27-04-06

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CIVIL APPEAL NO: 22/05
Grand Court Cause #256/05

BETWEEN

BRAC CONSTRUCTION LTD

APPELLANT

AND

(1) RODERICK BROOME AND

(2) GERALDINE BROOME

RESPONDENTS

BEFORE: **THE RT. HON. MR. JUSTICE E. ZACCA, PRESIDENT**
THE HON. MR. JUSTICE M. TAYLOR, J.A.
THE HON. MR. JUSTICE I. FORTE J.A.

Appearances: Mr. Ramon Alberga, Q.C. instructed by Waide Da Costa for Appellant. Mr. Alan Turner & Ms. Andrea Dunsby for Respondents

Heard 17th & 18th November 2005. Delivered: 27th April, 2006.

Reasons for Judgment

FORTE, J.A.

The respondents are two of some 500 members who had purchased Time Share Entitlements in the Indies Suites Resorts owned and operated by the appellants. Each member had purchased his unit for a fixed sum of money, which entitled him to the use of the apartment and the amenities attached thereto for one or two weeks per year, as the case may be, for a total period of 99 years. The property was operated as a proprietary Club with each "time share holder" becoming a member, on paying a "one-time membership fee" and thereafter annual maintenance dues.

In September of 2004, Hurricane Ivan ravaged Grand Cayman. The property concerned in this appeal was not spared. In fact it was so severely damaged that the appellants took the decision that it was financially unwise to restore it, and instead sold the property to a third party.

This decision, the respondents maintained, was made without consultation with them and in breach of the Rules of the Club, which, *inter alia*, provided:

(a) that in the event of the destruction of the club premises, the appellant would be obliged to repair or restore the property – such restoration or repair to be commenced within two years;

(b) to effect (a) the property should be fully insured.

In keeping with their claims concerning the breach by the appellants, the respondent, (with the support of 175 other members and without firstly requesting the return of the money paid by them,) brought an *ex parte* summons before the Court on 6th June 2005. They sought an order that the Company be placed in liquidation, praying, in particular, for the following orders, which after the *ex parte* hearing, on 7th June 2005, were granted by Henderson, J:

"1. That Christopher D. Johnson of Christopher Johnson and Associates Ltd, Strathvate House George Town, Grand Cayman, Cayman Islands be appointed as Provisional Liquidator of Indies Suites Ltd ('The Company') with the following powers:

(i) to locate, protect, secure, and take into his possession and control all the assets and

property to which the Company is or appear to be entitled;

(ii) to locate, protect, secure, and take into his possession and control the books, papers and records of the Company including the accounting and statutory records;

(iii) to carry out such investigations as he may consider appropriate into the promotion, formation, business, dealings, affairs or property of the Company, including without limitation applying for relief under section 127 of the Companies Law (2004 Revision) ('the Companies Law') or an equivalent in any other jurisdiction;

(iv) to do any acts or things considered by him to be necessary or desirable for the protection of the assets and property of the Company;

(v) to take any such action as may be necessary or desirable to obtain recognition of his appointment in any other relevant jurisdiction to make applications to the courts of such jurisdictions for that purpose;

(vi) to retain and employ barristers, solicitors or attorneys and/or such other agents or professional persons, whether in the Cayman Islands or elsewhere, as he considers appropriate for the purpose of advising or assisting in the execution of his powers;

(vii) to exercise such powers without further sanction of the Court as are set out in section 109(a) to (h) of the Companies Law

2. No disposition of the Company's property by or with the authority of the Provisional Liquidator in the carrying out of his duties and functions and his exercise of his power under this Order shall be avoided by virtue of section 156 of the Companies Law.

3. Pursuant to section 99 of the Companies Law alternatively pursuant to the inherent jurisdiction of this Honourable Court, all actions, suits or proceedings of any nature whatsoever against the company be and hereby restrained until further order of this Honourable Court and no further action, suit or proceeding shall be commenced against the Company without the leave of this Honourable Court.

4. That the Provisional Liquidator and his staff be remunerated out of the assets of the company at rates to be approved by this Honourable Court.

On the 22nd of July 2005, the appellant applied to the Court, *inter alia*, to discharge the orders of Henderson, J (supra) and to dismiss the Petition.

That matter came on for hearing before Smellie, C.J. A point *in limine* was taken that the respondents were not creditors and consequently could not bring a petition to place the Company into liquidation. The learned Chief Justice nevertheless granted the following orders:

"1. That the Petitioners are creditors and have status and standing to bring a Petition pursuant to Section 96 of the Companies Law (2004 Revision).

2. That Indies Suites Limited ('the Company') be wound up by the Court under the provisions of the Companies Law (2004 Revision);

3. That Christopher Johnson and Russell Smith of Chris Johnson and Associates Ltd Strathvale House, George Town, Grand Cayman, Cayman Islands be appointed as Joint Official Liquidators of the Company.

4. That the Joint Official Liquidators be authorized to exercise all powers set out in section 109 of the Companies Law (2004 Revision) without

further sanction or intervention of this Honourable Court.

5. That the Joint Official Liquidators do file with the Clerk of the Court a report in writing on the position of, and the progress made with the winding-up of the Company and with the realisation of the assets thereof, and as to any other matters connected with the winding up of the Company, every six calendar months or as the Court may from time to time direct;

6. That the Joint Official Liquidators be at liberty to employ attorneys, counsel and professional advisors whether in the Cayman Islands or elsewhere as they may consider necessary to advise and assist them in the performance of their duties and on such terms as they may think fit;

7. That the Joint Official Liquidators and their staff be remunerated out of such assets of the Company at rates to be approved by this Honourable Court;

8. That the costs of the Petitioners be paid by the Company, with the exception of the costs connected with the *in limine* objection taken by Brac Construction Limited, which should be

paid by Brac Construction Limited to the Petitioners."

It is from these orders of Smellie, C.J. that the appellant now appeals.

Having heard the arguments on appeal, we made the following orders and promised then, (18th November 2005), to put our reasons in writing at a later date.

1. Application for amendment refused.
   [This will be addressed in detail later in this judgment]

2. Appeal allowed.

3. Orders of Smellie, CJ set aside.

4. Costs of the appeal and in the Court below to be the appellants' to be taxed, if not agreed.

5. Taxation of these costs to await final determination of any new petition being filed within the next 30 days.

6. Disposition of the Costs of the liquidation to await the disposition of any such new petition.

7. The US $1,538,000.00 paid into Court to remain in Court pending final determination of any new petition.

8. Undertaking has been made on behalf of the appellants that these monies are to be held exclusively to meet the claims determined or agreed, made by the time share holders, other than Indies Suite.

9. The parties will have liberty to apply.

The application for amendment of the Petition arose out of the arguments before this Court, and in the Court below, as to whether the respondents had the proper status to petition the Court to place the Company into liquidation and for an appointment of a provisional liquidator. These arguments were mounted on the basis of submissions unsuccessfully made before Smellie, CJ by the appellants.

In fact, the grounds of appeal challenging the ruling of Smellie, CJ sought firstly to overturn the learned CJ's ruling, on a point *in limine* made by the appellants to that effect. This is how the first ground of appeal is worded:

> "1. That the learned Chief Justice was wrong in law in holding that the Respondents who are husband and wife (the Petitioners in Cause No. 256 of 2005 were creditors of the Indies Suites Ltd ("The Company) and had the status and standing to bring a petition to wind up the Company pursuant to section 96 of the Companies Law (2004 Revision).

It was agreed by the parties that if this ground were successful, it would be sufficient to dispose of this appeal. Then, there would be no necessity to consider the merits of the other grounds. This was also accepted in the Court

below. However, the point *in limine* failed there, so the learned Chief Justice was obliged to consider the other arguments advanced.

Having considered the submissions made by Counsel, we had great difficulty accepting the views expressed by Smellie, CJ, on the preliminary point. Having examined the law we concluded that the respondents did not have the status, in these particular circumstances, to petition the Court as they did. Consequently, we felt it unnecessary to address the other grounds and will not now do so.

The appellant relied heavily on the provisions of **section 96 of the Companies Law (2004 Revision)** and the case of ***In re Pen-Y-Van Colliery Company*** (1877) 6 Ch. D. 477.

Section 96 of the Law speaks to the person(s) who are entitled to bring such a Petition, and consequently it is a good starting point. It states:

> "Any application to the Court for the winding up of a company shall be by petition which may be presented by the company or by any one or more than one creditor or contributory of the company, or by all or any of the above parties, together or separately; and every order which may be made on any such petition shall operate in favour of all creditors and all the contributories of the company in the same manner as if it had been made upon the joint petition of a creditor and a contributory." (Emphasis added)

This section makes it clear that such a petition can only be brought by:

(a) the Company itself;

(b) a creditor or;

(c) a contributor to the Company.

It was conceded that the respondents were neither *the company* nor *contributors*. In order for them to succeed on appeal, therefore, they have to show that they were *creditors*.

ARE THE RESPONDENTS CREDITORS?

Mr. Alberga, Q.C., Counsel for the appellants, argued that a creditor for the purpose of section 96 must be an *actual creditor*. In support of this proposition, he relied on the ***Pen-Y-Van Colliery Company*** case (*supra*) and in particular the dicta of Jessel MR, who delivered the judgment of the Court. The head note to the case reads:

> "An order continuing the voluntary winding-up of a company under the supervision of the Court can only be obtained on a petition by the company, a creditor, or a contributory.
>
> A claim against a company for unliquidated damages on account of alleged fraudulent representation does not contribute the claimant a creditor, so as to entitle him to petition either for a winding-up order or a supervision order: before he can so petition he must make himself a creditor by changing his claim for damages into a judgment."

We should note that the cited case (*supra*) was concerned with an application to bring a voluntary winding-up under the supervision of the Court. For these purposes we find no difference between those circumstances, and that which exist in the instant case, that is to say, a petition to bring the Company into liquidation. In this view, we are supported by the dicta of Jessel M.R. in the ***Pen-Y-Van Colliery*** case (*supra*) when he stated at page 480:

> "There never has been, as far as I am aware, any difference suggested until to-day between a petition

> for a supervision order and a petition for a winding-up order by the Court. But it having been suggested to-day to the Court, that there is a difference, it becomes necessary to consider the Act of Parliament to see whether what I believe to be the general practice is correct, or whether there is a power in anybody, who so desires, to petition against a company in voluntary liquidation or against the liquidators, to obtain a supervision order, though the same person could not have obtained a winding-up order from the Court. I think there is no such power."

Another point of importance concerning the dicta of Jessel M.R., as it relates to the circumstances of the instant case, is the fact that the ***Pen-Y-Van Colliery Company*** case was decided in England at a time when the legislation was in *pari materia* to the Companies Law (2004 Revision). The English Act was amended in 1907 to give such a right to a prospective creditor. Significantly, although the Cayman Companies Law was revised in 2004, the Legislature, who must be assumed to have had knowledge of the amendments to the English Act, nevertheless elected to continue to fashion the Cayman Companies Law in terms similar to those in the original English Act of 1862. It is therefore reasonable to assume that the Cayman Legislature intended to withhold this right from prospective creditors and to reserve it for persons clearly established as creditors.

In the ***Pen-Y-Van Colliery Company*** case (*supra*) the allegation was that because of fraudulent representation, the claimant was entitled to recover damages from the Company and could therefore apply to have the winding-up placed under the supervision of the Court. Jessel, M.R. despite his later

conclusion that a prospective creditor had no right to petition the Court, in that regard, nevertheless, examined the evidence offered to support the allegation. He concluded that such evidence as there was, did not establish the allegation.

Here is what he said at page 483:

> It is plain that there is no claim at all on these statements against anybody before me; but I think, as the point of law has been raised, it is right I should say that I do not think a claim for unliquidated damages, that is, a claim for damages for fraudulent representation, makes a man a creditor entitling him to petition under the Act either for a winding-up by the Court or a winding up under supervision. He must change the claim for damages into a judgment, and thus make himself a creditor, before he can petition the Court."

It has been argued that the principle expressed in this passage should be restricted to cases where there is a claim for damages for fraudulent representation. We find great difficulty in accepting this contention. The real question, in these circumstances, is whether the person can establish himself as a "creditor", which in our view necessitates that a liquidated amount (or, in other words, an amount which is certain) is owed by the Company to the person making the application.

We do not accept, nor do we believe, that Jessel, M.R. was confining his statement of the principle only to cases in which there has been a fraudulent representation. Jessel, M.R. was at pains to demonstrate, though he thought it unnecessary, having regard to the issue before him, that the evidence did not substantiate the allegation of fraudulent representation. When the learned Master of the Rolls said that he did not think that a claim for unliquidated

damages, that is, a claim for damages for fraudulent representation made a man a creditor, he was merely making reference to that claim finding its source in allegations of fraudulent representation. He should not be understood as limiting all claims for unliquidated damages to claims arising out of allegations of fraudulent representation. Of course, a representation cannot be held to be fraudulent unless it is first proven so to be. In the same vein, a claim for damages cannot be converted into a debt where there has been no determination of liability and no assessment of damages.

It is against that background, that we now examine the reasons for the judgment of the learned Chief Justice.

After referring to **Sections 94 and 96 of the Companies Law**, the learned Chief Justice, in summarizing the arguments of the petitioners (respondents) stated:

> "... they say for the purposes of paragraph (c) that they are creditors because the Company owes them a contractual debt for a liquidated amount of money on an amount which can readily be quantified and ascertained, and in respect of which, they may and ought to be allowed to prove in the liquidation. They are thus to be regarded not as contingent or prospective creditors but as actual creditors."

It is this characterisation of the claims made in the Petition that ultimately led the learned Chief Justice into error and which resulted in the orders granted by him. To understand clearly the error, we refer to certain clauses of the Petition, which show that the claim by the respondent, did not, in fact, relate to a liquidated amount. The relevant clauses are set out hereunder:

"(i) para. 5 The Company has recently sold the land and remaining buildings of Indies Suites and is consequently unable to fulfill its obligations to the Petitioners pursuant to the Club Membership dated 1st April 1994 and the Petitions have suffered loss and damages as a result

(ii) para. 7 The Petitioners and other members of Indies Suites Club will have a claim for damages, for breach of contract against the Company as a result of the Company's failure to provide the services which it has promised to the Petitioners and others." (Emphasis added)

These passages demonstrate, in our view, that the Petition was based on claims for damages for breach of contract and were not in fact claims for liquidated amounts.

There were no amendments applied for, nor granted, before the learned Chief Justice. So the claim remained one for unliquidated damages. In spite of this, the learned Chief Justice apparently treated the petition as if there were claims for liquidated damage. In paragraph 11 of his reasons he states:

"The petitioners, not surprisingly, allege that their contract with the Company, expressed in the form of the Rules of the Club has been breached, and that they are immediately entitled to damage by way of return of their membership fees. If the fees are not to be entirely repaid, at least as pro rated by reference respectively to the amount of time each has already enjoyed the benefit of membership, as

against the number of years of the 99-year membership terms left to run."

and again in paragraph 12 as follows:

"It seems no claim is to be otherwise made for general damages in respect of the loss of the benefit of use of the premises or for annual fees and dues; although such claims may as yet only be unarticulated."

In our view, this treatment of the Petition was incorrect, given the terms of the Petition, which alleged an entitlement to damages as a result of breach of contract. It is also to be noted that the petition did not, in any way, limit those claims to "damages by way of return of their membership fees" as stated in paragraph 11 of the learned Chief Justice's judgment.

Although, the learned Chief Justice treated the claims as claims for liquidated sums, he nevertheless sought to distinguish the case of ***Pen-Y-Van Colliery Co*** *(supra)* from the instant case. He was of the view that the former had its *ratio* in the fact that there was an allegation of fraudulent representation. In arriving at that view, he was obviously influenced by the following dicta of Jessel, M.R. which he cited:

"Now, the claim which the Company brings forward is not a claim of debt, as I understand it. It is a claim of a very singular kind. ... what possible claim there can be against anybody upon these statements I cannot understand. It is quite sufficient to say that the respondents dispute the allegations about the overman, the shareholders and everything else.

> There is not a scintilla of claim against Jones, who has sold to Sarl and who has a right to be paid. He did not make the alleged misrepresentation because he did not then exist as a liquidator for this was in 1875, the years before his appointment."

The learned Chief Justice then interpreted that passage as follows:

> "So while the case must be regarded as settled authority for the propositions for which it still stands after a hundred and twenty odd years it must be noted for the present purposes, that Jessel MR regarded the claim for the debt sought to be advanced in it as being of a very singular kind. Precisely because of the speculative, prospective or contingent nature of the allegations of fraud, it was decided in that case that the claimants were not properly constituted creditors within the meaning of the Act as it was then framed and so had no standing to petition to wind up the Pen-Y-Van Company."

As we have stated, we do not agree that Jessel M.R. came to his conclusion based solely on the nature of the allegation of fraud. The ***Pen-Y-Van Colliery*** case (supra) of course dealt with an allegation of fraudulent representation, which by its nature, and in the absence of an admission of liability, had to be proven before it could be established that the Company, in fact, was indebted to the prospective creditor. The *ratio decidendi* does not rest on an allegation of fraudulent representation but speaks to any circumstance where it cannot be ascertained that any sum is owing, until liability has been proven and an assessment of the quantum of compensation has been concluded. Until then,

the prospective creditor remains just that, a person who may or may not be entitled to recover from the Company.

We concluded that the principles set out in the judgment of Jessel MR in the ***Pen-Y-Van Colliery Company*** case (supra) are consistent with our own views. It is necessary for persons who have claims in unliquidated damages, to first convert those claims, by an action in Court, into a judgment, so that they can thereafter be *creditors* within the terms of the Law. In the instant case, we concluded that the respondents' claim against the Company was for unliquidated damages because of what was pleaded in the Petition. Therefore they were not, at that time, creditors in accordance with the Law.

During the course of argument, either because of comments emanating from the Bench, or recognition of the weakness of his argument, Counsel for the respondents applied to amend paragraphs 8 to 11 of the Petition, to assert that the appellant was indebted to the respondents for a liquidated sum i.e. the amount paid to the appellant under the contract. The amendments applied for were as follows:

> "8. Further and/or alternatively the Company has received the sum of US$10,700.00 from the Petitioners for a consideration which has failed and the sum of US$10,700.00 is repayable in its entirety to the Petitioners or such proportion thereof which represents the unexpired portion of the 99 year lease from on or about the 30th September 2004 to 31st December 2092.
>
> 9. Further and/or alternatively the Petitioners are entitled to repayment of the sum of US$10,700.00 or such proportion thereof which

represent the unexpired portion of the 99 year lease from or on about the 30th September 2004 to 31st December 2092. As the goods and services which the Company agreed to provide to the Petitioners for the sum of US$10,700.00 cannot now be provided by the Company to the Petitioners and/or because the Company will be unjustifiably enriched if allowed to retain the benefit of the sum of US$10,700.00 in all the circumstances.

10. Further and/or in the alternative the Company is holding the sum of US$10,700.00 or such proportion thereof which represents the unexpired portion of the 99 year lease from in or about 30th September 2004 to 31st December 2092 in trust from the Petitioners.

11. Further and/or alternatively the Company is liable to account to the Petitioners for the sum of US$10,700.00 or such portion thereof which represents the unexpired portion of the 99 year lease from on or about 30th September 2004 to 31st December 2092 in trust for the Petitioners."

Mr. Alberga, Q.C., opposed the application for the amendment. He contended that if the amendment were granted, it would give the respondents an opportunity to reconstruct their case and put it on an entirely different basis, which would result in an entirely new Petition. He maintained that the

application to amend was an attempt by them, at a late stage, to bring the Petition within the principles set out in the ***Pen-Y-Van Colliery Company*** case (supra), which was within their knowledge at the time it was heard.

He further contended that even if the amendments were granted there would be no certainty as to the amount owed, as the respondents had, in the past, enjoyed the benefits of the property and the time-sharing arrangement. Consequently, they would not be entitled to the total sum they had paid. There would have to be an assessment in each case as to the definitive amount to which each member would now be entitled.

We agreed with the submissions of Mr. Alberga, Q.C. and found that in all the circumstances the application for amendment was made at a stage too late in the proceedings and consequently had to be refused. We concluded that the appeal should be allowed and the orders of the learned Chief Justice set aside. We however found that it would be open to the respondents to bring a new Petition, based on the appellants' liability to them, for a sum which can be calculated in definitive terms. Such Petition, however, we ordered to be brought within 30 days of the Order made on the 18th November 2005.

During the course of the arguments we were informed that a sum of US$1,538.00 from the proceeds of the sale of the property has been paid into Court for the specific purpose of repaying to the members any sum duly owing to them. We were given an undertaking by Mr. Alberga Q.C. that no attempt will be made to withdraw that amount from the Court, pending the outcome of the New Petition to be brought by the respondents and that the amount will be used exclusively to meet the claims agreed or determined. We accepted that undertaking, but nevertheless made the order No. 7.

For the above reasons, we allowed the appeal and made the orders already referred to earlier in this judgment.

Zacca, P.

Taylor, J.A.

Forte, J.A.