

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.23 OF 1999

BETWEEN:

HUGH C. MARSHALL Snr.

Appellant

and

**ANTIGUA AGGREGATES LIMITED
PAT ZILINKAS
ROBIN YEARWOOD
LESTER BIRD
EUDLYNJEFFREY**

Respondents

Before:

**THE HON. MR SATROHAN SINGH
THE HON. MR ALBERT REDHEAD
THE HON. MR ALBERT MATTHEW**

**JUSTICE OF APPEAL
JUSTICE OF APPEAL
JUSTICE OF APPEAL**

Appearances:

Mr Hugh Marshall Jnr. for the Appellant.

Mr Anthony Astaphan, Q.C., Miss Rika Bird and Mr Gary Collins with him for the Respondents.

June 12, 26: 2000

JUDGMENT

- [1] **SINGH, J.A.:** On December 8, 1999, **Georges J** struck off with costs certified fit for the respondents' counsel, a petition brought by the appellant for the winding up of Antigua Aggregates Limited [**The Company**].
- [2] In doing so, the learned judge agreed with the submissions of Senior Counsel, Mr Astaphan, that the petition filed, did not comply with the rules pertaining to the filing of such a petition.

- [3] The trial judge found those rules to be the English Companies (Winding-up) Rules of 1949. because the Antigua Legislation on Companies provided no such rules, even though there was power therein for Antigua to make its own rules.
- [4] The Appellant is dissatisfied and has appealed. He has conceded that there were no local rules guiding the presentation of a winding-up petition and that Antigua needed to look to the English Rules for guidance. However, learned Counsel Mr Marshall argued that the relevant English Rules were not the **1949 Rules** as found by the judge, but the **English Insolvency Rules 1986** as amended. He contended that applying these **Insolvency Rules**, the petition was not flawed.
- [5] The issue before this Court therefore, is whether a petition for winding-up of a company in Antigua should follow the **English 1949 Winding-up Rules** or the **English 1986 Insolvency Rules** as amended. And, if the latter, whether the petition was flawed.
- [6] It is pertinent to mention here that this appeal remained only against the **Company** as, by Order of this Court dated February 8, 2000, it stood dismissed against the other four respondents, with costs certified fit for Senior Counsel, on a concession made by Mr Marshall on behalf of the appellant.

THE ISSUE

- [7] At the commencement of the hearing of the appeal, senior counsel, Mr Astaphan conceded that the trial judge erred when he applied the **1949 Rules**. Learned counsel agreed with Mr Marshall that the relevant rules would be the aforementioned **English Insolvency Rules**. It is therefore only necessary for this Court to adjudicate on the issue whether or not, on an application of those rules, the petition as filed, was flawed. I will therefore now address that issue.

- [8] **Sections 8 and 9 of the English Insolvency Fees Order 1986**, as amended, prescribe, that before a winding-up petition can be presented in England, a deposit of 1500 pounds must be paid to the Court in which the petition was to be presented.
- [9] This **Order** is to be found in the **United Kingdom Statutory Instrument No.2030 of 1986**, which states that this pre-requirement would apply to the **Insolvency Act 1986** and the **Insolvency Rules 1986**. The **Order** was made by the **Lord Chancellor of England**, in the exercise of powers conferred on him by **Section 133 of the Bankruptcy Act 1914, Sections 414 and 415 of the Insolvency Act 1986. Section 2 of the Public Offices Fees Act 1879** and with the **Sanction of the Treasury of England**. It specifically states that the provisions of the **Order** extend to England and Wales only.
- [10] It is therefore reasonable to infer from these different power sources and its jurisdictional limitation, that the fees to be prescribed by the **Lord Chancellor** under this **Order**, would have to be fees peculiar to the situation and circumstances prevailing in England and Wales at the time of his decision.
- [11] This deposit was also stated to be in the form of security, for the statutorily fixed administration fee of £490 payable for the performance by the **Official Receiver** of England, of his general duties as **Official Receiver**, on the making of a winding up order. **[See item 1 in Part 1 of the Schedule to the aforementioned Order.]**
- [12] This deposit as it appears, is ambulatory. Initially it was fixed at £200 and since 1994 it was changed to £500 by the **Lord Chancellor of England** who was empowered as above stated by Statute so to do.
- [13] Senior counsel, Mr Astaphan contended that despite his aforementioned concession, because of this pre-requirement before the appellant's petition could

have been presented to the Court, that the judge's decision would still be correct, though for the wrong reason, and that the appeal should therefore still be dismissed, because the appellant did not make the t.500 deposit before he presented his petition

[14] Mr Marshall, accepted that such a prerequisite prevailed in England, but contended that it did not apply to Antigua as it would not be practicable to implement it. Alternatively, if applicable, then its non-observance by the appellant was a mere irregularity which could be cured and that it did not nullify the presentation of the petition. Learned counsel referred, in support thereof, to **Section 7.55** of the aforementioned **Insolvency Rules 1986**, which dealt with "Winding-up (England)". This rule stated that "no insolvency proceedings shall be invalidated by any formal defect or by any irregularity unless the Court before which objection is made considers that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the Court",

[15] It is accepted that there are no local rules guiding the presentation of a company's winding-up petition in Antigua. It is also accepted that Antigua needed to look to the **English Rules** for such guidance. Power to do so, is given by **Section 11 of the Eastern Caribbean Supreme Court Act Cap. 143** which states that:-

"The jurisdiction vested in the High Court in Civil proceedings, and in Probate, Divorce and Matrimonial causes, shall be exercised in accordance with the provisions of this Act and any other law in operation in Antigua and Barbuda and rules of court, and where no special provision is therein contained **such jurisdiction shall be exercised as nearly as may be in conformity with the law and practice administered for the time being in the High Court of Justice in England.**" [Emphasis mine]

[16] This provision did not mandate a total and slavish acceptance of the English Rules. It suggests that the jurisdiction should be exercised **as nearly as may be**, in conformity with the law and practice for the time being administered in the High Court of England. This, in my view, suggests, that only those rules, that could with convenience be used in Antigua, should be adopted.

- [17] Unlike in England, there is no **Official Receiver** in Antigua. In winding-up proceedings in the High Court in this jurisdiction, Liquidators are appointed by the Court to carry out the functions of the **Official Receiver**. The Liquidators' fees are determined by the Court on the application of the Liquidator, and the Court decides by whom payment of those fees should be made. Those fees are not fixed by Statute like those of the **Official Receiver** in England.
- [18] In deciding on £200 and then £500 in England, the **Lord Chancellor** would have had to consider circumstances as they prevailed in England and Wales. And, as is obvious, as those circumstances change, the **Lord Chancellor** would amend that fee to accommodate the new English situation.
- [20] Given those factors, share the view of Mr Marshall, that to import that pre-requirement into the **Antigua Company's** Act, would be to allow the **Lord Chancellor of England** to dictate the fees for Court approved Liquidators in Antigua, based on situations prevailing in England and Wales and not in Antigua.
- [21] In my judgment therefore, I would rule that whilst the **English Insolvency Rules 1986**, as amended, should guide the presentation of winding-up petitions in Antigua and Barbuda, until there is a local rule authorizing a similar deposit pre-requirement, there is no such pre-requirement in existence in the Antigua jurisdiction. The English pre-requirement of the ISOO deposit is not to be treated as part of the Laws of Antigua and Barbuda regulating the presentation of winding-up petitions to the High Court of Justice. It is not a substantive provision of the **English Insolvency** Rules. It is contained in an **Order** made by the **Lord Chancellor of England** who was mandated by statute to decide on the fees required for the operation of the **Insolvency Rules** in England and Wales.
- [21] For these reasons, I would allow this appeal and set aside the judgment of **Georges J.** The winding-up petition is restored, and referred back to the High Court, to be proceeded with, in accordance with the other procedural requirements of the 1986 **English Insolvency Rules** as amended, in so far as it is practicable and convenient to use those rules in the Antigua jurisdiction. Of this, the judge will decide.

[22] The appellant will have his costs in this court to be taxed if not agreed.

SATROHAN SINGH
Justice of Appeal

I concur

ALBERT REDHEAD
Justice of Appeal

I concur

ALBERT MATTHEW
Justice of Appeal