IN THE MATTER OF A.P. WHOLESALE AND RETAIL LTD AND IN THE MATTER OF COMPANIES ORDINANCE

High Court of Solomon Islands
(Muria J.)
Civil Case No. 174 of 1991
Hearing: 14 and 15 October 1991
Judgment: 18 October 1991

F. Waleilia for the Petitioner
T. Kama for Company
J. Corrin for a Number of Creditors
S. Iro for Melanesian Traders

MURIA J: In this matter a Winding-up Petition was presented on 29th July 1991 seeking that A.P. Wholesale and Retail Limited ("the Company") be wound-up by the court. The Petitioner is Henry Cumines Pty Limited ("the Petitioner") who claimed that the company was indebted to it in the sum of AU$13,712.99. The Petitioner alleges that the Company is unable to pay its debts and that in the circumstances it is just and equitable that the company should be wound-up. The statutory demand dated 22nd April 1991 under section 211(a) of the Companies Act (Cap.66) in the sum of AU$13,712.99 was served on the company on 26th April, 1991. That sum is said to be for goods sold and delivered together with interest thereon.

The circumstances in which a company may be wound up by the court are provided for under section 210 of the Act. One of such circumstance, and the one relied upon by the Petitioner, is that -

"the company is unable to pay its debts"

as specified in paragraph (e) of section 210.

The evidence for the Petitioner as disclosed in the affidavit of David Jessop were not disputed by the company. In fact counsel for the company informed the court from the Bar table that his client is not opposing the Petition.

Mr Jessop stated in his affidavit that on the 22nd April 1991 the company was indebted to the Petitioner in the sum of AUD$13,712.99 and a demand notice of which was served on the company's registered office on 26th April 1991. On the same day, the solicitor for the company wrote to the Petitioner's solicitor. In that letter the solicitor for the company

confirmed being served on behalf of the company the notice of demand for the payment of AUD$13,712.99. The letter also proposed repayment of the debt by instalments of AUD$500.00 per month. On the 6th May 1991, the solicitor for the Petitioner wrote to the solicitor for the company refusing acceptance of the company's proposal. I set out hereunder in full, the two letters mentioned. The letter written by the solicitor of the company on 26th April, 1991 to the solicitor for the Petitioner reads:

> *"Dear Sir,*
>
> *Re: Henry Cumines Pty Ltd*
>
> *I was served on behalf of A.P. Wholesales & Retails Limited your client's notice of demand for the payment of AUD$13,712.99.*
>
> *My client proposes to repay the debt by monthly instalments of AUD$500.00 commencing on Friday 3rd May, 1991.*
>
> *Can I have your client's acceptance of my client's proposal within 7 days?*
>
> *Would your client state in your return mail to whom they would like to be paid?*
>
> *Yours faithfully"*

The reply from the Petitioner's solicitor dated 6th May, 1991 reads:

> *"Dear Sir,*
>
> *Re: Henry Cumines Pty Ltd -v-A.P. Wholesale Ltd*
>
> *I refer to your letter of 26th April 1991 wherein your client offered to settle my client's debt of AUD$13,712.99 by monthly instalments of AUD$500.00. I have now received my client's instructions not to accept the offer on the basis that similar promises which your client has made in the past have not been honoured.*
>
> *Yours faithfully"*

As it can be seen, on the issue of the notice of demand on 22nd April 1991 the company did not deny that it owed the Petitioner the amount claimed. In fact in subsequent letters of 14th and 28th May 1991 which are exhibited to Mr Jessop's affidavit, the company paid by bank drafts to the Petitioner two (2) bank drafts of AUD$500.00 and two cheques of AUD$750.00 respectively as part payment of the debt of AUD$13,712.99. All those cheques had been returned by the Petitioner to the company.

It is submitted by counsel for the Petitioner that there are two important factors in the present case, and these are, firstly, the company is not disputing the Petition and secondly, the company, accepting that it owes the money to the Petitioner, offers to pay by instalments. This counsel says, shows that the company has been unable to pay its debts and meet the

requirement of the Demand Notice. In such circumstances, counsel says, the court need only have to be satisfied that the 21 days specified in the Notice have lapsed and that the debt remains outstanding. Further, counsel submitted that the court need to be satisfied that the demand was actually made and that the demand was for more than $100.00. Once the court is satisfied of those requirements then section 211 creates a presumption that the company is insolvent and in the absence of sufficient evidence, the court is bound to make the winding-up order.

As I have already mentioned, counsel for the company informed the court that his client is not opposing the Petition. Counsel, however, says that the company disputes the allegation that it was unable to pay its debts. He sought to support this argument on the basis that the company has offered and did make payments to the Petitioner in part settlement of the debt, although the cheques for those payments have been returned to the company. In any case, the company has since paid the sum of AUD$4,700.23 which was acknowledged by the Petitioner on 14th August 1991. A letter dated 14th August 1991 acknowledging the receipt of the said AUD$4,700.23 was produced by the company during the hearing and objected to by the Petitioner and other creditors. I will return to that letter later on.

What does the law says when a company is unable to pay its debts? Section 211 of the Act provides for the circumstances under which a company is deemed to be unable to pay its debts. These are:

> *"(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one hundred dollars then due has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or*
>
> *(b) if 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) if it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company."*

In the present proceedings, the Petitioner relies on paragraphs (a) and (c) which it says the company has satisfied, that is, the company neglected to pay the sum owing at the end of the 3 weeks demand notice and that the company has been shown to be unable to pay its debts. The onus of proving that the company is unable to pay its debts is on the Petitioner.

But what does the phrase "unable to pay its debts" in section 211(c) entail? In *The Law of Company Liquidation* by McPherson, 3rd Edition at pp. 54 and 55, the learned author writes:-

"The phrase 'unable to pay its debts' which appears in s.364(2)(c) (which is similar to our s.211(c)) is susceptible of two interpretations. One meaning which may properly be attached to it is that a company is unable to pay its debts if it is shown to be financially insolvent in the sense that its liabilities exceed its assets. But to require proof of this in every case would impose upon an applicant the often near-impossible task of establishing the true financial position of the company, and the weight of authority undoubtedly supports the view that the primary meaning of the phrase is insolvency in the commercial sense - that is, inability to meet current demands, irrespective of whether the company is possessed of assets which, if realised, would enable it to discharge its liabilities in full"

It will be observed that the learned author is there saying, that when a company is unable to pay its debts, it is insolvent in the commercial sense. In my view section 211(c) of our Act must be given similar interpretation.

The evidence in this case shows that at the presentation of the Petition the company owed the Petitioner the sum of AUD$13,712.99. Two other creditors who have given notice were owed a total of AUD$50,511.83. A further nine other creditors who also gave notice were owed a total of SI$409,992.63. One creditor who also gave notice was owed YEN 1,024,680.00 and another who also gave notice was owed HK$158,023.73. There is also evidence that a number of them are judgement creditors. There is no evidence from the company that any of those creditors have been paid and as such I find that at the time of presentation of the Petition those debts remained unpaid.

At the hearing of the Petition, the company sought to tender a letter from the Petitioner dated 14th August 1991 acknowledging the receipt of AUD$4,700.23 as part settlement of the sum specified in the statutory demand, that is, AUD$13,712.99. Counsel for the company argued that although the Petition is not disputed, the letter of 14th August, showed that the company is still willing to pay its debt and that the Petition should be brought on a different ground. What that ground was, counsel did not say. Counsel for the Petitioner has been taken by surprise by his client's letter acknowledging the receipt of AUD$4,700.23 in part settlement of its debt. He argued, however, that even if the letter is accepted as evidence of payment it did not change the position and does not affect the court's discretion to make the winding-up order since there is sufficient evidence to show that the company is insolvent and unable to pay its debts. Further, the company is not disputing the Petition. I consider it a major concession when counsel for the company informed the court in the course of his submission that there is no opposition to the Petition and that the company is prepared to assist if the order is to be made.

I accept the letter of 14th August as showing part payment of the debt owing. It does no more than that. The Petitioner is still, as to the undisputed portion of the debt, undisputedly a creditor. The letter does not mean that the debt is disputed. The position where the existence of the debt is not disputed is dealt with *Re Tweeds Garages Ltd* [1962] 1 All

E.R. 121, where Plowman J. said at page 124, after referring to sections 222, 223 and 224(1) of the Companies Act of 1948 (which provisions are equivalent to sections 210, 211 and 212 of our Companies Act (Cap. 66):

> *"From those provisions it appears that the only qualification which is required of the Petitioners in this case is that they are creditors, and about that, as I have said, there is really no dispute. Moreover, it seems to me that it would in many cases be quite unjust to refuse a winding-up order to a petitioner who is admittedly owed moneys which have not been paid merely because there is a dispute as to the precise amount owing. If I may refer to an example which I suggested in the course of argument, suppose that a creditor obtains judgment against a company for £10,000 and after the date of the judgment something is paid off. There is a genuine bona fide dispute whether the sum paid off is £10 or £20. The creditor then presents a petition to have the company wound up. Is the company to be entitled to say: "It is not disputed that you are a creditor but the amount of your debt is disputed and you are not, therefore, entitled to an order?" I think not. In my judgment, where there is no doubt (and there is none here) that the petitioner is a creditor for a sum which would otherwise entitle him to a winding-up order, a dispute as to the precise sum which is owed to him is not of itself a sufficient answer to his petition"*

Having said that, and being satisfied that the company was insolvent, Plowman J., continued:

> *"In the present case, being as I have said, satisfied that the company is insolvent, I think that it would be wrong to put these petitioners to the trouble and expense of quantifying the precise amount which is owing to them in other proceedings and in all the circumstances of this case I propose to make the usual compulsory order."*

It has also been stated that if a creditor petitions in respect of a debt which he claims to be presently due and that claim is undisputed, the petition proceeds to hearing and determination in the normal way: see *Stonegate Securities Ltd -v- Gregory* [1980] 1 All E.R. 241, *Re Tweeds Garages Ltd* (supra) and McPherson on *The Law of Company Liquidation*, 3rd ed. p. 63.

In the present case I am satisfied on the evidence before me that the company is unable to pay its debt owed to the Petitioner and I am further satisfied, that the debt is undisputed. I am also further satisfied that the company has for three weeks after the service upon it of a demand to pay the sum due, neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the Petitioning Creditor. In those circumstances I am also satisfied that the company is commercially insolvent.

That leaves me to consider what order I should make. The powers of the court on the hearing of a winding-up petition are provided under section 213 of the Act. Subsection (1) provides that:

"(1) On hearing a winding-up petition the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit, but the court shall not refuse to make a winding-up order on the ground only that the assets of the company have been charged or mortgaged to an amount equal to or in excess of those assets or that the company has no assets."

That provision gives the court a very wide discretion in the kind of orders it can make on hearing a winding-up petition and this no doubt is to enable the court to take into consideration all the circumstances of the case before it in order to decide whether it is just and equitable that the company should be wound-up.

In my judgement since the company did not oppose the petition the Petitioner is entitled to its order *ex debito justitiae* and accordingly I make the winding-up order. I consider it also within the courts power to make "any other order that it thinks fit". This power enables the Court to take into consideration circumstances which apart from the statutory provisions, the court might not have been entitled to rely upon. Thus I take into consideration the fact, and it is established by evidence, that the company after the filing of the winding-up petition offers to pay by instalments the debt owed to the Petitioner. I take into account also the fact that the Petitioner accepted payment of more than one-third of the sum due.

In my judgment those factors must also be properly considered by the court and I do so in this case, in order to make *"any other order that the court thinks fit"*.

Accordingly the order of the court is that the company shall be wound-up, but that order shall not be effective until the expiration of 14 days from the date hereof, and if in the meantime the company pays the balance due or give security to the satisfaction of the Petitioner for the payment of that outstanding balance the order will not take effect and there will be substituted an order dismissing the Petition with costs to be paid by the company. If the conditions aforesaid are not complied with within the time limited, then the winding-up order stands.

(G.J.B. Muria)
JUDGE