[1991–92 Gib LR 154]

IN THE MATTER OF ALOMAR MORTGAGE SERVICES LIMITED

SUPREME COURT (Alcantara, A.J.): July 12th, 1991

Companies—compulsory winding up—inability to pay debts—test of solvency is ability to meet current demands, not whether debts could be paid if all potential assets realized

Companies—liquidators—appointment—provisional liquidators—appointed only if prima facie case shown for winding up and justified in circumstances—no need if petition to be heard soon and no risk of dissipation of company assets—ex parte application to be made uberrimae fidei and undertaking in damages required—not so for inter partes application

The petitioner applied for the winding up of a company on the ground that it was unable to pay its debts.

The petitioner, a wholly-owned subsidiary of the company, was owed over £224,000 as an inter-company debt. The company had entered a joint venture agreement with two banks, under which the banks took a minority shareholding in the company, and the petitioner became owned by the company. The company and the petitioner bore the overheads by drawing on the petitioner's overdraft facility with one of the banks. Within a few months the group indebtedness exceeded £500,000, and eventually the company was placed in administrative receivership.

The company brought proceedings against the bank and against one of its own directors to recover damages for misrepresentation and negligent misstatement and a declaration that the receivers had not been validly appointed.

In support of the winding-up petition, the petitioner quoted from the previous end-of-year accounts, indicating that the company was indebted to the petitioner and was insolvent. The company alleged that the debt was in fact owed by the banks, which were liable to repay the whole of the group's debt. It stated that the accounts exhibited by the petitioner had been prepared on the basis that the joint venture (which had now ended) would continue and that the banks would reimburse the overheads incurred by the group. Redrafted consolidated accounts, prepared for the same period and reflecting the termination of the joint venture, showed the debt not as an inter-company debt owed by the company but as a debt to the group owed by the banks.

The petitioner applied for the appointment of joint provisional liquidators pending the hearing of the petition.

The company submitted that (a) the petition should be struck out, since there was a substantial dispute as to the existence of the debt on which it was founded; (b) the evidence supporting the petition should be disregarded, since that of the director of the company had misled the court by neglecting to mention the particular circumstances affecting the company accounts; (c) the petitioner had not established that the company was insolvent, since assets would become available if the debt were repaid by the banks and the action against them for damages were successful; and (d) the court should not appoint provisional liquidators unless a *prima facie* case for winding up had been made (which had not been shown here) and, in any event, the petition was to be heard very shortly.

The petitioner submitted in reply that (a) the existence of two sets of accounts did not constitute a substantial dispute as to whether the company was indebted to it; (b) the company was plainly insolvent; (c) the company had made no objection to the evidence of its director at the hearing of the interlocutory applications; and (d) the court should appoint provisional liquidators, since there was a *prima facie* case for winding up.

Held, ordering that the company be wound up:

(1) The court would not strike out the petition *in limine*, since it was not satisfied that it disclosed no reasonable cause of action or constituted an abuse of process. On the basis of the affidavit evidence for and against the petition, there did not appear to be a substantial dispute as to the existence of the debt to the petitioner and the company's inability to pay it (para. 8; paras. 12–13).

(2) There was no need to appoint provisional liquidators pending the hearing of the petition. Once the petitioner had established a *prima facie* case for the winding up of the company, it had also to show that such an appointment was justified in the circumstances and since in this case the petition was to be heard only two days after the hearing of the interlocutory applications, and the company's assets at the bank had been frozen, there was no real risk of dissipation (paras. 9–10).

(3) The court would order that the company be wound up. The evidence of the company's director in support of the petition was as valid as that of any other deponent. Although it was true that *uberrima fides* was required of an applicant for the appointment of provisional liquidators on an *ex parte* application, the evidence in this case had been adduced at an *inter partes* hearing at which the company had ample opportunity to highlight any inaccuracies or omissions. The court rejected the second set of accounts presented by the company, which purported to indicate that the company was solvent rather than giving the true picture. Although the company may have had claims against the banks, the test of solvency was whether it was able to meet the current demands being

made of it, not whether, if all potential assets (such as damages from its action against the banks) were realized, it would be in a position to do so (paras. 20–27).

Cases cited:
(1) *Highfield Commodities Ltd., In re*, [1985] 1 W.L.R. 149; [1984] 3 All E.R. 884, applied.
(2) *Lympne Invs. Ltd., In re*, [1972] 1 W.L.R. 523; [1972] 2 All E.R. 385, referred to.
(3) *Nuevo Castille Ltd., In re*, 1991–92 Gib LR 74, applied.
(4) *R.* v. *Kensington Income Tax Commrs., ex p. Princess Edmond de Polignac*, [1917] 1 K.B. 486; (1916), 86 L.J.K.B. 257, followed.
(5) *R.* v. *Stipendiary Mag., ex p. Att.-Gen.*, 1991–92 Gib LR 107, referred to.
(6) *Tweeds Garages Ltd., In re*, [1962] Ch. 406; [1962] 1 All E.R. 121, *dicta* of Plowman, J. applied.
(7) *Welsh Brick Indus. Ltd., Re*, [1946] 2 All E.R. 197; (1946), 90 Sol. Jo. 430, considered.

J.E. Triay, Q.C. and *R.A. Triay* for the petitioner;
Mrs. J. Gerit and *C. Finch* for the company.

1 **ALCANTARA, A.J.:** This is a petition by Alomar Financial & Technical Services Ltd., an English company, through its joint administrative receivers, to wind up Alomar Mortgage Services Ltd., a local company, on the grounds which are set out in the petition:

> "5. The company is indebted to the petitioner in a sum of not less than £224,000.
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> 6. The petitioner has made an application to the company for payment of its debts, but the company has failed to pay the same or any part thereof.
>
> 7. The company is insolvent and unable to pay its debts."

2 Prior to the actual hearing of the petition, there were two interlocutory applications before me in chambers. The company sought to strike out and/or stay the winding-up petition on the grounds that—

(a) the petition disclosed no reasonable cause of action; and

(b) it was otherwise an abuse of the process of the court.

The petitioner, in turn, asked that joint provisional liquidators be appointed.

3 The petition was set down for hearing on May 17th, 1991. The interlocutory applications were set down for hearing on May 9th, 1991, when they were part heard and adjourned to May 17th, when they had to

be further adjourned to May 28th and disposed of. The petition was called on May 17th and was adjourned to May 30th, 1991, to enable the hearing of the interlocutory applications to be concluded. On May 30th, 1991, the petition came on for hearing and I was informed that the parties had agreed that there should be a winding-up order by consent, on certain terms and conditions. I then expressed my doubts as to whether it was possible to make a winding-up order by consent, and adjourned to the following morning to give an opportunity for both counsel and me to find out whether this was a correct or proper course.

4 Whatever understanding or agreement there might have been between the parties, it came to nothing, as the following morning, May 31st, 1991, I was informed that the petition would continue as a contested petition. I was then asked to give directions, including time-limits, for further affidavits to be filed, and leave to cross-examine the various deponents. It was then agreed that the petition would finally come up for hearing on June 18th, 1991. On that day and the two subsequent days, the petition was heard.

5 The interlocutory applications had been concluded on May 28th, 1991. I dismissed both applications and said I would give my reasons. Before I was able to give my reasons, the petition had come on for hearing, first on May 30th and 31st, 1991 and subsequently on June 18th, 1991. Although the interlocutory applications are no longer a live issue, I should give an abbreviated version of my reasons for their respective dismissals.

6 In the company's application to strike out, Mr. Finch, its counsel, contended that if the company raised a substantial issue concerning the existence of the debt, the petitioner had no *locus standi* as a creditor. There were two sets of draft accounts of the company; the first one showing a debt and insolvency and a later one showing no debt and solvency. This, he said, amounted to a dispute. He relied on *In re Lympe Invs. Ltd.* (2) to have the petition struck out *in limine*.

7 Mr. Triay, for the petitioner, distinguished the above authority and drew my attention to *Re Welsh Brick Indus. Ltd.* (7) and to *In re Tweeds Garages Ltd.* (6). Counsel argued that the second draft accounts had been prepared after the appointment of the joint receivers. The existence of two draft accounts was not in itself proof of a disputed debt, still less a dispute on substantial grounds.

8 In the headnote to *Re Welsh Brick Indus. Ltd.* in *The All England Law Reports*, it was held ([1946] 2 All E.R. at 197):

> "In spite of the fact that unconditional leave to defend had been granted in the King's Bench action, it was competent for the Judge in a winding-up court to go into the evidence which was before him to consider whether or not there was a bona fide dispute. The Registrar's order was a matter which the winding-up court would

> take into consideration, but did not preclude the judge finding, as a fact, that there was no bona fide dispute as to the debt. The Judge had, therefore, discretion to make a winding-up under Companies Act, 1929, s. 168."

Taking into account the evidence presented by the petitioner, particularly the affidavits in support, I was not prepared to strike out the petition *in limine*.

9 On the application for the appointment of joint provisional liquidators, I think that it is useful to repeat what the Chief Justice has said very recently in *In re Nuevo Castille Ltd.* (3) and add something more (1991–92 Gib LR 74, at paras. 5–6):

> "The power to appoint a provisional liquidator is set out in s.171 of the Companies Ordinance and r.31 of the Companies Winding-up Rules 1929. They reflect the provisions of the equivalent section and rule in the English Act and Winding-up Rules, so, in the absence of any decision of the Gibraltar courts . . . I will apply the principles set out in relevant decisions of the English courts . . . [The Chief Justice referred to the English authorities.] These underline the fact that the court has to exercise an unlimited discretion save for the fact that it must be exercised judicially.
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> 6 . . . The same decisions emphasize that first of all the applicant for the appointment of a provisional liquidator must make out a good *prima facie* case for the winding up to be made at the hearing of the petition. Then, if it succeeds in passing that test, it must persuade the court that it is right in the circumstances to appoint a provisional liquidator before the hearing of the petition and the order of winding up is made."

What I wish to add is what Megarry, V.-C. said in *In re Highfield Commodities Ltd.* (1) ([1984] 3 All E.R. at 889):

> "First, the general practice is to require an undertaking in damages if a provisional liquidator is appointed ex parte. Second, the general practice is not to require an undertaking in damages if the appointment is made inter partes."

10 I was not persuaded by the petitioner that it was right to appoint a provisional liquidator in the circumstances. The hearing of the petition was only two days ahead, when, had the petition been heard and a winding-up order been made, a liquidator would have been appointed. There was also no immediate danger of dissipation. The assets of the company at the Royal Bank of Scotland (Gibraltar) Ltd. had already been frozen by that bank, I was informed by counsel.

11 As I have already stated, the petition came on for hearing on June 18th, 1991. On this occasion, I was told that the parties had agreed that

there would be no cross-examination of the various deponents, and that I should decide the petition on the affidavit evidence. The petition is supported by the affidavit of Walter Lindsay Stewart, dated April 26th, 1991. The deponent is a banker and he is both a non-executive director of the petitioner and of the company. In his affidavit he says:

> "From information received in my capacity as a Director of AMS [the company] and of the petitioner I believe that the inter-company debt referred to in 'WLS 2' was owed by AMS to the petitioner as at February 1991. Although a total of £192,000 (*i.e.* £120,000 plus £72,000) was owed by the petitioner to AMS, the net position was that, as at February 28th, 1991, AMS was indebted to the petitioner for at least £224,000."

The deponent then refers to the Cork Gully Report, which is an analysis of the inter-company debtors, and ends up by saying that the net indebtedness of the company to the petitioner, as at February 28th, 1991, was not less than £224,610.09.

12 This is confirmed by the affidavit dated April 29th, 1991 of Robert Bruce McLaren Graham, one of the appointed joint administrative receivers and the person who prepared the Cork Gully Report, I extract two paragraphs from the said report dated April 11th, 1991:

> "2. R.B.M. Graham and J.M. Iredale were appointed joint administrative receivers of Alomar Financial & [Technical] Services Ltd. on Thursday, March 28th, 1991."

> "18. The accounting records were processed up to February 28th, 1991."

Those records show that the company, Alomar Mortgage Services Ltd., was indebted to the petitioner.

13 The deponent Walter Lindsay Stewart then produced a true copy of the statement of accounts of the company as at September 30th, 1990. Those accounts, which are in a draft form, clearly show that the company is insolvent.

14 What does the company say to all this? First, that there is no debt, or if there is, it is a disputed debt. According to counsel for the company, Mrs. Giret, the two banks, the Royal Bank of Scotland PLC and the Banco de Santander S.A., have abused their position to bring about the downfall of the company. This latter contention can be gauged by the relief which is being claimed against those two banks and Mr. Walter Lindsay Stewart by the company (as one of the plaintiffs) in a writ issued in the High Court on May 31st, 1991. The relief claimed against the Royal Bank of Scotland PLC is:

"1. Damages for misrepresentation and/or negligent misstatement.

2. A declaration that the receivers appointed on or about March 28th, 1991 over the assets and undertaking of the third plaintiff [the petitioner in the present proceedings] were not validly appointed."

The relief claimed against the Royal Bank of Scotland PLC and the Banco de Santander S.A. is "damages." The relief claimed against Mr. Walter Lindsay Stewart is "damages for breach of fiduciary duty." And the relief claimed against all three defendants is "all necessary accounts and enquiries and payment of the same found due and owing on the taking of such accounts."

15 The history of this claim against the banks and Mr. Stewart is set out in the affidavit of Mr. Brian John Wilkinson, a director of the company. He deposes that Alomar Holdings Ltd. was a family-owned business, dealing with property, and that Alomar Financial & Technical Services Ltd. (the petitioner) assisted in the operation of the business. In February 1989, Alomar Mortgage Services Ltd. was incorporated in Gibraltar.

16 Some time afterwards the Alomar Group entered into discussion of a joint venture with the Royal Bank of Scotland PLC and Banco de Santander S.A. The joint venture did not come into existence until May 24th, 1990, when the various documents were signed. Under the joint venture agreement, each of the banks took 20% of the shares in Alomar Mortgage Services Ltd. (Alomar Holdings Ltd. keeping the remaining 60%), and Alomar Financial & Technical Services Ltd. became fully owned by the company.

17 Mr. Wilkinson states in his affidavit: "The cost and expenses of our time and other Alomar employees was borne by AMS [the company] and AFTS [the petitioner]. This could only be achieved by drawing on the overdraft facility with RBS." It is common ground that the overdraft facility was the facility the petitioner had with the Royal Bank of Scotland (Gibraltar) Ltd., and not with the Royal Bank of Scotland PLC. In the following paragraph, the deponent states: "By September 30th, 1990 the cost and expense recorded in the accounts of the AMS Group was £587,104. It had always been the position of Alomar that the whole of this indebtedness is the indebtedness of the banks." "The banks" must mean the Royal Bank of Scotland PLC and the Banco de Santander S.A., not the Royal Bank of Scotland (Gibraltar) Ltd., which was not a party to the joint venture agreement. There is in the above paragraph an admission that the Alomar Group was indebted by over £500,000.

18 The company's case is that the whole of this indebtedness has to be repaid by the Royal Bank of Scotland PLC and the Banco de Santander S.A., and not just 40%, as seems to be the contention of the two banks.

19 What the company really has is a claim against those two banks. This is made clear by quoting two paragraphs of Mr. Wilkinson's affidavit in full:

> "40. As a result of the breaches of the banks as reflected in the statement of claim, the joint venture has been accepted by Alomar as being at an end. The draft accounts exhibited to Mr. Stewart's affidavit (including the management accounts) were prepared on a going concern basis, and on the assumption that the JVA would continue, and the back-costs would be reimbursed by the banks. Until such reimbursement was actually made (or review after September 1991 as stated above) the draft accounts, of course, continue to record the financial position of AFTS and AMS with the burden of the back-costs. I should say that the intention was that the moneys reimbursed by way of back-costs would be credited to AMS (as happened with the first tranche of £132,000 already paid by the banks) which would, in turn provide funds to AFTS. All this is well known to Mr. Stewart and the banks.
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> 41. There is now produced and shown to me, marked 'BW8,' a copy of redrafted consolidated accounts of AMS for the period to September 30th, 1990 to reflect the position as a result of the termination of the JVA but not the anticipated successful outcome of the writ action. The back-costs are not recorded as an inter-company indebtedness. They are reflected in the consolidated accounts of AMS, as it is the group that is owed the money. They are not recorded in the accounts of AMS itself."

20 I find as a fact that the first draft accounts (the accounts exhibited to Mr. Stewart's affidavit) are the proper accounts of the company. They were prepared by the Alomar Group, not by any outsider. They reflect the position of the company as at September 30th, 1990. They show that the company is insolvent and that there is a debt owing to the petitioner. The re-drafted accounts, or the second accounts, are suspect. They came into existence only after the receivers had been appointed, and without the agreement or consent of the petitioner. They purport to reflect a solvency. To give an example, the £74,900 paid for the shares in the petitioners' company disappears and becomes just £100, although the allotment of those shares was filed with the Registry of Companies at Bush House as having been allotted and paid. I reject the second draft accounts.

21 Mr. Triay, for the petitioner, has referred me to the test of insolvency to be found in *In re Tweeds Garages Ltd.* (6), where Plowman, J. approved the explanation given in *Buckley on the Companies Acts*, 13th ed., at 460 ([1962] 1 All E.R. at 122):

> "The particular indications of insolvency mentioned in paras. (a), (b) and (c) [of s. 223 of the Companies Act, 1948] are all instances of

> commercial insolvency, that is of the company being unable to meet current demands upon it. In such a case it is useless to say that if its assets are realised there will be ample to pay 20s. in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realisable; but although this be so, yet if it have not assets available to meet current liabilities it is commercial insolvent and may be wound up."

22 The company in the present proceedings says that it will have assets if its writ action succeeds and the back-costs are paid. Those assets, if they are assets, are not presently available. There is abundant evidence that the company is insolvent, and I so find.

23 Mrs. Gerit, for the company, has another card up her sleeve. She has mounted an attack on Mr. Stewart, which Mr. Triay has called "character assassination." She submitted that I should disregard the whole of the evidence of Mr. Stewart, as he has seriously misled the court in relation to the application to appoint provisional liquidators (which failed). Mr. Stewart, she says, was aware of certain facts and did not disclose them, to wit, the joint venture and the question of back-costs. He also put forward propositions which were misleading. This latter assertion refers to the second affidavit of Mr. Stewart, dated April 26th, 1991, in which he stated that the Alomar Group had incorporated a company by the name of Alomar Mortgage Services (UK) Ltd. to take over the business of the company, and also the transferring of the company's client account to Lloyds Bank in Jersey.

24 In *R.* v. *Stipendiary Mag., ex p. Att.-Gen.* (5), I followed *R.* v. *Kensington Income Tax Commrs., ex p. Princess Edmond de Polignac* (4), which had decided that the rule of the court requiring *uberrima fides* on the part of an applicant for an *ex parte* injunction applied equally to the case of an application for a rule *nisi* for a writ of prohibition. I am of the opinion that the said rule applies with the same force, if not more, in the case of an *ex parte* application for a provisional liquidator.

25 But the application for the appointment of provisional liquidators that came before me was not *ex parte*. It was *inter partes*. The company had full opportunity to have put me right had it so desired. It did not, apart from the fact that counsel on both sides informed me that the account of the company at the Bank of Scotland (Gibraltar) Ltd. had been frozen.

26 I am not prepared to accede to Mrs. Gerit's request. The evidence of Mr. Stewart is as much evidence as the evidence of any other deponent. I must now consider in what sense the alleged debt is disputed. What is said in substance is that by reasons of claims the company has against the

Royal Bank of Scotland PLC and the Banco de Santander S.A., there are deductions to be made in what is owing to the petitioner. The case is not that there are claims against the petitioner, which would have the effect of a set-off.

27 I have come to the conclusion that there is a debt owing to the petitioner. This is clear from the affidavits of Mr. Stewart and the first draft accounts of the company. The petitioner has complied with all the requirements leading up to a winding-up petition. I accordingly make a winding-up order.

Order accordingly.