to promptly initiate proceedings in the civil claims to set aside or vary the orders and put to forward a defence.

[53] It is a fact that to date the judgments remain unchallenged. No evidence was adduced to show what steps the respondent has taken to act on its belief that there is a genuine and substantial dispute in relation to the debts. Moreover the respondent has not explained in its affidavits why it refrained from raising these disputes in the civil proceedings or applied to set aside the orders.

[54] It is also doubtful, considering the length of time which has elapsed, whether the respondent can now successfully raise these issues in the civil claims. It is my finding that the issues raised do not constitute a bona fide dispute of the debts.

[55] The case of **Re Walsh Brick Industries Ltd**[34] is instructive on the manner in which the court might approach this issue. In that case a petition was presented for the compulsory winding up of a company for inability to pay its debts, in circumstances where a registrar had made an order giving the company unconditional leave to defend the claim. The county court judge found on the evidence that the debt was owed and that the company could not pay its debts and he made a winding-up order. The company appealed the order, contending that the judge should have dismissed the petition because the order of the registrar giving the company unconditional leave to defend the action for repayment of the debt was in itself inclusive of the fact that there was a *bona fide dispute*, and winding-up proceedings were not the appropriate procedure for dealing with disputed debt. The Court of Appeal held that in spite of the fact that unconditional leave was granted to defend, it was competent for the judge in the winding up court to go into the evidence which was before him to consider whether or not there was a bona fide dispute. The registrars order was a matter which would be taken into account but it did not preclude the judge from finding as a fact that there was no bona fide dispute of the debt. The judge therefore had discretion to make the winding up order under the Companies Act.

[56] At no time has the respondent categorically denied its indebtedness to the petitioner. Instead it has advanced payments which it claims are just about sufficient to discharge the sum claimed in relation to its own operations and then seeks to question the method of applying interest to the debts. This is not a case of denial of liability by the respondent but rather one of admission of the debts with the respondent raising allegations of dispute very late in the proceedings. In my opinion the respondent's evidence falls below the threshold required to support a finding of genuine or substantial dispute.

[34] [1946] 2 All ER 197

[57] In **Re Claybridge Shipping Co SA**[35] Lord Denning MR expressed the view that a person is a 'creditor' for the purposes of winding up proceedings, so long as he has a good arguable case that a debt of a sufficient amount is owing to him. He stated the following:-

> *"In the Companies Court it appears that a rule of practice has been adopted to the effect that the debt should be undisputed, and that the petition should not go forward if it is disputed. I do not think that is correct. It certainly is not so in regard to the amount of the debt". There is a decision of Plowman J in* ***Re Tweeds Garages Ltd***[36] *In that case the amount was not known with any exactness at all. All that was known was that something was due. That was held to be sufficient to justify a petition for winding up."*

[58] The petitioner here has gone much further than simply showing that "*something is due*" and quantified the debts due in the civil claims for which judgments were entered. When the petition was filed in 2013 the debts collectively stood at $1,042,166.13 and the petitioner deposed that on May 3, 2016 it stood at $1,111,814.06 inclusive of interest.

[59] The parties agree that interim payments totaling $150,000.00 were made during the period March 11, 2014 to June 24, 2015. From July 2015 to January 2016 no payments were made but resumed in February and March 2016. Since then no further payments have been made. It was confirmed by the petitioner in the related petition for Sinead Investments[37] that these payments were distributed between the various loan accounts of the respondent and its co-defendants.

[60] The nature of the disputes seem to me to be more in keeping with that of an unwilling debtor raising a cloud of objection in affidavits and claiming that the debts are disputed on matters which ought to be tried in another action, in order to escape being placed into liquidation, on the basis of unpaid debts.

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[35] [1997] 1 BCLC 572 at page 574
[36] [1962] 1 All E.R. 121
[37] SLUHCV2013/0933 - Bank of Nova Scotia v Sinead Investments Limited et al.

[61] In ***Re Claybridge Co SA***[38] cited earlier, Oliver J puts it this way:-

> *"On an application like this the court necessarily has to take a view whether, on the evidence, there really is substance in the dispute which is raised…… I do not wish in the least to cast doubt on the practice of the Companies Court – which is well-established – of staying a petition in circumstances where there is a bona fide and substantial dispute as to the existence of a debt and leaving it to the parties to fight the matter out between them in an action. But that is, at highest, a rule of practice and it must, I think, give way to circumstances which make it desirable that the petition should proceed, although it may be that that would only apply in very exceptional circumstances."*

[62] He went on to say[39]:-

> *"But it ought not, in my judgment, to be an inflexible rule that the Companies Court should never take upon itself the burden of determining the matter on the hearing of the petition. It does so in petitions on the just and equitable ground, and it is only too easy for an unwilling debtor to raise a cloud of objections on affidavits and then to claim that, because a dispute of fact cannot be decided without cross-examination, the petition should not be heard at all but the matter should be left to be determined in some other proceedings. Whilst I do not in any way, therefore, seek to weaken the rule of practice as a general rule, I think that it ought not to be assumed to be inflexible and to preclude the Companies Court from determining the issue in an appropriate case simply because the debtor files mountains of evidence raising disputes of fact which require to be determined by cross examination. The court must, I think, reserve to itself the right to determine disputes – even perhaps in some cases substantial disputes – where this can be done without undue inconvenience and where the position of the company,……is such that the likely result in effect of striking out the petition would be that the creditor, if he established his debt, would lose his remedy altogether. I am in no doubt that the instant case is such a case, although I am bound to say on the evidence before the court that I am very far from being persuaded that the dispute in the instant case in fact warrants the description of 'substantial"*

[63] Indeed, in Re a Company (No. 006685 of 1996)[40] Charwick J addressing the same issue stated:-

> *"I accept that any court, and particularly the Companies Courts, should not seek to resolve issues of fact without cross-examination where there is credible affidavit evidence on each side. But I do not accept that the court is bound to hold that there is a need for a trial in the circumstances in which, on a proper understanding of the documents, the evidence asserted in the affidavits on one side is simply incredible."*

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[38] At page 578, paragraphs (b) to (d)
[39] At page 579 paragraphs (c) to (g)
[40] [1997] 1 BCLC 639 at pages 647 and 649

[64] He stated further:-

> *"I reach the conclusion that this is a case in which the dispute now said to exist is not founded on any substantial grounds. Rather, this is one of those cases in which, as Oliver LJ observed in Re Claybridge Shipping Co SA, an unwilling debtor is raising a cloud of objections on affidavit in order to claim that a dispute of fact exists which cannot be determined without cross-examination so that the petition cannot be allowed to proceed. Staughton LJ pointed out in Taylors Industrial Flooring Ltd that anything that the law could do to discourage such behaviour should be done. One of the things that the law can do in a case of this nature is to allow the petition to proceed."*

[65] I am not at all persuaded on the facts, that the disputes being raised in the instant case are credible and substantial and the respondent has not established a prima facie case of dispute on genuine and substantial grounds. I accept the petitioner's submissions on this issue and find that the debts are due, the petitioner is a creditor of the respondent with the requisite standing to bring this petition, therefore the winding-up proceedings must continue.

[66] Counsel for the respondent in written submissions made reference to one of the civil claims SLUHCV2012/0044[41] which was listed before the court on April 6, 2016, for report on settlement discussions and was removed from the list at the request of Counsels for the parties. The court's order stated "*That the matter is hereby removed from the court list*". Mr Foster submits that the removal of the matter from the list corroborates the death of one of the judgments. I consider this argument to be flawed and devoid of legal reason. I do not accord the removal of the matter from the list as being tantamount to discontinuance of the claim itself. It was simply a removal from the court list, leaving the parties free to pursue any other course they chose.

[67] He also submits that the orders for monthly installments made in the committal proceedings had the effect of demolishing and replacing the earlier consent orders and judgments. No authority was provided for this proposition and I have not been able to find

[41] Bank of Nova Scotia v The Charthouse Limited, etal]

any. I conclude on this point that the later orders simply provided the respondent with a further avenue for liquidating the debts by monthly payments and have not in any way vitiated the existence or validity of the judgments.

[68] In any event law is that once the court has found as a fact that there is no bona fide or substantial dispute in relation to the debts, the petition must continue irrespective of ongoing proceedings in another court.

Is the respondent unable to pay its debts and therefore insolvent

[69] Section 386 of the Act stated in paragraph 15 above outlines the circumstances in which a company will be deemed unable to pay its debts and they are as follows: (i) that a debt exists which is in excess of $5,000.00 and a written demand issued remains unpaid for three weeks following the date on which it was issued; or (ii) execution or other process issued on a judgment or order of the court remains wholly of partly unsatisfied; or (iii) the court is satisfied that a company is unable to pay its debts as they become due.

[70] The test to be applied here is whether the respondent is able to pay its debts as they fall due. It is clear on the evidence that the respondent is unable to do so.

[71] The debts for which the respondent is jointly and severally liable became due and payable from October 31, 2012. To date, in spite of committal proceedings substantial sums remain unsatisfied. The respondent is the only operating entity of Mrs Ashworth's group of companies. She stated that currently she operates the respondent from cash flow only and that its only assets are "*pots, pans, furniture and equipment required to run the business*." She insists that the respondent is successful and solvent and is willing to have a voluntary arrangement with the petitioner to pay the debts.

[72] Failure to pay a debt as it falls due is a question of fact and historically the court will look at the position at the time of the application and will try to determine whether the company is actually paying its creditors.

[73] Two of the interested creditors filed affidavits to clarify the status of their respective debts. In relation to the NIC the respondent's status has deteriorated from $170, 758.10 in June 2014 to $281,379. 43 as at April 2016, with the respondent unable to pay this monthly statutory obligation as it become due. CFL's debt has decreased by the sum of $21,000.00 however a balance of $26,644.34 plus interest remains owing. FEL did not file an affidavit and relied on the information contained in its Notice to Appear which disclosed a debt of $30,252.82. The respondent deposed that $20,000.00 had been paid to date, on that debt, however a balance remains due with interest accruing. This is a clear indication that the respondent's cash flow is insufficient to service its debts as they fall due.

[74] At the hearing the interested creditors recanted from their position of supporting the petition and indicated their willingness to continue working with the respondent as a going concern, to allow an opportunity to trade out of its financial difficulties and keep its employees in gainful employment. Their respective Counsels conveyed that meetings were held with the respondent, some payments have been made towards their debts, albeit not fully in accordance with the court orders but notwithstanding that, they were all amenable to working with the respondent. In the case of CFL and FEL these entities still continue to transacted business with the respondent.

[75] Failure to pay a debt which is due and not disputed is sufficient evidence of insolvency, even in instances where there is evidence to suggest that the company has a substantial surplus of assets over liabilities[42] (which is not the case here). Additionally the ability of a debtor to pay off its debts, if given sufficient time, is generally not regarded as a good reason to regard a company as solvent and the court cannot be asked to speculate about whether funds might become available.

[76] However the courts have also considered that where a debtor is able to pay agreed installments on a debt, the inability to discharge the debt in totality would not be a sufficient basis for a winding up order. It must be shown in such instances that the debtor is able to pay the installments as they become due, so that the installment order would protect the

[42] Cornhill Insurance PLC v Improvement Services Ltd.[1986] 1 WLR, 114

debtor from insolvency[43]. The evidence is that this respondent has reneged on all the orders for monthly installments, in the civil proceedings.

[77] The respondent's debts far exceed the statutory minimum, several judgments exist which remain substantially unsatisfied, the value of its assets are significantly less that the amount of its liabilities and based on its cash flow it is simply unable to pay its debts as they become due. Taken together these factors are sufficient to cause this court to conclude that the respondent is insolvent.

Is it Just and Equitable to wind up the respondent company

[78] The question whether it is 'just and equitable' to wind-up a company, within the meaning of section 385 (e) of the Act must be answered on the facts which exist at the time of the hearing[44]. The words 'just and equitable' are to be given the widest meaning and do not limit the jurisdiction of the Court. Each case will turn on its own peculiar facts[45].

[79] This question has been decided on the single issue of whether a company could in time be made a profit-earning concern and in ***Davis & Co Limited v Brunswick (Australia) Ltd[46]*** the benchmark applied was whether having regard to all the circumstances, there was at the date of the presentation of the petition a reasonable hope that in time the company could be carried on at a profit.

[80] The position was stated as follows:-

> *"It should be observed that in this case there is no question of a deadlock, nor is there any question of shareholders who have the voting power using that power for their own commercial interests outside the company in disregard of the interests of a minority. Nor, again, is there any question involved of an improper management of the company by the directors who are in control. The problem involved is of the nature of a business problem. If there was at the relevant time a*

[43] Re A Debtor [1967] 1 All ER 668; Gittins v Serco Home Affairs [2012] 4 All ER 1362

[44] Re Fildes Bros Ltd [1970] 1 All ER 923 at 927 d and f

[45] Loch and Another v John Blackwood Limited [1924] A.C. 783

[46] [1936] 1 All ER 299

> *reasonable hope of tiding over the period of deep depression and of emerging into a region in which the company might reasonably expect to carry on at a profit, there would seem to be no sufficient reason why the court, regard being had to the essential character of the bargain made between the parties on the formation of the company, and considering the matter from much the same standpoint as if the company were a private partnership, should wind up the company under the just and equitable clause. Their Lordships then* ***considered the evidence, and concluded*** *that it might reasonably have been expected that the company could have carried on at a profit." In the circumstances of that case their Lordships were of the view that the appellants had not discharged the burden of showing that it was just and equitable that the company should be wound up."*

[81] The respondent operates solely on cash flow and has no substantial assets to liquidate its debts. No business plan, cash flow projections or updated financial statements were provided to enable the court to assess whether the respondent could, in time, carry on at a profit. It appears that in 2013 Mrs Ashworth commenced efforts at refinancing the debts but has not been successful.

[82] I am satisfied on the evidence that the respondent is carrying on business at a loss, with its remaining assets insufficient to pay its debts and there appears no reasonable hope at this rate, that it could reverse the trend, unless significant debt consolidation and refinancing is undertaken.

[83] In the circumstances I consider it just and equitable that the respondent be wound up.

CONCLUSION

[84] Mrs Ashworth's appears to have a strong desire to continue the enterprise started by her deceased husband and herself. However she is faced with severe financial challenges. She stated that she owns Parcel No 1255 B 114 at Rodney Bay as executrix of the estate of her late husband. The land register is exhibit by the petitioner as Exhibit SL9. In 2012 she undertook a valuation of this asset to commence a restructuring program for her companies and the value of the property at that time was about $9.9 million.

[85] I have no doubt that if the opportunity is presented to utilize this asset in a sound financial restructuring program the respondent could be placed in a position to liquidate its debts. However the onus is on Mrs Ashworth to demonstrate that as director she is committed to achieving this outcome, if she truly desires to save the respondent and by extension safeguard the welfare of its employees, by securing their jobs.

[86] In light of this the court will exercise its discretion to allow a short-term window of three (3) months to allow the respondent a final opportunity at making a concerted effort to fully settle its debts, failing which it will be wound up.

[87] It is therefore ordered and declared as follows:-

1. The respondent is permitted a further period of three (3) months from the date of this judgment to fully liquidate the debts due to the petitioner.
2. During the stated period the respondent will also continue to work with Crown Foods Limited, Food Express Limited and the National Insurance Corporation for settlement of the debts owed to these creditors.
3. During the stated period the respondent is under an obligation to refrain from engaging in any conduct which would have the effect of dissipating any of its remaining assets and shall not engage in any conduct which may result in prejudice to the petitioner, in the event that the respondent is wound up.
4. In the event settlement of the judgment debts is not achieved within the stated period, the respondent company shall be wound up pursuant to section 385 (c) and (e) of the Act, with effect from February 25, 2017 (the "effective date").
5. For this purpose **Mr Evan Hemiston** shall be appointed liquidator from the effective date and shall be empowered to exercise all the rights and duties and observe all the obligations of liquidator under the Act or any other related legislation.
6. The liquidator may apply to the court for further directions on any matter arising in the course of liquidation.
7. In the event the winding up order takes effect a copy of this order shall be served on the Registrar of Companies no later than 7 days after the effective date.

8. If the winding up order takes effect the liquidator shall present a report to the Court within thirty (45) days of the effective date and the matter will be subsequently listed by the court office, for review of the liquidator's report and further directions.
9. Cost is awarded to the petitioner in the sum of $5,000.00. In the event the respondent is wound up such cost shall be paid as an expense of the liquidation.

[88] I wish to thank all Counsels for their submissions in this matter.

Cadie St Rose Albertini
Commercial Court Judge