

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CIVIL)
A.D. 2020**

CLAIM NO. AXAHCV 2020/0010

BETWEEN:

JOHN OLIVER DYRUD

Petitioner

and

- 1. SEA-ISLAND REALTIES 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 4;
2021: January 5.

Winding up Petition – Section 217(1)(a)(ii) of Companies Act, R.S.A., c. C65 – Petition by shareholder to wind up company on just and equitable grounds – Alleged deadlock in management of company – Whether just and equitable to wind up company – Alternative remedies to a winding up order – Enforcement of arbitration award – Whether quasi-partnership

[1] **INNOCENT, J.:** Mr. John Oliver Dyrud (the ‘Petitioner’) seeks an order for the winding up of Sea-Island Realities Limited (‘Sea-Island Realities’) pursuant to section 217(1)(a)(ii) of the Companies Act.¹ The petition is opposed by the second-named respondent, Ms. Palmavon J. Webster (‘Ms. Webster’).

[2] Mr. Dyrud seeks the winding up of Sea-Island Realities on the grounds that there has been a total and irretrievable breakdown of the longstanding business relationship between the parties which has resulted in deadlock between the two

¹ R.S.A. c. C65

shareholders regarding the management of Sea-Island Realities and, that in all the circumstances of the case, it is just and equitable to dissolve the company.

- [3] Sea-Island Realities was incorporated by Ms. Webster in 1988 with only one issued share held by her, and prior to Mr. Dyrud's acquisition of an interest in the shareholdings of Sea-Island Realities. Sea-Island Realities was continued under the Companies Act on 1st January 1997 with a share capital of 50,000 shares. Mr. Dyrud and Ms. Webster each own fifty percent of the shareholding of the company. Mr. Dyrud's shareholding in the company is not in dispute.
- [4] It appears that Sea-Island Realities was incorporated by Ms. Webster prior to the commencement of the partnership arrangements between Mr. Dyrud and herself which involved the transaction of professional business via the medium of First Anguilla Trust Company Limited ('FATCL') and the law firm Webster Dyrud Mitchell ('WDM'), and other related entities. The partnership arrangements between Mr. Dyrud and Ms. Webster relative to those entities have since been dissolved by a Partnership Withdrawal Agreement ('PWA') and an Arbitration Award.
- [5] Ms. Webster has opposed the winding up petition on the grounds that it is not just and equitable, in all the circumstances of the case, for the court to wind up the affairs of the company.
- [6] The bases for Ms. Webster's opposition to the winding up proceedings stems primarily from her involvement in Sea-Island Realities from its inception and the financial contribution that she claims that she has made in respect of the acquisition of the only asset held by Sea-Island Realities.
- [7] Ms. Webster claims that Sea-Island Realities was incorporated by her primarily for the purpose of transacting real estate business and thereafter for holding her personal and family assets. Her sister is also one of the persons appointed as a director of the company.

- [8] Ms. Webster also claims that she purchased the property registered as Registration Section East Central Block 89319 Parcel 109 ('Parcel 109') in 2002 without any financial contribution from Mr. Dyrud. Parcel 109 is registered in the name of Sea-Island Realities. Parcel 109 is presently held as security for a loan obtained by the WDM partnership in 2005 and subsequent refinancing obtained in 2008. In the arbitration proceedings, the arbitrator found that Mr. Dyrud was not liable for the debts of the WDM Partnership or any of its related entities and that Ms. Webster and Webster were solely liable for the debts.
- [9] In support of her opposition to the petition for winding up, Ms. Webster contended that Mr. Dyrud is seeking to employ the remedy of winding up as a means of enforcing the Arbitration Award, a fact which Mr. Dyrud forcefully denies, despite the fact that there are other secured creditors interested in the assets of Sea-Island Realities. Ms. Webster contended that the charge secured on Parcel 109 exceeds its market value.
- [10] Section 217(1)(a)(ii) of the Companies Act empowers the court to order the liquidation and dissolution of a company or any of its affiliated companies upon the application of a shareholder, debenture holder, creditor, director or officer if the court is satisfied that it is just and equitable that the company be liquidated and dissolved.
- [11] The present case interrogates the exercise of the court's discretionary power to order the winding up and dissolution of Sea-Island Realities on just and equitable grounds and the principles that ought to guide the court in the exercise of such discretion.
- [12] In the circumstances, the court must first resolve the issue of whether the shareholders of Sea-Island Realities are deadlocked on issues related to the management of the company.

- [13] It is not in dispute that the relationship between Mr. Dyrud and Ms. Webster has broken down to the point that they can no longer coexist within a business relationship. The present proceedings is just another chapter in the seemingly never ending saga of litigation between the parties concerning the many intertwined entities that they jointly owned and operated at most instances in the form of a quasi-partnership.
- [14] However, in respect of the petition for winding up, there appears to be no specific issue related to the corporate governance and management affairs of Sea-Island Realities over which the parties are deadlocked. What is apparent is that Mr. Dyrud clearly wants out of the company. The critical issue is whether this is sufficient reason to enable the court to order the winding up of the company.
- [15] Ms. Webster contended that Mr. Dyrud has not made out a case for the winding up of the company on just and equitable grounds for the following reasons.
- [16] Firstly, that Sea-Island Realities was incorporated prior to the commencement of any quasi-partnership between them and prior to the acquisition of any shares by Mr. Dyrud in the company. This is not a matter of dispute between the parties.
- [17] Secondly, that the sole asset owned by Sea-Island Realities, namely Parcel 109, was acquired by the company prior to Mr. Dyrud becoming a shareholder of the company. This fact is not denied by Mr. Dyrud.
- [18] Thirdly, that Mr. Dyrud, by virtue of his membership as a partner in WDM (the law firm) and other related entities, derived a benefit from the loans for which Parcel 109 stood as security. This is a point of contention between the parties despite this issue having been clearly and distinctly settled in the arbitration proceedings. On this point, Mr. Dyrud argued that the debts of the WDM Partnership and the related entities in which he and Ms. Webster were involved, were solely the responsibility of Ms. Webster and Webster LP. This issue, as far as the court is concerned, was finally and distinctly settled in the arbitration proceedings. Therefore, given this

finding, Mr. Dyrud is not at risk of incurring any liability as a shareholder in respect of the security held over Parcel 109.

- [19] Fourthly, that Mr. Dyrud has presented no evidence that his rights as shareholder have been or are being infringed. In essence, Ms. Webster contends that save and except for the bald assertions regarding irretrievable breakdown of the relationship between the parties, there exists no other ground upon which the court can competently exercise its discretion to order the dissolution of the company.
- [20] Fifthly, Ms. Webster has raised an issue that may conveniently be regarded as lying at the kernel of the present case; the resolution of which may very well determine whether or not the court applies its discretion towards granting the winding up order.
- [21] According to Ms. Webster, the position is that Mr. Dyrud's desire to realise his investment and to enforce the Arbitration Award, cannot be satisfied by winding up proceedings; and in order to satisfy his desire, it is open to him to sell his shares to a third party at market value.² In addition, Ms. Webster contended, that there is no deadlock between the parties. More importantly, Ms. Webster relied on the fact that the company was not operated as a quasi-partnership, the object of which has disintegrated as a result of the conduct of the parties and the perennial disputes between them.
- [22] Ms. Webster also argued that Mr. Dyrud, in presenting the winding up petition, has conflated issues related to other entities operated as quasi-partnerships between the parties with the affairs of the Sea-Island Realities, which were the subject of the arbitration proceedings,
- [23] Essentially, Ms. Webster adopted the position that the findings of the arbitrator did not affect Sea-Island Realities, and therefore, it would be improper to import the

² Per Blenman JA in *Chu Kong v Lau Wing Yan and another* at para 62

deadlock and disputes between the parties relative to those other entities as evidence of deadlock and breakdown in the relationship of trust and confidence between the parties in the present proceedings. Ms. Webster's argument appears to be premised heavily on the approach adopted by the Court of Appeal in the case of **Chu Kong v Lau Wing Yan and another**³ upon which she relied extensively.

[24] In **Chu Kong v Lau Wing Yan and another**,⁴ the applicant and the respondent were both directors and 50% shareholders of a BVI holding company ('OSL') for another company in Hong Kong ('PBM'). PBM owned the minority shares in another company in Hong Kong ('BG'). PBM invested monies in BG. The applicant required his share of the monies that PBM had invested in BG and sought to have them paid to him. The parties disagreed as to the course that should be followed in light of the applicant's request. The applicant applied to the court for the winding up of OSL on the ground that it was just and equitable to do so owing to the breakdown of trust and confidence between himself and the respondent which resulted in a deadlock between himself and the respondent in the management of OSL. The winding up application was granted and the respondent appealed to the Court of Appeal to determine the question of whether the Commercial Court judge had erred when he found that the parties were deadlocked and whether the learned judge erred in the exercise of his discretion in ordering the winding up of OSL.

[25] On appeal, it was held, allowing the appeal that the learned judge took into consideration issues related to BG which could not have affected OSL at the director and shareholder level. That as a general rule, matters which concern a totally unrelated company which is not a subsidiary should not be taken into account to determine whether there was a deadlock in a company. BG was not a subsidiary of OSL. Neither was OSL a holding company of BG. That there was

³ Supra

⁴ [2020] ECSCJ No. 5

objective documentary evidence before the judge pointing to the fact that there was no deadlock. The Court of Appeal found on the evidence that the relationship between the parties had not deteriorated to the point of deadlock in the management of the company.

[26] It is clear from the reasoning of the Court of Appeal in **Chu Kong v Lau Wing Yan** that a winding up petition should not be resorted to merely because there is dissension within a company. In the present case, the dispute between the parties seemingly concern Ms. Webster's indebtedness to Mr. Dyrud which emanates from the arbitration award, and Mr. Dyrud's employment of the winding up process as a method of enforcing the Arbitration Award. It cannot be said, in these circumstances, that the dispute is in the nature of a deadlock in the management of the company.

[27] Unlike the case of **Chu Kong v Lau Wing Yan**, there is no evidence, and it does not appear from the company's articles and by-laws, that there is contained therein an exit route from the company or a means of resolving any deadlock between the parties. Mr. Dyrud himself considers that there are no other reasonable alternatives available to him given the constitution of the company.⁵ Ms. Webster has argued that Mr. Dyrud has the alternative of selling out his shares to a third party at market value. However, the court is of the view that given the current state of indebtedness of the company, this is clearly not a viable option for Mr. Dyrud to explore; a fact upon which Mr. Dyrud also relied.⁶

[28] Mr. Dyrud contended that the business relationship between the parties can properly be regarded as a quasi-partnership and was one of the related entities referred to by the arbitrator in the arbitration proceedings.⁷ It appears that Mr. Dyrud's argument is that the breakdown of trust and confidence between the parties in the management of WDM, WDM Limited, FATCL and First Nevis Trust

⁵ At para 7 2nd affidavit of JOD filed 20th May 2020 (Exhibit JOD4)

⁶ Supra

⁷ At paras 4 and 5 2nd affidavit of JOD filed 20th May 2020 (Exhibit JOD2)

Company Limited ('FNTCL') has somehow also infected the relationship of trust and confidence between the parties which has resulted in deadlock in the management of the company. On this basis, Mr. Dyrud contended that Sea-Island Realities should be dissolved on just and equitable grounds. Mr. Dyrud sought refuge in what is contained at paragraphs 12-15 of the Arbitration Award relative to his claim as it relates to the "related entities". Mr. Dyrud's position in the arbitration proceedings was 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 the indebtedness carried by those entities for the benefit of the WDM Partnership.

[29] In support of this argument, Mr. Dyrud relied on the case of **In re Yenidje Tobacco Company Limited**⁸ for the proposition that in the case of a partnership there would clearly be grounds for a dissolution, and that the same principle ought to be applied where there was in substance a partnership in the guise of a private company; and that in these circumstances, where the situation amounts to a complete deadlock, it was just and equitable that the company should be wound up.

[30] Lord Cozens-Hardy M.R. in giving the court's reasons in **In re Yenidje Tobacco Company Limited** said:

"In those circumstances, supposing it had been a private partnership, an ordinary partnership between two people having equal shares, and there being no other provision to terminate it, what would have been the position? I think it is quite clear under the law of partnership, as has been asserted in this Court for many years and is now laid down by the Partnership Act, that that state of things might be a ground for dissolution of the partnership for the reasons which are stated by Lord Lindley in his book on Partnership at p. 657 in the passage which I will read, and which, I think, is quite justified by the authorities to which he refers: "Refusal to meet on matters of business, continued quarrelling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation have been held sufficient to justify a dissolution. It is not

⁸ [1916] 2 Ch. 426

necessary, in order to induce the Court to interfere, to show personal rudeness on the part of one partner to the other, or even any gross misconduct as a partner. All that is necessary is to satisfy the Court that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it.”⁹

[31] **In re Yenidje Tobacco Company Limited**, the court treated the private entity as a partnership and ordered the winding up of the company. The court’s reasoning for adopting that approach can be found in the following portion of the judgment:

“I have treated it as a partnership, and under the Partnership Act of course the application for a dissolution would take the form of an action; but this is not a partnership strictly, it is not a case in which it can be dissolved by action. But ought not precisely the same principles to apply to a case like this where in substance it is a partnership in the form or the guise of a private company? It is a private company, and there is no way to put an end to the state of things which now exists except by means of a compulsory order. It has been urged upon us that, although it is admitted that the "just and equitable" clause is not to be limited to cases ejusdem generis, it has nevertheless been held, according to the authorities, not to apply except where the substratum of the company has gone or where there is a complete deadlock. Those are the two instances which are given, but I should be very sorry, so far as my individual opinion goes, to hold that they are strictly the limits of the "just and equitable" clause as found in the Companies Act. I think that in a case like this we are bound to say that circumstances which would justify the winding up of a partnership between these two by action are circumstances which should induce the Court to exercise its jurisdiction under the just and equitable clause and to wind up the company.”¹⁰

[32] It appears to the court that the findings that the arbitrator made in relation to Sea-Island Realities were with respect to the issues of Mr. Dyrud’s shareholdings in the company which was based on an inquiry as to the manner in which those shares were acquired by him (an issue which remains a source of contention between the parties) and Sea-Island Realities’ indebtedness for the liabilities incurred with respect to the WDM Partnership. It does not appear that the arbitrator made any specific findings with respect to issues concerning the management of Sea-Island

⁹ At p 430

¹⁰ At p 432

Realties. However, what is evident from the arbitration proceedings, is that the affairs of Sea-Island Realities seemed inextricably tied to the other entities that were subject to the arbitrator's terms of reference. Indeed, the arbitrator's terms of reference was subject not only to the WDM quasi-partnership but also other related entities, from which it is reasonable to infer included Sea-Island Realities.¹¹

- [33] The court is satisfied that there is evidence from which it can be gleaned that the business and affairs of Sea-Island Realities were being conducted as a quasi-partnership between the parties. The court has adopted this view on the premise that the affairs and dealings of Sea-Island Realities were so inextricably intertwined with the other related entities, of which Mr. Dyrud and Ms. Webster were directors and shareholders, that Sea-Island Realities could conceivably be regarded as a quasi-partnership. Clearly, Sea-Island Realities was just one of the corporate vehicles utilised by the parties to undertake their joint business ventures in the form of a quasi-partnership. It is clear from the evidence presented to the court that this was the common intention and understanding of the parties upon which they both agreed.
- [34] It appears that prior to Mr. Dyrud's acquisition of 50% of the shares in Sea-Island Realities, those shares were held by a company named FINSCO as nominee. FINSCO was owned by FATCL. Mr. Dyrud and Ms. Webster were the directors and shareholders of FATCL which they operated as a quasi-partnership.
- [35] In any event, the court is satisfied that the evidence presented to the court disclosed a state of deadlock in the management and affairs of Sea-Island Realities, not necessarily connected to any distinct issue, but rather generally, which would entitle the court to make an order for its dissolution.
- [36] The court declines taking the view that the petition for the winding up of the company is being deployed primarily as a means of enforcing the Arbitration

¹¹ Exhibit JOD2

Award. Presumably, if the court accepts Ms. Webster's representations regarding the debt service ratio of the company, then clearly Mr. Dyrud has no material benefit to be derived from the dissolution of the company as a means of enforcing the Arbitration Award.

[37] Ms. Webster insisted that Mr. Dyrud's intentions in bringing the petition for winding up are malevolent in that it is seemingly an indirect method of recovering the debt owed to Mr. Dyrud with respect to his financial contributions in the WDM Partnership and other related entities; a debt which Ms. Webster claims, and by Mr. Dyrud's own admission, has been liquidated by his acquisition of the shares in Sea-Island Realities.¹² This issue, as far as the court is concerned, had already been decided in Mr. Dyrud's favour by the arbitrator in the arbitration proceedings. Therefore, there clearly is no point in Ms. Webster pursuing this argument in the present proceedings.

[38] Also, if one accepts the position regarding Ms. Webster's liability for the indebtedness of the WDM Partnership and other related entities, as per the arbitration award, which clearly has not been addressed by Ms. Webster, then it appears that Mr. Dyrud has a viable reason for exiting the company. This situation is emblematic of the breakdown in the relationship between the parties. In these circumstances, the court also finds it just and equitable to make an order for the winding up of the company.

[39] The Company is presently not trading, generates no profits and is in a dire state of indebtedness. Coupled with that reality is what the court accepts as the irreconcilable differences and the long standing disputes between the parties regarding the management of the many related entities, including the present company, which they engaged in as a quasi-partnership, which has resulted in protracted litigation between them. The purpose for which the parties collaborated has been entirely frustrated.

¹² Exhibit PJW6 – Transcript of Arbitration Proceedings, 24th May 2016

- [40] There clearly is no point in continuing the business relationship which clearly has been at an end for a considerable length of time.¹³ In the court's view, the PWA and the arbitration proceedings that foreshadowed the Arbitration Award have eroded the underlying basis upon which Mr. Dyrud and Ms. Webster had come together for a common purpose and utilising a corporate structure that employed several corporate vehicles to realise the purpose of their quasi-partnership.
- [41] In arriving at its decision, the court has paid due regard to the principles set out by the Court of Appeal in **Union Zone Management Limited**¹⁴ relied on by Ms. Webster in support of her opposition to Mr. Dyrud's winding up petition.
- [42] 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**¹⁵, 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.
- [43] The court of appeal also held in **Union Zone** 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.
- [44] The court is of the view that the circumstances in the case of **Union Zone** are distinguishable from those of the present case. The common intention and

¹³ At para 4 2nd Affidavit of JOD

¹⁴ [2015] ECSCJ No. 4

¹⁵ [1972] 2 All ER 492

understanding of the parties have been clearly frustrated by the dissolution of the WDM Partnership.

- [45] Prior to the court delivering its decision in the matter, the decision of the Privy Council in the case of **Chu v Lau**¹⁶, on appeal from the decision of the Court of Appeal, came to the court's attention. Accordingly, counsel appearing for the respective parties were invited to file further written submissions in light of that decision. The court has considered the further written submissions of counsel.
- [46] Having considered the Privy Council decision in **Chu v Lau**, the court is fortified in its views expressed in this judgment. The case of *Chu v Lau* is authority for the following propositions.
- [47] 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). 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.¹⁷

¹⁶ [2020] UKPC 24

¹⁷ *Chu v Lau* per Lord Briggs at paras 14-15

- [48] In the present case, the court finds that both functional deadlock and irretrievable breakdown in trust and confidence between the parties exist sufficient to justify the winding up of Sea Island Realities.
- [49] With respect to the question of an alternative remedy, the court finds that the sale of Mr. Dyrud's shares on the open market as a less than viable option given the perennial state of the company's indebtedness.
- [50] In the circumstances, the petition for the winding up of the Company is granted. A liquidator shall be appointed for the purpose of dissolving the Company in accordance with the provisions of the Companies Act. The costs of the winding up petition is to be paid by the respondent to be assessed if not agreed within 21 days of the date of this judgment.

Shawn Innocent
High Court Judge

By the Court

Registrar