REF. NO:...417.....

IN THE SUPREME COURT)
OF THE TERRITORY OF)
PAPUA AND NEW GUINEA)

CORAM : MANN, C.J.

IN THE MATTER OF THE
COMPANIES ORDINANCE 1963-1966
AND IN THE MATTER OF
C.D.R. BUILDING COMPANY PTY.LTD.
AND
STEAMSHIPS TRADING CO. LIMITED.

J U D G M E N T

Port Moresby.
1967
April 27.

Mann, C.J.

This is an application for an Order to adjourn the petition of Steamships Trading Company Limited for the winding up of the above-named Company. The Petitioner is a Judgment Creditor and undoubtedly would have had a positive right to a winding up Order under the older legislation.

In applying the provisions of the Companies Ordinance 1964 I am asked to grant an adjournment to enable the Company to call a meeting under Section 198-202 and to enable the Creditors to consider whether the Company should be placed under official management. This is the first occasion upon which I have had to consider the point involved and I have taken time to consider the history of this and the previous legislation. The petitioning Company can establish its right to a winding up Order and has come forward first in point of time. Once the notice provided for in Section 198 has been given, the stay of further proceedings provided for by Section 199 comes into force subject to any order for leave of the Court in case a Creditor wishes to proceed.

The earlier practice based on the principles and experience of both the Common Law and Equitable Jurisdictions was intended to give recognition to the rights of Creditors, and this applied to cases where administrative work had to be done to get in assets for realisation to pay debts. Large Creditors who came in promptly could expect

to have authority to control or to influence or even to carry out the administration. Thus the self interest motive was recognised to a considerable extent in several jurisdictions. The Courts have had express powers conferred on them from time to time to prevent abuses and protect all persons' interests. Rules were developed tending to require all Creditors to act as a body in the administration of a winding up, but still recognising the strength of their position as Creditors having a right to be paid. Shareholders and others might or might not have an effective voice, depending on their prospects, and the Court continues to exercise a discretionary and supervisory role, but is reluctant to interfere unnecessarily in business affairs. The concept of official management has been incorporated into the Territory's legislation, the provisions being taken from the recent uniform Australian Legislation. The essential point is whether Section 199 of the Ordinance is intended to recognise and preserve the prior rights of a Judgment Creditor who can prove his case, and gets to the Court first, or whether that Section should be read as modifying the old right to the extent of giving the Creditors as a whole, a power to play the part designed for them in Part IX of the Ordinance.

Paragraph 199 does not expressly answer this question but makes clear the position after service of the Notices. I think that the Company should have served the Notices before the matter was due to come before the Court and it could well have done so. In the ordinary course of proceedings enough time must be allowed to enable the Company or a Judgment Creditor to take the simple steps whereupon Section 199 would operate automatically subject to the leave of the Court. Mr. White, who appears for substantial Creditors, seeks the adjournment principally to allow this procedure to take its course.

I do not think that I should allow some hesitation or delay to alter the course that the legislation is intended to take. There has been, so far as I know, no ruling on this point, and the parties appeared to be trying to simplify the problem by approaching the Court on an application for an adjournment of the Petition principally in order to obtain the desired ruling.

Some light is thrown upon the intended meaning of Section 199 by considering whether there is any apparent reason why the Ordinance does not leave it simply to the Creditors to implement the new scheme without reference to the Court. It is clear from the short history of this type of legislation set out in Australian Company Law by Paterson and Ednie, as an introduction to Part IX of the corresponding Australian legislation, and from the authorities there cited that this new legislation is not a sudden departure from previous practice and, in fact, preserves the older principles consistently with the more modern procedure trends in the development of the law. Thus, instead of the Court itself winding up the Company, we have had progressively, provisions for voluntary winding up, official inspections or supervision judicial management and official management, particularly in South Africa and the Australian States. Always there has been power in the Court to wind up a Company compulsorily if some milder form of resolution of the Company's affairs did not afford proper protection in the circumstances for Creditors or other persons having, in fact, some interest in the winding up.

This same trend is, I think, followed by Section 199 of the new Ordinance. Most questions may be expected to be resolved on the votes of the Creditors and the committee of management when appointed, and it should not be commonly necessary for the sometimes very great expense of a compulsory winding up to be incurred. Nevertheless, one obvious reason for the provision in Section 199, to the effect that the Court may grant leave for proceedings to be commenced or proceeded with, or impose terms, is that a Company may be in a situation in which it is incapable of being carried on in the future consistently with the rights of Creditors, in which case the only proper course might well be to wind up the Company. This, of course, is a deep seated rule for the floating wreckage of a Company, although sometimes valuable to entrepreneurs, becomes a dangerous hazard to commercial business, and may easily be a source of fraud on the public.

Dealing with other legislation, also designed to recognise similar principles, Fullagar J, in the Insurance

1967
C.D.R.BLDG. v. STEAMSHIPS TRADING CO.LTD.
MANN, C.J.

Commissioner v. Associated Dominions Assurance Society Pty. Ltd. (1953) 89 C.L.R. 78, at p. 112 et.seq., says after considering fully the legislation before him and the affairs of the Company "It all comes back again, in my opinion, to an assessment of future prospects." This broad summary should not be read narrowly.

In my view, Section 199 is intended to prevent the new procedure set out in Part IX from being the occasion of introducing new risks and dangers, whilst at the same time achieving smoother and possibly more efficient administration of the affairs of a debtor Company, in the hope of saving it from unnecessary destruction if it is worth saving. The Court is there with a free hand, and may, if the circumstances justify it, make an order which wil have the effect that the new procedure will not apply to the affairs of a particular Company.

The petitioning Creditor on this application for an adjournment has not placed before me evidence which might show, for example, that the Company is a hopeless wreck, or cannot be saved or safely be allowed to continue in business. I gather that such an assertion, if made, would be strongly contested and that the issues involved are likely to require trial on the merits. Taking the view that I have expressed as to the intended operation of Section 198, I propose to grant a short adjournment to enable the Company to give the required Notices, preferably at the instance of a Creditor if there is one qualified to make the request specified in Section 198(1). Failing this, and failing prompt action on the part of the Company, there would be no reason, so far as I can see, for the Court to adjourn the matter further.

Should the Notices specified be given by the Company, the petitioning Creditor will be at liberty, on proper material, to ask for leave to proceed under Section 199.

ORDER: Petition adjourned; to come on for hearing on 2nd May, 1967.