

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

**SAINT LUCIA
COMMERCIAL DIVISION**

CLAIM NO. SLUHCM2019 /0018

BETWEEN:

BANK OF SAINT LUCIA LIMITED

Petitioner

And

KFC ST. LUCIA COMPANY LIMITED

Respondent

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini

High Court Judge

Appearances:

Ms. Cleopatra McDonald with Ms. Diana Thomas for the Petitioner
Mr. Peter Marshall with Ms. Ann-Alicia Fagan for the Respondent

2019: November 19
December 17

JUDGMENT

- [1] **ST ROSE-ALBERTINI, J. [Ag]:** On 28th February, 2019 Bank of Saint Lucia Limited (“the Bank”) filed a petition to wind up the respondent company KFC (St Lucia) Ltd (“KFC”) on the grounds that:-

1. a demand was issued on 30th May, 2014 (“the demand”) for sums allegedly owed by KFC as a principal debtor and also as surety for the debts of La Marie Food Group (St Lucia) Incorporated (“LMFG”), which remains unpaid¹; and
2. a default judgment dated 18th January, 2018 (“the default judgment”) was obtained against KFC for the sum of \$81,060.25, in Claim No. SLUHCV2016 /0301 (“the civil claim”) which also remains unpaid².

[2] The Bank says that KFC is unable to pay its debts, is insolvent and has ceased operations for almost 10 years. In the circumstances, the company has lost its substratum, and it is just and equitable that it be wound up.

[3] KFC opposes the petition on the grounds that:-

1. the demand is invalid because service was irregular;
2. the default judgment is the subject of an application to set it aside, which is yet to be determined in the civil claim; and
3. the Bank, as recently as 21st June 2019, filed a commercial claim³ for recovery of the surety debts, to which a defence has been duly filed and the claim is being contested.

[4] KFC says that in these circumstances, there is a bona fide dispute in relation to the debts and the Bank is not yet clothed with the status of a creditor, thus the petition is premature and ought to be dismissed. In addition, it is solvent and able to pay its debts and it would amount to a grave injustice if the company was wound up at this time.

The Issues

[5] The issues which arise for consideration are:-

1. Is there is a bona fide dispute in relation to the debts to warrant dismissal of the petition?
2. If no such dispute exists, should KFC be wound up?

¹ See Exhibit DE3

² See Exhibit DE15

³ SLUHCM2019/ 0055 –Bank of Saint Lucia Limited v KFC ST Lucia Company Limited

Background

- [6] A brief background of the facts leading up to the petition will assist in setting the context.
- [7] KFC is a private company⁴ incorporated under the Companies Act⁵ ("the Act"), with its registered office at No. 17 Bridge Street, Castries. The sole shareholder Mr. Frank C. Keller passed away in 2010 and currently Mr. Allen Eudoxie is the sole director.
- [8] It appears that over a period of time, the Bank loaned sums of money to KFC, LMFG and others to finance their business operations. KFC served as surety for the loans granted to LMFG and used its immovable property situated at Bridge Street, Castries with a building erected thereon, as security for the loans. The property is registered in the Land Registry of Saint Lucia as Parcel No. 0848F 210 and the security was by way of: (i) a hypothecary obligation registered as Instrument No. 3184/2003⁶ in relation to a loan to KFC; and (ii) a third hypothecary obligation registered as Instrument No. 721/2006⁷ in relation to a loan to LMFG. Sometime in 2011, the Bank and LMFG entered into a Debt Swap Agreement ("the DSA") to liquidate the debts. To this end, KFC, LMFG and the Bank executed several inchoate notarial instruments comprising Deeds of Transfer and Discharge of the Hypothecs to facilitate fruition of the DSA. The Bank avers that LMFG reneged on its obligations under the DSA, and in 2013 the Bank called in the loans. Subsequently, in June 2014, a demand was issued to KFC as principal debtor, as well as surety for the debts of LMFG. These debts remained outstanding and in 2016 the Bank filed the civil claim against LMFG, KFC and others, seeking an order that the DSA was validly rescinded and that the inchoate notarial instruments be set aside.
- [9] On 18th January, 2018 the Bank obtained a default judgment which set aside the notarial instruments and judgment entered against KFC for the sum of \$81,060.25 and against the remaining defendants for the sums due in relation to the surety debts.

⁴ Company No. C89/1984

⁵ Cap 13.01 of the Revised Edition of the Laws of Saint Lucia

⁶ See Exhibit DE2

⁷ See Exhibit DE3

- [10] On 3rd October, 2018, the defendants filed an application to set aside the default judgment. On 24th January, 2019, the defendants' counsel was removed from the record, which KFC alleges was done without their knowledge and the application was heard and refused in their absence. As a result, KFC says there was no opportunity to seek new counsel, in order to be heard on the application. On 10th May, 2019, the defendants filed an application to set aside the court order of 24th January, 2019 that dismissed the application to set aside the default judgment, on the premise that if they were present a different order would have been made. Currently, that order has been set aside and the application to set aside the default judgment is to be heard afresh. KFC says there is a realistic prospect of succeeding on that application.
- [11] Meanwhile, in February 2019, this petition was filed to wind up KFC on the grounds that it is unable to pay the judgment debt, as well as the surety debts, as and when they became due. It is alleged that the total indebtedness of KFC to the Bank at the date the petition was filed stood at \$8,503,039.02, which includes the judgment debt of \$81,060.25. The balance is allegedly owed for the surety debts.
- [12] The petition was served and duly advertised. No response was filed by KFC and directions were given for a hearing on 16th May, 2019. As it turns out, the petition was served on Mr. Michael Pilgrim, supposedly as a director of KFC; however the Bank subsequently discovered that he ceased to be a director on 3rd August, 2010, and that the sole director of KFC was in fact Mr. Allen Eudoxie. Consequently, the petition and attendant documents were then served on Mr. Eudoxie. On 13th May, 2019, LMFG, Deluxe Drycleaners (St. Lucia) Ltd, Philmore Davis and Wendy Davis (the co-defendants in the civil claim) filed a notice of intention to appear at the hearing as interested parties, to oppose the petition.
- [13] In another application filed on 10th May, 2019, KFC where the interested parties sought a stay of the petition, pending determination of the extant applications in the civil claim. By order dated 8th August, 2019, the application for stay was refused and directions given to advance the petition to a hearing.

- [14] Further affidavit evidence, written submissions and authorities were filed. At the hearing held on 19th November, 2019, Counsels elected to forego cross examination of the respective deponents and the Court heard oral submissions from both sides.

The Law

- [15] The petition is brought pursuant to sections 385 and 386 of the Act. These sections provide as follows:-

“385. Circumstances in which company may be wound up by court

A company may be wound up by the Court if—

(a) the company has by special resolution resolved that the company be wound up by the Court;

*(b) **the company** does not commence its business within a year from its incorporation, or **suspends its business for a whole year;***

*(c) **the company is unable to pay its debts;***

(d) an inspector appointed under Division B of Part 5 has reported that he or she is of the opinion—

(i) that the company cannot pay its debts and should be wound up, or

(ii) that it is in the interests of the public or of the shareholders or of the creditors that the company should be wound up, or

*(e) **the Court is of the opinion that it is just and equitable that the company should be wound up.***

386. Definition of inability to pay debts

(1) A company is deemed to be unable to pay its debts if—

*(a) **a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding \$5,000 then due, has served on the company, by leaving it at the registered office of the company, a demand under his or her hand or under the hand of his or her agent lawfully authorised requiring the company to pay the sum so due, and the company has for 3 weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor;***

*(b) **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) *it is proved to the satisfaction of the court that the company is unable to pay its debts as they become due.*

(2) *A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.*" [Emphasis added]

[16] It is also the law that if the debt which forms the basis of a petition is disputed on genuine and substantial grounds, the court may not make a wind up order and should dismiss the petition as an abuse of process. This position is chronicled in several decisions of our Court of Appeal, with its genesis found in the often-cited case of **Sparkasse Bregenz Bank v Associated Capital Corporation**⁸. There, Sir Dennis Byron CJ set out the applicable principles and approach to be adopted by the courts as follows:-

*"The law governing the making of winding up orders is well settled and could easily be set out at this stage. The Court will order a winding up for failure to pay a due and undisputed debt over the statutory limit, without other evidence of insolvency. **If the debt is disputed, the reason given must be substantial and it is not enough for a thoroughly bad reason to be put forward honestly.**"*¹ [Re Taylor's Industrial Flooring Ltd. (1990) BCC 44] But if the dispute is simply as to the amount of the debt and there is evidence of insolvency the company could be wound up.² [Tweeds Garages Ltd. (1961) 1 Ch. 406] To fall within the principle, **the dispute must be genuine in both a subjective and objective sense. That means that the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the Court should ignore. There must be so much doubt and question about the liability to pay the debt that the Court sees that there is a question to be decided.** The onus is on the company to bring forward a prima facie case which satisfies the Court that there is something which ought to be tried either before the Court itself or in an action or by some other proceeding.³ [Palmer's Company Law Vol. 3 Para 15.214] A creditor who has served a statutory notice on the company is not entitled to a winding up order if the company bona fide disputes the debt and there is no evidence of the insolvency of the company.⁴ [In re London and Paris Banking Corporation (1874) LR 19 Eq. 444] **If the existence of the debt on which the winding up petition is founded is disputed on grounds showing a substantial defence requiring investigation, the petitioner would not have established that he was a creditor and thus would not be entitled to present the petition, accordingly the presentation of such a petition would be an abuse of the process of the Court.**⁵ [Mann v Goldstein (1968) 2 All ER 769] **The process of the Companies Court could not be used in cases where there were issues of disputed fact. Such questions must be resolved in actions. A**

⁸ BVIHCVAP2002/0010 (delivered June 18, 2003, unreported) at para 3

*debt disputed on genuine and substantial grounds could not support a winding up petition. Invoking the process of the Court in relation to a debt which was known to be disputed on genuine and substantial grounds was an abuse of the process of the Court.*⁶ [Re Ringinfo Ltd (2002) 1 BCLC 210]" [Emphasis added]

- [17] To warrant dismissal of the petition, KFC must show that there is a dispute concerning its liability for the debts, which is genuine and has substance. The law requires that the Court conduct a preliminary examination of the facts to determine the soundness of the dispute being raised. It must be bona fide, as opposed to insubstantial or trumped up. If a genuine dispute is found to exist it must be resolved in the respective actions and the petition dismissed, for failure to establish standing as a creditor.

The Bank's Submissions

- [18] Counsel for the Bank Ms. Cleopatra McDonald contends that the Notice of Opposition to the petition filed by the interested parties has not shown that they have the requisite standing to appear at the hearing. Counsel says that on a wind up petition, the court should only have regard to the wishes of creditors or contributories and there is no evidence that these parties can be categorized as either. Some authorities were cited in support⁹.
- [19] Additionally, Ms McDonald submits that no steps have been taken towards transmission of the shares of the deceased shareholder to place anyone in a position to exercise the rights of a shareholder of KFC. Further, the deceased shareholder's personal representative has not made any representation to the Court. No other creditor has appeared to support or oppose the petition, though it appears that another creditor exists, namely Food Express Limited exists, with a default judgment in the sum of \$380,863.25.
- [20] Counsel contends that KFC is cash-flow and balance sheet insolvent and unable to pay its debts. It ceased trading since 2010 following the death of the sole shareholder and the substratum of the company no longer exists. She relied on Mr. Eudoxie evidence when cross examined on the application to stay the petition that:- (i) no shareholders meeting

⁹ Re Camburn Petroleum products Ltd [1979] 3 All ER 297, Halsbury's Laws of England (Vol 16 (2017) at para 392

has been held since the death of the sole shareholder of KFC in 2010, (ii) the company has no bank account in the jurisdiction and ceased trading in 2010 after the death of Mr. Keller, (iii) the sole asset of KFC is the immovable property registered as Parcel No. 0848E 210 which is in a state of disrepair and currently uninsured, (iv) the property is hypothecated to secure the debts of LMFG, and (v) in relation to the judgment debt of \$81,060.25 KFC is willing to pay that sum into court pending determination of the civil claim. Ms McDonald submits that taken together, these matters demonstrate that KFC is unable to pay its debts as they fall due and is cash-flow insolvent.

[21] It was further argued for the Bank that the open market value of the sole immovable asset as at 28th April, 2016 was \$2,395,000.00, with a forced sale value of \$2,000,000.00¹⁰, which value is substantially less than the total liabilities of the company, taking into account contingent and prospective liabilities. With the property in a state of disrepair and rapidly deteriorating, the market value does not exceed KFC's liabilities and as such it is also balance sheet insolvent. The sum which has been offered as payment into court is less than 2% of the total sum due to the Bank and that in itself is an indication that KFC has no cash assets. No objective evidence in the form of cash flow projections or audited financial statements has been provided to facilitate an objective assessment of the company's financial position.

[22] Counsel relied on the case of **Re Casa Estate (UK) Limited (in Liquidation)**¹¹ as a basis for rejecting KFC's offer of payment into court. There, a respondent had shown that a debt could be discharged by using investors' funds to pay it off. The court held that using monies from 3rd parties would be equivalent to a loan and not probative of a company being able to pay its debts and such conduct was considered a misuse of investors' money. Counsel argued that even if KFC was able to shore up the cash to cover the judgment debt, the court would not be precluded from examining the issue of balance sheet insolvency, as proof that it is insolvent.

¹⁰ See Exhibit DE9 – Valuation

¹¹ [2014] 2 BCLC 49

[23] The Bank also contends that it is just and equitable to wind up the company as subsection 385 (b) of the Act stipulates that a company may be wound up if it *suspends its business for a whole year*. Mr. Eudoxie's evidence is that KFC has not traded for almost 10 years. In that regard, Counsel relied on **Western Union International Limited v Reserve International Liquidity Fund Ltd**¹² where Bannister J had said:

".....I can see nothing strange in a creditor whose debt cannot be repaid precisely because a company has ceased to trade and whose management has become paralysed, relying on those matters as grounds for winding up."

[24] Ms. McDonald submitted that loss of substratum is an issue of fact to be determined on the evidence and in the **Western Union case** the court found that suspension of business for a period of less than 2 years was sufficient to ground a finding that it was just and equitable to wind up the company. In the present case, there is no shareholder and no steps have been taken to transfer the shares, there is no CEO and only one remaining director. With no shareholder for almost 10 years and a sole director who is unable to take any actions on behalf of the company, the Bank should not be made to accept an inferior remedy by way of a payment into court of a sum which is less than 2% of the total debts owed. In the circumstances Counsel argued that the Bank is entitled to seek to wind up KFC, as it has not displaced the presumption that it is cash-flow and balance sheet insolvent or that it is just and equitable to wind up the company.

KFC's Submissions

[25] Counsel for KFC, Mr. Peter Marshall, argued that whereas subsections 385 (b) and (c) of the Act stipulates the circumstances in which a company may be wound up, even where a case has been made for a wind up order, subsection 385 (e) still affords a discretion as to whether it would be just and equitable to make such an order. He contends that the only debt which falls to be considered under section 385 of the Act is the judgment debt of \$81,060.25, which KFC has indicated it is prepared to pay into court in the civil claim, pending determination of that claim.

¹² CLAIM NO: BVIHCV 2009/322

- [26] He went on to say that subsection 386 (1) (a) requires that the demand be served by leaving it at the registered office of the company and the Bank has not complied with that requirement. Having served the demand on Mr. Eudoxie at Yorke Hill, La Clery, which was not the address of the registered office, it cannot be said that service was effective. For this reason, he submits that no demand has been served, the purported demand is not valid for the purposes of section 386 and by extension subsection 386 (1) (c) has not been satisfied. Consequently, if there is no demand, there can be no refusal or inability to pay the surety debts.
- [27] Mr. Marshall argued further that even if the demand is found to be valid it would not be just and equitable to wind up KFC on the basis of the debts demanded, because there is a genuine dispute with regard to the debts. In the civil claim, the debts are disputed on the basis that the Bank wrongfully rescinded the DSA, which contained a compromised settlement for extinguishing all the debts. Counsel contends that as part of the compromise the Bank accepted the transfer of the property registered as Parcel No. 0848F 210, along with other properties and had the Bank not reneged there would have been no debt owed by KFC. The deeds have not been improbated and should not have been set aside in the absence of the defendants. Thus the application to set aside the default judgment is being actively pursued, in order to fully defend the claim. He stated that the issues have not been adjudicated on the merits and are critical to a determination of KFC's liability to pay the debts. In any event, the company still has assets which are well in excess of the negligible judgment debt of \$81,060.25.
- [28] Counsel submitted that the surety debts now form part of the default judgment against the co-defendants in the civil claim and not against KFC. These same debts are also part of the commercial claim filed by the Bank against KFC, on 21st June, 2019 subsequent to filing this petition. In that claim the Bank is now seeking to have the issue of liability for the surety debts adjudicated. A defence has been filed timeously, the claim is strongly contested, and there are facts and issues which must be investigated and adjudicated. Counsel maintains that if there was no dispute in relation to KFC's liability for payment of

these debts, the Bank would have no reason to file another claim, some 4 months after the petition was filed.

- [29] Mr. Marshall further says that the only sum which is undisputed is the debt owed to Food Express Limited and that entity has not appeared as a creditor in these proceedings. In any event, KFC has immovable assets sufficient to liquidate this debt and is not insolvent on account of it. In the circumstances, all the sums claimed are disputed as the parties hold completely opposite views on the facts surrounding the breakdown of the DSA. It is therefore critical to first determine which party was responsible for the breach that has caused the debts to remain outstanding, before any liability can be attributed to KFC. He relied on dicta from **Sparkasse**¹³ to the effect that: *“The process of the companies court cannot be used where there are issues of disputed facts. Such questions must be resolved in actions”*. He also relied on pronouncements in **Bank of Nova Scotia v Pizza! Pizza!**¹⁴ where this Court said: *“If it is that the dispute raised should be tried by the court itself or by an action in some other proceedings, this will generally suffice as a substantial dispute to warrant dismissing the petition.”*
- [30] Mr. Marshall stated that there has been no delay or apathy by KFC in seeking to retain new counsel to have matters addressed in both claims. The application to set aside the default judgment is live and lends support to the fact that KFC has a real belief that a bona fide dispute exists in relation to the debts. The commercial claim is contested for the same reasons and on that basis the petition should be dismissed and the Court need not consider matters of insolvency or whether the company has lost its substratum.
- [31] For the purposes of subsection 385 (b) of the Act, he submits that the business for which KFC was incorporated is found at clause (4) of its Articles of Incorporation which state: *“The Company shall as soon as possible after its incorporation, pay all fees disbursements and expenses of whatever nature incurred in its formation”*. Counsel submits that it is quite common that holding companies do not usually trade, thus to say that KFC has stopped trading is immaterial, as there is no evidence that it has not done or is not doing the

¹³ At para 3

¹⁴ CLAIM NO. SLUHCV2013/0932 at para 51

business that it was incorporated to do. Therefore the evidence does not support a finding that KFC has suspended its business for a whole year, or lost its substratum, or that it is unable to pay the judgment debt.

The Bank's Reply

- [32] In response to these submissions, Ms. McDonald maintained that it is for KFC to prove that there is a dispute which is substantial and not frivolous. It is not whether KFC believes there is a dispute, but whether one exists on the factual evidence. It is not disputed that monies were borrowed which have not been fully repaid. There is no evidence of a breakdown of the DSA, except to say that it did not extinguish the debts between the parties. The civil claim was filed some 5 years later, in circumstances where the steps required to transfer the agreed properties to the Bank were never consummated. It is therefore unreasonable to say that it is the Bank who reneged on the DSA.
- [33] Counsel opined that a genuine dispute could be that the debts do not exist, or that KFC does not know how they arose, or that the debts are not owed. The onus is on KFC to put forward a substantial defence requiring investigation with respect to the civil claim. No defence has been filed and there is nothing in Mr. Eudoxie's affidavit to establish what the alleged dispute is about. To rely on the applications filed or to simply say that the Bank reneged does not disprove liability for the debts. She relied on the case of **Angel Group v British Gas**¹⁵ for guidance on the threshold for disputing a petitioner's status as creditor. The evidence adduced must support the existence of a substantial dispute and KFC has not provided such evidence. Even if the default judgment is set aside, the parties would be back in the original position, with KFC and the co-defendants still being indebted to the Bank and by extension KFC as surety for the debts of LMFG. Counsel further stated that even if the Bank was not entitled to rescind the DSA, that would not extinguish the debts and the Bank would still be entitled to either the debts or the property. As the property has not been transferred, KFC cannot say in good faith, that the debts are not due. In the circumstances Counsel says KFC's allegation of a dispute amount to nothing more than a

¹⁵ [2012] EWHC 2702

cloud of objections which are frivolous and without-substance, of the kind that the courts warned against in **Sparkasse** and **Pizza! Pizza!**

[34] In response to KFC's charge that the demand was not valid because service was irregular, Ms. McDonald submitted that service on a director is a lawful form of service on a company. KFC's registered office is located at No. 17 Bridge Street which is the building erected on Parcel No. 0848F 210. When the demand was served in June 2014 that office was defunct and there was no address at which the Bank could leave the demand to cause same to come to the knowledge of the officers of the company. The last annual return was filed in 2010 and no further annual return or notice of change of registered office has been filed since. The objective of leaving the demand at the registered office is to bring it to the attention of the officers of the company. In the circumstances, the Bank took the steps required to make the demand known to Mr. Eudoxie, who by then was the sole director of KFC. Counsel stated that even if the demand did not meet the requirement of the subsection, it was at least a regular demand issued to KFC, indicating that the Bank was calling in the debts due under the hypothecary obligations. This would be sufficient to satisfy the requirements of sub-sections 385 (c) and 386(1) (c), in that the KFC is unable to pay its debts or has not paid those debts when they became due.

[35] Concerning cessation of operations, Ms McDonald says Mr. Eudoxie in cross-examined on the application for stay of the petition, admitted that KFC carried on the business of selling fast food products under a franchise for Kentucky Fried Chicken and that the company had not traded since 2010.

[36] In response to KFC's contention that the commercial claim is an attempt to determine liability for the debts, after a petition has been filed, Ms. McDonald submitted that this was a step that the Bank was entitled to take pursuant to the hypothecs, where LMFG as principal debtor and KFC as surety both covenanted at clause 3 to pay the debts on demand. The claim only seeks to enforce the promise to pay and petition does not extinguish the obligations of KFC or the right of the Bank to take steps in relation to the hypothecs.

[37] Concerning the charge that the default judgment contained no order against KFC in relation to payment of the surety debts, Ms. McDonald's response is that when the civil claim was filed in 2016 the Bank had not taken steps to enforce all its rights against KFC. The judgment against the co-defendants in that claim turned on the substantive issues in relation to the DSA and culminated in the judgment debt of \$81,060.25 against KFC, in its capacity as a principal debtor.

Analysis

Is there a substantial dispute in relation to the debts to warrant dismissing the petition, and if not, should KFC be wound up?

The Interested Parties

[38] It is the law that a court may only consider the wishes of creditors or contributories in wind up proceedings. Notices to appear are at a minimum required to give some indication of the basis on which the appearance will be made. No such information was provided in the notice and the co-defendants claiming to be interested parties have not indicated that they fall within any of the categories of persons who may engage the court's attention in opposing the petition. I therefore dis-regard the notice for the purpose of these proceedings, and in any event, no submissions were made by Mr. Marshall on their behalf.

The Section 386 Demand

[39] Regarding service of the demand, in this jurisdiction the authorities¹⁶ suggest that once a document is left at the address of the registered office, this constitutes good and proper service irrespective of whether the address is abandoned, defunct or not frequently visited. Service is also deemed to be proper if the document is left with a low level employee or with no one at all. Equally, there is also support for the position that service of a document

¹⁶ The Marina Village Limited v St. Kitts Urban Development Corporation Limited Claim No.: SKBHCVAP2105/0012, Linda (Lindy) Tamn v The Fountain Beach and Tennis Club Limited Claim No.: AXAHCV0067/2009, Ernesco Inc. v Bank of Saint Lucia Limited Claim No.: SLUHCV2009/0458)

at a defunct address, could in certain circumstances, not amount to proper service¹⁷. Section 521 of the Act also speaks to service of a notice or document on a company and it states:-

“521. Service on company

A notice or document may be served on a company—

(a) by leaving it at, or sending it by telex or telefax or by prepaid post or cable addressed to the registered office of the company; or

(b) by personally serving any director, officer, receiver, receiver-manager or liquidator of the company.”

[40] I accept that the primary purpose of service at the registered office is to ensure that the demand would come to the attention of the officers of the company and that even a very low threshold of merely leaving it at the stated location will suffice. It is the Bank's position that in the circumstances, the demand was served on Mr. Eudoxie as a means of bringing it to the attention of the company. In my view, the Bank did the most prudent thing by serving the sole director instead of leaving it at a defunct address. This amounts to proper service in accordance with section 521 of the Act and I accept that the demand was duly served. It certainly cannot be said that it did not come to the attention of the company, as might have been the case if it was simply deposited at the defunct address on Bridge Street.

The Surety Debts

[41] KFC has said that even if the demand was properly served, there is a bona fide dispute in relation to surety the debts referenced in the demand and there are facts and issues which must be investigated and adjudicated through the process of trial. I understand KFC to be saying that it is important to ascertain whether the DSA was validly rescinded before any liability for payment can be attributed to it.

¹⁷ Calais Shipholding Co. v Bronwen Energy Trading Ltd. at paras 22-23

- [42] The dispute is therefore whether the Bank is entitled to repayment of the debts by KFC, or does KFC have a genuine reason for refusing payment until sometime in the future when the issues concerning liability for payment, have been resolved. In other words are the debts due and payable by KFC as surety at this time, as opposed to some other form of settlement based on the outcome of the existing claims. As I understand it the compromise settlement contemplated transfer of immovable properties, discharge of the existing hypothecs and other monetary payments on the basis of which KFC's liability for payment of both the surety debts and its own debt would have been extinguished.
- [43] The Court is not required to speculate on what the outcome of the civil claim might be. The fact is the claim is still ongoing and the application to set aside the default judgment which forms the basis of the debt of \$81,060.25, as well as the debts against the co-defendants is to be heard afresh. It is also the case that in the commercial claim, the Bank is seeking to have this Court adjudicate on KFC's liability for the surety debts. KFC has filed a defence to which the bank has filed a reply. The Bank has not applied to have the defence struck out, nor has an application been made for summary judgment. It is fair to say that the pleadings have disclosed issues to be investigated through the process of trial and the claim is proceeding accordingly. It is not the remit of this Court, in these circumstances, to attempt to resolve disputes in relation to validity or liability for payment of the debts on which the petition is premised. Such matters must be resolved before a petition is filed. Where the dispute concerns matters of factual evidence which require further investigation, the authorities make clear that such dispute should not to be resolved in a summary fashion on affidavit evidence in the winding up proceedings.
- [44] In order to successfully invoke the Court's jurisdiction on this petition, the Bank must stand in the shoes of a creditor without blemish. The question whether it is the Bank or LMFG that reneged on the DSA and the likely consequences to flow from this are not matters which should engage the Court's attention on this petition. These are matters of substance which call for examination of the facts and circumstances in the respective claims. Unless these issues are resolved, the Bank's standing as a creditor of KFC in relation to the surety debts remains questionable. It is unclear what the outcome of these claims will be. In my

view, these matters must be allowed to come to conclusion before a wind up petition on the basis of the surety debts can be brought against KFC.

The Default Judgment

[45] KFC's position is that the hearing of the application to set aside the judgment is imminent, and if successful, the claim will be heard on the merits. The Bank's position on the other hand is that it was entitled to rescind the DSA when the civil claim was filed five years after LMFG failed to transfer the properties as agreed under the DSA.

[46] As I have stated earlier, these are matters which should be resolved in the respective actions and not in the wind up proceedings. A court may have to review the DSA against the conduct of the parties to determine whether it was wrongly or rightly rescinded and what redress should follow. I am only required to find that a prima facie dispute exists which has substance and in my judgment these are substantial disputes which require further investigation and resolution. In the circumstances, the petition must be dismissed and questions or findings in relation to insolvency would of necessity be rendered otiose.

Conclusion

[47] For the reasons set out above, I make the following orders:-

1. The petition is dismissed.
2. Cost is awarded to KFC in the sum of \$5,000.00.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar