

IN THE EASTERN CARIBBEAN SUPREME COURT

COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. DOMHCV2001/0266

IN THE MATTER OF THE LIQUIDATION OF COCONUT BEACH HOTEL LTD

AND

IN THE MATTER OF THE COMPANIES ACT 1994

BETWEEN:-

COCONUT BEACH RESIDENCE LTD

Claimant

And

COCONUT BEACH HOTEL LTD (In Liquidation)

Defendant

RULING

Appearances:

Mr. Michael Bruney for the Claimant

Mrs Dawn Yearwood Stewart for the Liquidator

2017: May 5th

July 24th

- [1] **STEPHENSON J.:** Coconut Beach Hotel Ltd is a company in liquidation by virtue of Order of Court dated 26th July 2002 under the hand of Mr Justice Dunbar Cenac. (hereinafter “the Defendant Company”). Initially, Mr Austin Nevin Winston was appointed liquidator, he resigned and Mr Clayton Munro was appointed in his place¹.
- [2] The property of the Defendant Company has been sold with the approval of the court and the Royal Bank of Canada the secured creditor has been paid off.
- [3] The total property left in the hands of the Liquidator is insufficient to satisfy the pay off debts of the Defendant Company. The Defendant Company is therefore insolvent.
- [4] The liquidator has now filed his proposed scheme of division of the remaining assets of the company. The remaining balance being held on account by the liquidator is \$901,059.95 which he wants to pay out to conclude the liquidation.
- [5] This brief ruling addresses the claim by Acme Garage (Karam) Limited.
- [6] Acme Garage (Karam) Limited was represented at the hearings before the court as currently constituted by one of its directors Mr Peter Karam². There has therefore been no legal representation made on behalf of Acme Garage (Karam) Ltd.
- [7] It is my understanding based on the liquidator’s averments in his affidavit filed on the 6th March 2017 that he received documents from the Directors of Acme Garage (Karam) Limited showing proof of loan to the Defendant Company³ being the company in liquidation.
- [8] Mr Munro has stated that the amount being claimed by Acme Garage (Karam) Ltd. to be \$1,070,286.00 (one million and seventy thousand, two hundred and eighty-six dollars).⁴

¹Mr Munro was appointed on the 27 January 2004

² Acme Garage (Karam) Ltd was therefore acting for itself by its Director who is not a lawyer.

³ Fourth Affidavit of Mr Clayton Monroe filed on the 6th March 2017 at paragraph 15

⁴ Paragraph 7 (f) of the Affidavit in support sworn to on the 20th January 2017 and filed on January 23rd 2017

[9] Mr Munro further averred in the same affidavit that he accepted the amount claimed by Acme Garage (Karam) Ltd. in person through its director Mr Peter Karam and that Mr Karam was able to prove to him that his company paid off loans on behalf of Coconut Beach Hotel Limited and also paid off a judgment interest on the judgment plus costs⁵ on behalf of the Defendant Company.⁶

[10] It is noted, however, that the loans made to Coconut Beach Hotel Limited and payments on behalf of that entity by Acme Garage (Karam) Limited were never secured. Therefore in the circumstances of the case at bar, they are to be regarded as an unsecured creditor. In fact, the liquidator in his affidavit of the 25th January 2017 stated that with regards to the scheme of division he identified three types of creditors and also identified Acme Garage (Karam) Limited as an Unsecured Creditor⁷.

[11] The liquidator has stated in his affidavit seeking approval of his scheme of division that he proposes to pay Acme Garage (Karam) Limited the sum of \$354, 870.78 which is a sum less than that which is being claimed and which is a prorated figure.

[12] Coconut Residences Limited ('Residences') objected to the proposed payment to Acme Garage (Karam) Ltd. This was stated by Miss Kathleen John Baptiste the local agent and representative of the Residences in her affidavit of the 17th February 2017 regarding the liquidator's proposed scheme of division.

[13] Miss John Baptiste averred that it was noted that there were no documents produced to the Court by the liquidator in support of the claim by Acme Garage (Karam) Ltd and the purported debt owed to them by the company in liquidation. The deponent also raised the question as to whether the transactions between

⁵ Judgment paid to one Angus Edwards receipts were presented proving payment cash in the sum of \$300,000.00 plus two double cab pickup trucks valued at \$250,00.00 and costs of \$5,000.00 in full satisfaction of a judgment debt.

⁶ Paragraph 13 ibid

⁷ 3rd Affidavit of L E Clayton Munro dated 25th January 2017 at paragraph 2(c)

Acme Garage (Karam) Ltd and Coconut Beach Hotel were arm's length transactions and whether there is, in fact, any payment to be made to them at all.⁸

[14] The Liquidator Mr Munro filed a fourth affidavit on the 6th March 2017 in which he outlined in detail what was presented to him by Acme Garage (Karam) Limited in support of their claim and that he was satisfied that the debt did in fact exist and should be settled in part. Mr Munro also exhibited the documents accepted by him as satisfactory proof of the debt as claimed by Acme Garage (Karam) Ltd.

[15] Mr Munro filed a supplementary affidavit in reply on the 8th March 2017 where he adjusted the proposed figures which he proposes to pay to the unsecured creditors including Acme Garage (Karam) Ltd in the sum of \$295,134.29 (two hundred and ninety-five dollars, one hundred and thirty-four dollars and twenty-nine cents). Mr Munro further stated in his affidavit how he arrived at the figures for the proposed payments.

[16] Residences filed a further affidavit in objection to the liquidators proposed scheme of division on the 24th May 2017, and in summary made the following points of objection:

- a. That none of the documents produced by the liquidator shows that there was a prior arrangement or agreement whereby the Defendant Company was to be liable in debt to the Acme Garage (Karam) Ltd;⁹
- b. That the judgment debt settled in favour of Angus Edwards was prior to the liquidation proceedings;¹⁰
- c. That there was no document produced by the liquidator to show that the alleged debt was registered in the defendant's books neither was there any evidence of any agreement to repay the debt by the Defendant Company neither was there any evidence of any part payment or payment made by the

⁸ See paragraph 11 of the affidavit of Kathleen John Baptist dated February 17 2017

⁹ See paragraph 19 Affidavit of Kathleen John Baptist dated the 24 March 2017

¹⁰ See paragraph 20 ibid

Defendant Company to Acme Garage (Karam) Ltd. before the liquidation whilst the Defendant Company was a going concern.¹¹

- d. That it was fair to assume that the shareholders voluntarily chose to have Acme Garage (Karam) Ltd settle its debt and that it was never contemplated between the Defendant Company and Acme Garage (Karam) Ltd that there would have been a reimbursement by the Defendant Company;¹²

[17] Residences submitted that there was no “justification for the liquidator to burden the insolvent Defendant Company with the reimbursement of the principal and interest of the loan repaid by the third party”¹³.

[18] In his affidavit in response to the affidavit of the Miss John Baptist filed on the 24th March 2017 and filed on the 13th April 2017, the liquidator averred that after receiving and reviewing the documents from Acme Garage (Karam) Limited he was satisfied that the debt due and owing by the Defendant Company was paid off by Acme Garage (Karam) Ltd. and that he was leaving the findings of the claim to this court.¹⁴

[19] The question for decision is whether the debts due to Acme Garage(Karam) Ltd should be paid by the liquidator.

[20] In liquidation proceedings, it is the duty of the liquidator to determine whether the claim of any person asserting himself to be a creditor is a valid claim against the company and, if so, in what amount.

¹¹ See paragraph 21 *ibid*

¹² See paragraph 23 *ibid*

¹³ See paragraph 23 *ibid*

¹⁴ See paragraph 20 of the affidavit of the Liquidator filed on the 13th April 2017.

[21] The document by which a creditor puts forward his claim is his 'proof', and the procedure by which a creditor claims his share of the company's assets by submitting a claim in writing is referred to as 'proving' for a debt.

[22] The liquidator may be presented with proofs of debts of all descriptions and, subject to his right to apply to the court for directions¹⁵ and the right of any aggrieved creditor or any other person who is dissatisfied to apply to the court for an order reversing or modifying any act, omission or decision of the liquidator¹⁶, he must determine in accordance with the general law whether to admit each proof¹⁷ and, if so, to what extent. The liquidator is also empowered to "do all such other things as may be necessary for winding up of the affairs of the company and distributing its assets."¹⁸

[23] Only those who are 'justly legally and properly' creditors of the insolvent company are entitled to dividends¹⁹, and accordingly the liquidator must be satisfied that a debt is properly due before he admits it in the liquidation.

[24] The requirement is that liquidator should examine every proof and consider the validity of the debt which is sought to be proved. This is the case even where the proof is based on a judgment, a covenant or an account stated²⁰.

[25] The liquidator must also consider any set-off asserted by the creditor to ascertain the proper sum in which the proof may be admitted²¹. A proof may be

¹⁵ Section 399 (3) of The Companies Act. Act number 21 of 1994. "The Liquidator may apply to the Court in the prescribed manner for directions in relation to any particular matter arising under the winding up."

¹⁶ Section 339 (5) of The Companies Act *ibid*. "If any person is aggrieved by any act or decision of the liquidator, that person may apply to the Court, and the Court may confirm, reverse, or modify the act of decision complained of, and make such order as it thinks fit."

¹⁷ Section 456(1) of the Companies Act *ibid* "In every winding up, subject to the case of insolvent companies to the application in accordance with the provision of this Act of the Law of Bankruptcy, all debts payable on a contingency, and all claims against the company, present and future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as are subject to any contingency or sound only in damages or for some other reason do not bear a certain value."

¹⁸ Section 398(2)(h)

¹⁹ *Re Van Laun ex p Chatterton* [1907] 2 KB 23,29

²⁰ *ibid*

²¹ *Re National Wholemeal Bread and Biscuit Co* [1892] 2 Ch 457.

admitted for dividend either for the whole amount claimed by the creditor or for part of that amount⁹.

[26] In the case at bar, the liquidator has accepted the debt claimed by Acme Garage (Karam) Ltd as proven. Residences as a creditor, however, are aggrieved by this decision. Residences submits that it can be assumed because the directors and shareholders of the Defendant Company and Acme Garage (Karam) Ltd are the same persons that the shareholders of Acme Garage (Karam) Ltd voluntarily chose to settle the debt of the Defendant Company and that it was never contemplated or agreed that they would have been reimbursed by the Defendant Company.

[27] A defined hierarchy of creditors exists when a company enters insolvency, with secured creditors being at the top. Unsecured creditors rank after secured and preferential creditors in an insolvency situation. There are also preferential creditors who are generally employees of the company who are entitled to arrears of wages and other employment costs up to certain limits.

[28] Where the company is insolvent, it is usually the unsecured creditors who are one of the last groups to be paid, being placed above the shareholders of the company.

[29] In her second affidavit filed on the 24th March 2017, Miss Kathleen John Baptiste averred that the shareholders and directors of Acme Garage (Karam) Limited and the Defendant Company were the same persons and “who would have been liable for the debt due to Angus Edwards²²”. It was further averred that “it is therefore safe to assume that the shareholders voluntarily chose to have Acme Garage (Karam) Ltd to settle the debt of the Defendant Company rather than the

²² See paragraph 22 of second affidavit of Kathleen John Baptiste filed on the 24th March 2017.

Defendant Company settle it itself and that it was never contemplated or agreed that the Acme Garage Ltd would have been reimbursed by the Defendant Company²³”.

[30] It is the contention of Residences that there is no justification for the liquidator to burden the Company with the principal and interest of a loan repaid by a third party.

[31] Having seen this, the questions which arise is what is the status of Acme Garage (Karam) Limited vis a vis the Defendant Company? Is Acme Garage (Karam) Limited a shareholder of the said Company or is it an unsecured creditor?

[32] Having perused the exhibit²⁴ to the affidavit sworn to on behalf of Residences it is clear that Acme Garage (Karam) Limited and the Defendant Company are in fact owned by the same persons and directed by the same persons in part. It is clear, however, that Acme Garage (Karam) Ltd²⁵ is not a shareholder of the Defendant Company.

[33] I understand that Residences is submitting that debt paid on behalf of the Defendant Company was not an arm's length transaction. This is what Mrs John Baptiste said in this regard

“ 23. It is therefore fair to assume that the shareholders voluntarily chose to have Acme Garage Karam Ltd settle the debt of the Defendant Company rather than the Defendant Company settle it itself and that it was never contemplated or agreed that Acme Garage Ltd would have been reimbursed by the Defendant Company.”

²³ See paragraph 23 ibid

²⁴ Exhibit KJB 1 of the affidavit of Kathleen John Baptiste dated 24th March and filed on the 4th April 2017

²⁵ It is noted that the company referred to at Acme Garage (Karam) Limited is in fact properly named Acme Garage Karam (1989) Ltd.

24. No evidence has been adduced to this court to show that there was any agreement for the Defendant Company to repay Acme Garage (Karam) Ltd to actually prove that there was a loan between what was clearly “sister” companies.

[34] Likewise there is no evidence that Acme Garage (Karam) Ltd took any steps to secure a charging order or to take any steps more than that Mr Peter Karam one of the directors held on to the Certificate of Title to property owned by the Defendant Company in the mistaken belief that in doing so Acme Garage (Karam) Ltd was protected, as in, that their payment on behalf of the Defendant Company was secure regarding repayment by the Defendant Company. At a separate hearing in this matter and upon an application brought by the liquidator Mr Karam surrendered the said certificate of title as the property was being sold.

[35] Taking all the circumstances of this case into consideration I find that Acme Garage (Karam) Ltd is an unsecured creditor being a person to whom the Defendant (insolvent) company is indebted to but to whom there is no guarantee that they will be paid upon liquidation.

[36] The liquidator averred in his affidavit filed on the 6th March 2017 that there was a general meeting of creditors held on the 29th November 2016 and at the meeting it was agreed that the unsecured creditors would waive their interest on the sums owed to them. However Residences did not agree to same.

[37] The unsecured creditors were identified by the liquidator to be:

- i. Coconut Beach Residences Ltd;
- ii. The estate of Ashton Henry
- iii. Acme Garage (Karam) Ltd.

[38] The liquidator after identifying and stating the amounts to be paid to the secured and preferred creditors stated the prorated figures which he proposed to pay to the unsecured creditors and for which he is seeking the court's approval.

[39] In the circumstances of the case and based on the law as I understand it I therefore approve of the liquidator's recommended payments as stated in his affidavit before the court.

[40] There is no order as to costs.

**M E Birnie Stephenson
High Court Judge**

BY THE COURT

REGISTRAR