NOTED CJ 4.12.98

3.12.98

IN OPEN COURT

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO 7 OF 1998

IN THE MATTER OF THE COMPANIES LAW (Revised)

-and-

IN THE MATTER OF ALLIED LEASING AND FINANCE CORPORATION

BETWEEN: **BANCO ECONOMICO S.A.** **Petitioner**

AND: **ALLIED LEASING FINANCE AND CORPORATION** **Respondent**

Appearances:
For the petitioner: Guy Locke of W.S. Walker & Co.
For the respondent: Linda DaCosta of Myers & Alberga

BEFORE GRAHAM J.

RULING AS TO COSTS

1. This ruling is to be read with the principal judgment herein dated the 23rd October 1998. I shall make specific references to extracts from that judgment in the course of this ruling.

The judgment ended as follows:

> *"This dispute has been litigated by the company on insubstantial and unreliable evidence. There never was a basis for the proper opposition to this petition. The result of that is that a very great deal of money has been wasted. This finding will govern certain findings as to costs which I am likely to make at the appropriate stage. Mrs. DaCosta informs me that a decision as to the appropriate legal representation of Mr. Donnelly, Mr. Azevedo, Mr. Melo and White Lightening will have to be made before submissions as to costs can be made. I order that such submissions be made within fourteen days of today's date".*

2. The matter next came on before me the 16th November 1998. I asked Mrs. DaCosta whether she now represented Mr. Donnelly, Azevedo, Melo and the company White Lightening. She told me that she had no instructions from any of those persons or from the company. I directed her to send to those people, and the company, a copy of the judgment together with an invitation to them to appear before this Court and make such submissions as they chose to. The case was re-listed for hearing on the 26th November 1998. On that day, Mrs. DaCosta told me that she had faxed copies of the judgment and a note as to the comments made by me on the 16th November 1998 to Messrs Donnelly, Azevedo, Melo and White Lightening Corporation by Courier. She informed me that she still represented the respondent, but that she appeared as *amicus curiae* in respect of those persons already mentioned and, would simply

draw to the Court's attention, such arguments and authorities as might assist it in the interests of justice. She so informed me, because she had received neither acknowledgment nor instructions from any of the persons to whom she had sent the judgment or its accompanying documents. I am bound to say that I was not in the least bit surprised by that attitude on the part of those individuals and White Lightening as it is all of a piece with their attitude to this Court throughout these proceedings.

3. The summons before the Court dated the 16th November 1998 seeks -

(i) Without prejudice to any order made under paragraph 2 below, the petitioner's costs of and incidental to the petition be paid out of the assets of Allied Leasing and Finance Corporation. ("The company") as an expense of a liquidation, to be taxed if not agreed.

(ii) Save only for the costs which would have been incurred the company had it appeared at the first hearing of the petition before the Hon. Mr. Justice Smellie on the 20th February, 1998 and consented to an order for winding-up, the costs of the company was an incidental to its opposition to the petition shall not be paid out of the assets of the company in priority to the payment in full of the petitioner and/or on secured prejudices of the company.

(iii) Jose Roberto Azevedo, William John Donnelly, Cesar Melo and White Lightening Corporation (a body incorporate in the British Virgin Islands) be jointly and severely liable to the petitioner for the petitioner's costs of and incidental

to the petition to be taxed if not agreed.

(iv) Such further and other orders as this Honourable Court deems appropriate.

What is claimed therefore are costs under three headings:

(a) the usual order in respect of the petitioner's costs

(b) a "Bathampton order" that is to say that the company's costs in opposing the motion should not be paid out of the assets of the company in priority to the payment in full of all the unsecured creditors of the company.

(c) a non-party costs order against Messrs. Donnelly, Azevedo, Melo and White Lightening Corporation. On a joint and several basis to be taxed if not agreed.

4. The prayer in paragraph 1 of the summons is the conventional prayer in winding -up proceedings and causes no difficulty. Such an order will be made and is not opposed by the respondent. The prayer in paragraph 2 seeks what is known as a "Bathampton order" deriving its title from the seminal case of ***Re Bathampton Properties Ltd. [1976] 1 WLR 168.*** a decision of Brightman J. (Later Lord Brightman) If made, it would mean that the company's costs of, and incidental to the petition would not be paid out of the assets of the company in priority to the payment, in full, of all unsecured creditors of the company. As the company is insolvent it would not be paid at all. It would have the effect of depriving the attorneys for the company of their costs unless they

have made private arrangements with Mr. Azevedo or Mr. Donnelly. It has been submitted to me by Mrs. DaCosta that such an order would be unjust and that there is no jurisdiction in the Court to make it. The prayer in paragraph 3 seeks a costs order against Messrs. Azevedo, Donnelly and Melo together with a similar order against White Lightening Corporation. None of these persons, nor the corporation were parties to the suit and could not have been made so as there was no cause of action against them. Although they have chosen not to be represented for the purpose of this application, it is suggested by Mrs. DaCosta, in her capacity as *amicus curiae,* that the Court has no jurisdiction to make this order either.

5. The statutory basis for the award of costs comes from two sources:

i) Section 24 (2) of the Judicature Law (1994 Revision). It reads:

> *"Where in any proceedings in any Court an advocate has been employed or other costs or charges have been incurred then, subject to any provision of this law or any other law or to any rule the awarding of costs and charges shall be in the discretion of the Court which may, by its judgment award them to the successful party in accordance with the prescribed scale."*

In the case of a company where the assets are insufficient to satisfy its liability (as has been demonstrated in this case).

Section 123 of the Companies Law(1998 Revision) provides that the Court may -

> *"make an order as to the payment of the assets of the company and the costs charges and expenses incurred in winding-up of the company in any order of priority as the Court thinks fit."*

6. It was my judgment in this case that very large costs have been wasted by the company in hopeless, not to say egregious, opposition to the petition. This was done in the face of the clearest possible warning to the company and its legal representatives by Smellie J (as he then was) which is set out in this judgment at pages 16 - 27. I do not propose to repeat his dicta in this ruling. His Lordship was told that by counsel in February 1998, that the reason for the opposition to winding -up was that the company was in fact solvent. I was told however, by that same counsel in July 1998 that the company was insolvent and that he agreed that it should be wound up at some undefined future date. No events of significance took place between February and July 1998 in respect of the company. I was further told, that contrary to the affidavit of Mr. Azevedo, who had deposed that the arrangement between the petitioner and the respondent was made with a full knowledge and consent of the

Brazilian financial regulatory authority, that in fact, the entire relationship between the parties was designed to deceive that authority. His present instructions were that the reason for opposing the winding-up order was to prevent "political difficulties" accruing to Mr. Azevedo in Brazil! (See page 5 of the judgment). He further submitted to me that each and every transaction was to be looked at as if it meant something entirely different. Despite those interesting concessions he continued to oppose the winding -up petition over many days of argument. I made a finding (see pages 43 -53 of the judgment) that the alleged investment agreement together with an explanatory side letter purporting to limit the debts of Banco Economico to a sole recourse to the underlying assets of the company were part and parcel of a "put up" job by Messrs. Azevedo and Donnelly to mislead the Court. Mr. Donnelly had, in turn, sold the assets of the company to a Mr. Melo, a Brazilian national who controls White Lightening Corporation in the British Virgin Islands. That sale was said to have taken place for a modest but undisclosed consideration. The Court, taking into the evidence on the liquidator, found that the people other than the directors were effectively in control of that company, and, indeed, appeared to have a "indirect ownership" in the Sugar Mill Loan which figured so prominently in the case as an alleged

underlying asset of the respondent. It was clear that Mr. Azevedo was still the "key man" in relation to the assets of the company, aided and abetted by Mr. Donnelly. The behaviour of Messrs. Azevedo, Donnelly and Melo and the White Lightening Corporation demonstrated quite clearly that the opposition to the petition was based on improper motivation as the "predominant intention" was to obtain a private advantage at the expense of creditors. Vide ***Re Tajik Air Limited [1996] 1BCLC 313.*** The result is that huge costs have been incurred. Although these named individuals are not parties to this suit they have chosen to take part in it and indeed orchestrate it in the name of the respondent. It is to be noted that any order I make will be made *in this Cause* (my emphasis). Therefore arguments as to service out of the jurisdiction do not arise.

7. It is submitted to me that "Bathampton jurisdiction" does not exist. This argument is founded on the absence in Section 24 (2) of the Cayman legislation of the words and "my whom" which occur in the equivalent English legislation, namely Section 51 (1) of the Supreme Court Act of 1981. The Cayman provision is othewise identical.

> *in the Supreme Court shall be in the discretion of the Court and that the Court shall have full power to determine by whom and to what extent the costs ought to be paid."*

For a time it was believed that the addition of the words "by whom" placed a limit on the wide discretionary power of the Court in this regard. Vide ***John Fairfax & Sons PTY Ltd. V. E.C. De Witt and Co. (Australia) PTY Ltd. [1958] 1QB 323.,*** a decision of the Court of Appeal. However, in ***Aiden Shipping Co. Ltd v. Interbulk Ltd. [1986] A.C. 965*** the House of Lords expressly reversed Fairfax. The judgment of the House was given by Lord Goff of Chievely in these terms:

> *"It is, I consider, important to remember that Section 51 (1) of the Act of 1981 is concerned with the jurisdiction of the Court to make orders as to costs, furthermore, it is not to be forgotten that the jurisdiction conferred by the subsection is expressed to be subject to rules court, as was the power conferred by Section 5 of the Act of 1880. It is therefore open to the rule making authority (now the Supreme Court Rule Committed) to make rules which control the exercise of the Courts's juisdiction under Section 51(1). In these circumstances, it is not surprising to find the jurisdiction conferred under Section 51(1), like its predecessors, to expressed in wide terms. The subsection simply provides that the Court "shall have full power to determine by whom the cost are to be paid.*

> *Such a provision is consistent with a policy under which jurisdiction to exercise the relevant discretionary power is expressed in wide terms, thus ensuring that the Court has so far as possible freedom of action leaving it to the rule making authority to control the exercise of discretion (if it thinks it right to do so) by the making of rules of Court, and to the Appellate Courts to establish principles upon which the discretionary power may, within the framework of the statute and the applicable rules of Court, be exercised. Such a policy appears to me, I must confess, to be entirely sensible. It comes therefore as a surprise to discover that it has been suggested that any limitation should be held to be implied into the statutory revision which confers the relevant jurisdiction".*

I therefore reject the submission made by Mrs. DaCosta in this regard and note that the two Cayman cases cited to me viz:- ***McAllister v. Santa Cruz Investment Co. Ltd. [1985] CILR 411 and Tower Corporation v. Hadsphaltic International [1986] CILR 40*** do not deal with the point in issue and in any event were decided before the decision of the House of Lords in Aiden Shipping. The respondent also relies upon dicta by Hoffman J (as he then was) in Re. ***Record Tennis Centre Ltd. [1991] BCC 509.*** The learned judge said:

> *"The Court therefore now, (referring to Aiden Shipping) has power to do directly what Brightman J. tried to do indirectly in Bathampton. In these*

> *circumstances, I find it difficult to imagine a case in which it would be proper in future to make an order in the Bathampton form.*"

However, his Lordship went on to recognise the Court's complete discretion to vary the usual order of priority in a winding-up order. In that regard, his Lordship was referring to Rules of the Supreme Court Order 62, rule 11. This rule has no equivalent in the Cayman Islands. Accordingly, I conclude that the Barthampton jurisdiction does exist in the Cayman Islands and I propose to exercise it. I pay heed to the comments made By Hoffman J. ***In Record Tennis Centre*** (ibid) in which he pointed out that it would be unfair to make such an order on grounds which might have a necessary connection with the conduct of the solicitors themselves and that the order should not be made unless the directors against whom it was proposed to be made had an opportunity of defending themselves. I have given them that opportunity in this case and they have declined it to avail themselves of it. It should be noted here that RSC Order 62, rule 11 (supra) gives the Court power to disallow solicitors' costs in certain circumstances. This is why the Bathampton jurisdiction is now redundant in England and Wales. To return to in ***Re Bathampton Ltd.*** the learned judge's

comments at page 175 of this judgment are of considerable help in this particular case:-

> *"If a solicitor acting for a person against whom a bankruptcy petition has been presented is in peril of his costs it may be impossible for the debtor to secure legal advise. That would be deplorable. It is not, however a situation that necessarily arises in the case of a company against whom a winding-up petition is presented. The corporators are not usually bankrupt and they may in fact be far wealthier than the creditor who seeks payment of his debt. There is nothing to prevent corporators guaranteeing the cost of opposing a creditor's winding-up petition.If the petition fails, the corporator loses nothing. If the petition succeeds, and the company's costs of opposing the petition are not allowed, the assets are effectively preserved for the benefit of the creditors whose claim thereto is superior to that of the corporator's. However, these are only intended as general observations. I think that each case must depend on its own facts."*

And later,

> *"The results of this decision, if it is correct is that a solicitor retained on behalf of a company, which is potentially insolvent, for the purpose of opposing a winding-up petition, may feel it prudent to seek an indemnity from one or more of the corporator before embarking on his task. I think this would be salutory; it may help to avoid the assets of the company being wasted on hopeless opposition to widing-up order."*

8. I remind myself that for an order to be made in the Bathampton form, exceptional circumstances must be demonstrated. In view of the

circumstances as set out fully in the judgment in this Cause and more briefly in these reasons; I do make such an order. I do so, so that the statutory recoveries on behalf of the single creditor are not to be diminished by, in effect, financing the legal representation of Azevedo, Donnelly, Melo and White Lightening. Affidavits on behalf of Donnelly and Azevedo were filed on behalf of the respondent by its attorneys. They controlled that litigation from start to finish. It is beside the point entirely that Azvedo has also deceived the petitioner, by which he was employed. If attorneys or counsel are going to put forward the instructions of Azevedo, Donnelly and Melo and advance quite extraordinary propositions of fact to the Court, and they then lose, then they have only themselves to blame. I have no evidence before me on this point either way but it is a reasonable assumption to make that attorneys would not act for foreign-based persons unless in funds. If they have not put themselves in funds before embarking upon such a course then that is a matter for them. For the same reasons I exercise my statutory power under Section 123 of the Companies Law and order that the costs, charges and expenses incurred in opposing the petition by the respondents are to be paid last in order of priority.

9. I turn now to the application by the successful petitioner for a non-party costs order against Messrs. Azevedo, Melo and the corporation White Lightening. In ***in Re Fisher [1894] 1 Ch. 450.*** an appeal against an order that a public body should pay the costs of and incidental to a petition for the payment out of moneys paid under an act of parliament for compulsory purchase. Kay LJ. commented in relation to Section 5 of the English Supreme Court of Judicature Act 1890 at pages 452 and 453:-

> *"Subject to the Supreme Court of Judicature Acts, and the Rules of Court made thereon, and to the expressed provisions of any statute whether passed before or after the commencement of this Act, the costs of and incidental to all proceedings of the Supreme Court including the administration of of status and trust shall be in the discretion of the Court or judge, and the Court and judge shall have full powers to determine by whom and to what extent such costs are to be paid. Taking these last words alone to what costs do they apply? Clearly to the costs of and incidental to all proceedings in the Supreme Court the object of words so plainly expressed must be to give the Court power to do that which it had not power to do before. In my opinion it is impossible to read Section 5 in any way but this. It is an enabling section enlarging the jurisdiction of the Court; giving it jurisdiction where it had not jurisdiction before in respect of costs. What are the limitation to the jurisdiction? The limitation is contained in the former part of the Section - "subject to the Supreme Court of Judicature Acts, and the*

> *Rules of Court made thereunder, and the expressed provisions of any statute whether passed before or after the commencement of the Act."*
>
> *That means if there be a provision in a Judicature Acts or in the Rules of Court or an expressed provison in any statute which limit the discretion of the Court, the Act is to be taken subject to that limitation, but it also means that the Court is to have a discretion where the former Acts are silent as to costs. It was for very reason that the Act was passed".*

I find that the comments of Lord Justice Kay most helpful when construing Section 24 (2) of the Judicature Law. I repeat my finding that the ommission of the words "by whom" has been dealt with by ***Aiden Shipping*** in a conclusive manner and I find that the Cayman wording is designed to be extremely wide indeed. Referring to the dicta of Lord Goff in ***Aiden Shipping*** it is open to the Rules Committee in the Cayman Islands to make rules which control the exercise of the Court's jurisdiction and its discretion. No such rules have been made. Accordingly, the very wide words of Section 24 (2) -

> *"Subject to any other provision of this law or any other law or to any rule, the ordering of such costs and charges shall be in the discretion of the Court."*

Include the jurisdiction to make a non-party costs order in appropriate cases.

It is an exceptional remedy to order costs against non-parties. The jurisdiction of the Court must be exercised in accordance with judicial authority and the Court of Appeal in England has provided significant guidance in the case of ***Symphony Group PLC v. Hodgson [1993] 4 All.E.R. 143.*** Balcolmbe LJ laid down a series of criteria for a judge to consider when deciding whether or not to make a non-party costs order. They are these -

(a) *An order for the payment of costs by a non-party is always exceptional. The judge should treat any application for such and order with great caution.*

(b) *It would be even more exceptional for an order for the payment of costs to be made against a non-party where the applicant has a cause of action against the non-party, and could have joined them as a party in original proceedings.*

(c) *Even if the applicant could provide a good reason for not joining the non-party against whom he has a valid cause of action , he should warn the non-party at the earliest opportunity of the possibility that he may seek to apply for*

costs against him.

(d) The application for payment of costs by a non-party should normally be determined by the trial judge.

(e) The fact that the trial judge in the course of his judgment has expressed his view on the conduct of a non-party, neither constitutes bias nor the appearance of bias.

(f) The procedure for determination of costs is a summary proceedure which was necessarily subject to all the rules which would apply in an action. The departure from basic principles could only be justified if the connection of the non-party with the original proceedings was so close that he would not suffer any injustice by allowing the exception to the general rule.

(g) Insofar as the evidence of witnesses in proceedings might lead to an application for the costs of those proceedings against him or his company it introduced yet another exception

to a valuable general principle.

(h) The fact that an employer of the company gave evidence in the matter did not normally mean that the company was taking part in that action, insofar as that allegation relied upon by the party who applied for an order for costs against a non-party.

I have considered with care the criteria set out in *Symphony* before coming to a conclusion on this part of the summons. I further accept the submission to me that the basic test for the exercise of this discretion is as stated by Lord Goff of Chievely in the ***Aiden Shipping*** case namely that it is to be exercised in accordance with "reason and justice".

As the petitioner will have his costs and expenses paid out of the recovered assets of the company they will to that extent reduce the net value available for the payment of the unsecured claim which is that of the petitioner itself. This has been long and protracted litigation and the costs, including those of leading and junior counsel from England, together with the instructing attorneys must be very significant. Having considered all the relevant criteria, as set out herein, I nevertheless make

a non-party costs order against Messrs. Azevedo, Donnely, Melo and White Lightening Corporation on the basis of joint and several liability.

10. I therefore make the following orders:-

1. Without prejudice to any order made under paragraph 2 below, the petitioner's costs of and incidental to the petition be paid out of the assets of Allied Leasing and Finance Corporation as and expense of the liquidation, to be taxed if not agreed.

2. Save only for the costs which would have been incurred by the company had it appeared at the first hearing of the petition before the Honourable Mr. Justice Smellie on 20th February, 1998 and consented to an order for winding-up, the costs of the company of and incidental to its opposition to the petitioner shall not be paid out of the assets of the company in priority to the payment in full of the petitioner and all unsecured creditors of the company. Further or in the alternative an order that under Section 123 of the Companies Law (Revised) that the costs charges and expenses incurred in opposing the petition by the respondents are to be paid last in order of priority.

3. Jose Roberto Azevedo, William John Donnelly, Cesar Melo and White Lightening Corporation be jointly and severally liable to the petitioner for the petitioner's costs of and incidental to the petition, to be taxed if not agreed.

4. An order that the costs of presenting and opposing the costs issue are to be treated for all purposes as subject to the orders as to costs made herein.

3rd December 1998

Hon. Mr. Justice Graham
Judge of the Grand Court