

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CIVIL)
A.D. 2021**

CLAIM NO. AXAHCV 2020/0009

BETWEEN:

**JOHN OLIVER DYRUD
(AS A SHAREHOLDER AND DIRECTOR OF WDM LIMITED)**

Petitioner

and

- 1. WDM LIMITED**
- 2. PALMAVON J. WEBSTER**

Respondents

Appearances:

Ms. Jean M. Dyer, J. M. Dyer & Co. of Counsel for the Petitioner

Ms. Rayana Dowden, Webster LP of Counsel for the Second-named Respondent

2020: June 9;
2021: January 5.

Winding up petition – Section 217 Companies Act – Private limited company – Petition for winding up by director and shareholder on just and equitable grounds – Alleged deadlock in the management and affairs of company – Company a corporate vehicle through which partnership conducted business for the benefit of the partnership – Whether common intention or understanding between shareholders leading to quasi-partnership – Whether just and equitable to order winding up of company

DECISION

[1] **INNOCENT, J.:** The petitioner ('Mr. Dyrud') and the second-named respondent ('Ms. Webster') are the only shareholders and directors of WDM Limited (the 'Company') with a shareholding of 50% each in the issued share capital of the Company.

[2] Prior to the incorporation of WDM Limited, Ms. Webster and Mr. Dyrud formed a partnership, Webster & Dyrud, for the purposes of carrying on a law practice by a written partnership agreement (the 'Partnership Agreement') dated 18th January

1993. The partnership was for a fixed term and was to expire on 31st December 2002 unless otherwise agreed. The partnership continued after its term had expired as a quasi-partnership.

- [3] WDM Limited was incorporated on 11th June 1999 for the purpose of acquiring and holding property as nominee for the Webster & Dyrud partnership through which Mr. Dyrud and Ms. Webster could indirectly own land in Anguilla. WDM Limited is the registered owner of the property registered as East Central Block 89319B Parcel 55, upon which is situated the premises known as Mitchell House (the 'Property'). The Property was acquired by the Webster & Dyrud partnership through a business loan from a commercial bank with a charge secured against the Property and a policy of insurance. After the acquisition of the Property, the partnership became known as Webster Dyrud Mitchell ('WDM').
- [4] The partnership failed due to a breakdown in relations between Ms. Webster and Mr. Dyrud, and the disputes between the parties were referred to an arbitrator. According to the Arbitration Award, Ms. Webster was adjudged to be liable for the indebtedness of the WDM partnership. The arbitrator adjudged that the WDM partnership ended as of 31st December 2006.
- [5] The Property is the only asset owned by WDM Limited. Mitchell House was destroyed by the ravages of Hurricane Irma. An impasse developed between the parties as to the application of the proceeds of the policy of insurance over the Property.¹ As a result of this impasse, Ms. Webster applied to the court for leave to bring a derivative action against Mr. Dyrud on the ground that the parties were hopelessly deadlocked with respect to the issue of the manner in which the proceeds of the insurance policy ought to have been deployed. The intended derivative action also sought to interrogate issues related to the management and

¹ At para 17 affidavit of PJW

corporate governance of WDM Limited by Mr. Dyrud. The application for leave to bring a derivative action was dismissed.

- [6] What is clear, is that the original purpose for which the WDM partnership was formed is no more. This is not in dispute. The WDM partnership was taken over by Ms. Webster and the firm Webster.
- [7] Mr. Dyrud and Ms. Webster are both in agreement that there exist a total and irretrievable breakdown of the business relationship of mutual trust, confidence and cooperation between them.
- [8] Ms. Webster opposes the winding up petition on the grounds that Mr. Dyrud has confused the issues regarding WDM Limited with those of the WDM partnership. Ms. Webster insisted that the indebtedness for the business loan from the commercial bank is that of WDM Limited and not that of the WDM partnership. It is not in dispute that the WDM partnership (formerly Webster & Dyrud) was stated as borrower on the loan agreements entered into.²
- [9] Ms. Dowden submitted that WDM Limited is a separate legal entity from the WDM partnership. In respect of this argument, Ms. Dowden has interpreted the Arbitration Award to mean that the arbitrator's finding with respect to Ms. Webster's and Webster's indebtedness was with respect to the WDM partnership and did not touch and concern the liability of WDM Limited. In other words, WDM Limited continues to be liable for the debt. Ms. Dowden also submitted that WDM Limited's liability for the loans is still a live issue which was not determined by the arbitrator in the Arbitration Award.
- [10] On the contrary, Ms. Dyer, counsel appearing for Mr. Dyrud, submitted that the Business Loan Agreement ('BLA') clearly shows that the liability for the indebtedness to the commercial bank is that of the WDM partnership (formerly

² At paras 10-11 affidavit of PJW

Webster & Dyrud) and not that of WDM Limited. Ms. Dyer submitted that ultimately the liability is that of the WDM partnership, the contractual obligation for which has been assumed by Webster LP. Therefore, Ms. Dyer argued that WDM Limited's assets cannot properly exist for the purpose of discharging what is ostensibly the indebtedness of Ms. Webster and Webster LP.

- [11] It appears that for many years the parties engaged in financial dealings and transactions with the WDM partnership (formerly Webster & Dyrud) as the engine that drove the entire operation utilising various corporate entities to carry on the mandate of the WDM partnership. It also appears that these other corporate entities, including WDM Limited, were corporate vehicles through which the parties carried on business at one time as a partnership and another as a quasi-partnership.
- [12] In the present case, the affairs of WDM Limited's existence can properly be described as having been inextricably bound up and intertwined with the WDM partnership. The disintegration of the business relationship between the parties related to the WDM partnership has also eroded the underlying purpose for which WDM Limited was formed in the first place. It does not appear that the constitution of WDM Limited provides an exit route to either party.
- [13] WDM Limited's existence as a corporate vehicle, holding company or nominee of the WDM partnership is amplified by Ms. Webster's averments in her affidavit filed in opposition to the petition.
- [14] Ms. Webster stated that as part of their business structure, all financial transactions were processed through the law firm (WDM) and that it was not uncommon for the parties to provide personal guarantees or use personal assets as security for loans accessed by the law firm and/or corporate entities in which they were shareholders.³

³ At para 3 affidavit PJW 16th March 2020

- [15] Ms. Webster does not dispute, but rather affirms that WDM Limited was incorporated specifically to hold the Property.⁴ Ms. Webster does not dispute Mr. Dyrud's contentions regarding the manner in which the Property was acquired. It appears that Ms. Webster agrees that to purchase the Property a loan was obtained from the National Bank of Anguilla Ltd. ('NBA').⁵ It also appears that the Business Loan Agreement ('BLA') dated 8th June 1999 specifically stated that it was for the purpose of purchasing the Property (Mitchell House).⁶ It is clear from the BLA that it was entered into by the Webster & Dyrud partnership.
- [16] The initial loan was secured by the Property. On or about 8th November 2001, Mr. Dyrud and Ms. Webster agreed to vary the terms of the initial loan which is evidenced by the Revision Agreement dated 8th November 2001.⁷
- [17] Ms. Webster also referred to a resolution of WDM Limited dated 8th November 2001 wherein the company resolved to enter into the Revision Agreement. Ms. Webster relied on this resolution⁸ in support of her contention that she and Mr. Dyrud always considered the loan to be a WDM Limited loan although the borrower was reflected as the law firm Webster & Dyrud. According to Ms. Webster, this fact was consistent with the business structure employed by them wherein all their business relations were managed through Webster & Dyrud.⁹
- [18] Ms. Webster described the business model employed by Mr. Dyrud and herself as involving the employment of companies to hold assets. According to Ms. Webster, WDM Limited was not generating income at the time and could not access loan facilities.¹⁰

⁴ At para 5 infra

⁵ At para 6 Infra

⁶ Exhibit PJW1

⁷ Exhibit PJW3

⁸ Exhibit pJW2.

⁹ At para 9 affidavit of PJW

¹⁰ At para 10 affidavit of PJW

[19] The initial loans were refinanced in 2005 with FirstCaribbean International Bank (Barbados) Limited ('FCIB'). The purpose of the refinancing was to assist with the repayment of the loan facilities with NBA. The refinancing arrangement with FCIB was also secured by the Property. The loan agreement with FCIB dated 30th June 2005 is addressed to 'The Partners, Webster Dyrud Mitchell', and is executed by both Mr. Dyrud and Ms. Webster on 4th July 2005 in their capacities as partners of WDM.¹¹

[20] Ms. Webster appeared to have made an attempt to contradict the findings of the arbitrator in the Arbitration Award. Ms. Webster's position is that the arbitrator did not consider either Mr. Dyrud's personal liability for the 2005 loan or the liability of WDM Limited for the said loan. According to Ms. Webster, WDM was an unincorporated entity and therefore the partners are personally liable for its indebtedness. In Ms. Webster's view, WDM Limited's liability for the indebtedness to FCIB did not fall within the scope of the arbitrator's terms of reference.¹²

[21] It is not accurate that the debts of WDM Limited did not fall within the scope of the arbitration or did not form part of the arbitrator's terms of reference.¹³

[22] At paragraph 1 of the Arbitration Award the arbitrator stated:

"The instant Arbitration is to resolve certain disputes and differences that exist between the Claimant and the Respondent ("the parties") with respect to Webster Dyrud Mitchell ("WDM"), First Anguilla Trust Company Limited ("FATCL") and related entities."

In addition, the arbitrator stated:

"The Claimant contends that given the interconnectedness of the WDM Partnership to the 'related entities', it would be impossible to wind up the affairs of the WDM Partnership without addressing indebtedness carried by those entities for the benefit of the WDM Partnership ...

¹¹ Exhibit PJW5

¹² At para 24 affidavit of PJW

¹³ See paras 1, 12, 15 and 16 Arbitration Award (Exhibit JOD2)

In furtherance to the 'related entities' claim, the Claimant states that Mitchell House, the office building of FATCL, which is more particularly described as Registration Section South East; Block 78914B; Parcel 55 is owned by WDM Ltd.; the Claimant and Respondent are each 50% shareholders."¹⁴

- [23] In the Arbitration Award the arbitrator summarised under the rubric 'Related Entities' at paragraph 18 the issue related to the indebtedness of WDM and the related entities in the following terms:

"The claimant requires that in the delivery of the award through the arbitrator, that there be determination and quantification of the extent to which the claimant has any liability for any such debt incurred following his de facto retirement from the WDM partnership."

- [24] In addition, at paragraph 307 of the Arbitration Award, with reference to issue 18 under the rubric 'What is the extent of the parties' respective liability for indebtedness of related entities?' the arbitrator found as follows:

"The Tribunal accepts that any liability the Claimant may have is proscribed by virtue of Clause 1.3 of the PWA. Therefore, save and except for any such claim against the Firm that falls within the parameters of Clause 1.3 of the PWA, it is held that the Claimant has no liability for the indebtedness of WDM."

- [25] In light of the terms of the Arbitration Award, it appears that the issue regarding the parties' respective indebtedness for the debts of the WDM partnership and related entities was fully and finally determined by the arbitrator. In the circumstances, the court finds that the encumbrances created over the Property were incurred for the use and benefit of the WDM Partnership. Therefore, pursuant to the Arbitration Award Mr. Dyrud is not personally liable for the debts of the WDM partnership.

- [26] Ms. Webster contended that in all the circumstances of the case it is not just and equitable to wind up WDM Limited. The fulcrum of Ms. Webster's argument is that a liquidation of WDM Limited's assets is not an appropriate remedy to end the deadlock between the parties. The gist of Ms. Webster's argument is that the

¹⁴ At paras 12-13 of the Arbitration Award

eventual pivotal issue of the distribution of the proceeds of the liquidation will not be resolved by ordering a winding up of the Company.

- [27] The short answer to Ms. Webster's concerns is simply that FCIB has secured the WDM partnership's debt by way of charge over the Property. The WDM Partnership has been dissolved. The arbitrator adjudged Ms. Webster personally liable for the debts of the WDM Partnership. Therefore, if the proceeds of the liquidation are applied to the payment of the debt secured over the Property, then clearly Ms. Webster is liable to reimburse Mr. Dyrud for his loss of equity in WDM Limited. Clearly, it is not in dispute that the Property was acquired for the WDM partnership which was dissolved by Mr. Dyrud's retirement therefrom.
- [28] Notwithstanding this syllogistic reasoning, Ms. Webster has instead proposed that the Property be sold by public auction and the proceeds thereof be paid to FCIB to liquidate the debt owed to FCIB by the former WDM partnership. It appears that Ms. Webster's rationale for this proposal is that WDM Limited cannot afford to incur the costs of the liquidation and the liquidator.
- [29] The court is of the view that WDM Limited is, in substance, a partnership or a quasi-partnership disguised with the façade of a private company. For all intents and purposes the substratum upon which WDM Limited stood, which was essentially the understanding and common intention of the parties that it would act as a holding company for the WDM partnership for the purpose of acquiring the Property and to secure financing for the WDM partnership, has disintegrated completely.
- [30] In addition, not only do the parties appear to be hopelessly deadlocked in respect of the application of the proceeds of the policy of insurance, but the relationship of mutual trust and confidence between the parties is now virtually nonexistent. The progenitor of WDM Limited, the WDM partnership has molded away, and its progeny, WDM Limited has joined its kindred dust.

- [31] In the circumstances, the court is of the view that it is just and equitable to order the winding up of WDM Limited. The entire purpose for which WDM Limited existed has been frustrated as a result of the dissolution of the WDM partnership.
- [32] In the present case, the sole purpose for which the company was formed was to act as a holding company for the purpose of acquiring the Property for the use and benefit of the shareholders' law firm which was being operated as a partnership. The partnership was subsequently dissolved and the sole purpose for which the holding company was formed has been entirely frustrated. The court is of the view that such circumstances can amount to just and equitable grounds for winding up the Company.
- [32] In arriving at its decision, the court is guided by the principles set out in **Union Zone Management Limited**.¹⁵ In **Union Zone**, the issue of whether common intention, or understanding among shareholders amounted to a quasi-partnership arose. The Court of Appeal in **Union Zone**, applying the decisions in **Ebrahimi v Westbourne Galleries Ltd and others**¹⁶, held, that in applying its discretion the court must have regard to the particular context which the court had to address and based on rational principles. The Court of Appeal reasoned that the fact that a company is a small private company is not enough to engage equitable considerations. The superimposition of equitable considerations would require something more; which may include an association formed or continued on the basis of a personal relationship; an agreement or understanding that all or some of the shareholders shall participate in the conduct of the business. The Court of Appeal also held that an allegation of frustration of the purpose, if proved, would naturally be a good ground for winding up a company on just and equitable grounds.

¹⁵ [2015] ECSCJ No. 4

¹⁶ [1972] 2 All ER 492

[33] The court is further fortified in its conclusions by the recent decision of the Privy Council in the case of **Chu v Lau**¹⁷ where the Privy Council held that a just and equitable winding-up may be ordered where the company's members have fallen out in two related but distinct situations, which may or may not overlap.

[34] In **Chu v Lau** Lord Briggs delivering the judgment of the court said:

"A just and equitable winding-up may be ordered where the company's members have fallen out in two related but distinct situations, which may or may not overlap. First, a winding-up may be ordered to resolve what may conveniently be labelled a functional deadlock. This is where an inability of members to co-operate in the management of the company's affairs leads to an inability of the company to function at board or shareholder level. Functional deadlock of this paralysing kind was first clearly recognised as a ground for a just and equitable winding-up by Vaughan Williams J in *In re Sailing Ship Kentmere Co* [1897] WN 58, a decision on the jurisdiction conferred by section 79 of the (UK) Companies Act 1862 (25 & 26 Vict, c 89). 15.

Secondly, where the company is a corporate quasi-partnership, an irretrievable breakdown in trust and confidence between the participating members may justify a just and equitable winding-up, essentially on the same grounds as would justify the dissolution of a true partnership."¹⁸

[35] After discussing the jurisprudence that evolved over the years involving winding up on just and equitable grounds due to deadlock Lord Briggs went on further to state:

"The important potential distinction between the two types of breakdown case is this. If there is a complete functional deadlock, then a winding-up may be ordered regardless whether the company is a corporate quasi-partnership. But if the company is of that type, then a breakdown of trust and confidence may justify a winding-up even where there may not be a complete functional deadlock. In the former case winding-up is a remedy for paralysis. In the latter it is the response of equity to a state of affairs between individuals who agreed to work together on the basis of mutual trust and confidence where that trust and confidence has completely gone. But of course both may exist together, and a complete breakdown in trust and confidence may well be the cause of functional deadlock, in a two party quasi-partnership like the present."¹⁹

¹⁷ [2020] UKPC 24

¹⁸ At paras 14-15

¹⁹ At para 17

[36] In relation to the question of whether there must be deadlock between the shareholders on a specific issue Lord Briggs had this to say:

“It is necessary to start with a little more analysis of the law. Leaving aside corporate quasi-partnership, when addressing the question of functional deadlock it is the management of the company sought to be wound up that must be addressed. Deadlock about other matters is neither here nor there, if the subject company is still capable of being effectively managed, and decisions made about important aspects of the direction of its business and assets. Nonetheless the breadth of the parties’ fallingout over other business matters may be very relevant to the court’s assessment of the question whether an apparent deadlock within the subject company has become irremediable.”²⁰

[37] In relation to the issue of an alternative remedy Lord Briggs opined:

“It is well established that winding-up is a shareholders’ remedy of last resort. But this does not mean that winding-up is unavailable to members if they have any other remedy. The member retains a significant element of choice in the remedy to be sought, even though the court has the last word.”²¹

[38] Ms. Dowden, counsel appearing for Ms. Webster, has suggested that there are two alternatives available to Mr. Dyrud, namely, the sale of Mr. Dyrud’s shares on the open market or the sale of the property owned by WDM Limited by public auction.

[39] With respect to the second option proposed by Ms. Dowden, the court has taken the view that on a petition for winding up, the court has no jurisdiction to make such an order. In addition, the sale of the property by public auction will not lay to rest the matters in dispute between the parties in so far as they relate to the management and corporate existence of WDM Limited, which appears to be of primordial importance to the parties.

[40] The court has assessed the question of the sale of Mr. Dyrud’s shares on the open market and has adopted the views expressed by Ms. Dyer. It appears that this is not a viable option open to Mr. Dyrud since the only asset owned by WDM Limited

²⁰ At para 23

²¹ At para 20

is heavily encumbered particularly with respect to debts that Ms. Webster is personally liable for.

[41] In **Chu v Lau** Lord Briggs considered the question of alternative remedies as they related to the sale of shares of a shareholder and said:

“It might in the Board’s view be an answer to a case based purely on functional deadlock that a member could extract himself by a sale of his shares, but only if he could be expected to be able to do so upon fair terms.”²²

[42] In the circumstances, the court makes the following order: -

1. The Petition for the winding up of the company WDM Limited is granted.
2. A liquidator shall be appointed in accordance with section 222 of the Companies Act for the purpose of dissolving the company WDM Limited in accordance with the provisions of the Companies Act.
3. The respondent shall pay the costs of the Petition for winding up to be assessed if not agreed within 21 days of this judgment.

Shawn Innocent
High Court Judge

By the Court

Registrar

²² At para 49

