## IN THE MATTER OF ALGOL MARITIME LIMITED

SUPREME COURT (Pizzarello, A.J.): August 23rd, 1996

*Companies—compulsory winding up—inability to pay debts—creditor may petition for winding up on basis of judgment debt even though execution of judgment stayed pending appeal—winding up not execution and petition not abuse of process*

The petitioner sought the winding-up of the respondent company.

The petitioner, a seaman, was injured whilst working on the respondent's ship and the Supreme Court (Pizzarello, Ag. C.J.) subsequently awarded him damages and annuity payments to which he was entitled under the provisions of his contract of employment up to the age of 65. The respondent's appeal was allowed to the extent of the future payments of the annuity which had not yet become due (in proceedings reported at 1995–96 Gib LR 146). The Court of Appeal (Fieldsend, P., Huggins and Davis, JJ.A.) also made an award of costs against the respondent's insurer, the "Swedish Club," on the ground that the respondent's defence had been conducted on its behalf, the respondent being insolvent. These proceedings are reported at 1995–96 Gib LR 242. However, the court granted leave to appeal to the Privy Council and stayed execution pending appeal, except as regards a sum which had been paid into court as security for the respondent's costs on appeal. This sum had not yet been paid out.

The petitioner then brought the present petition to wind up the respondent on the grounds that it was just and equitable to do so and that it was unable to pay its debts. The Court of Appeal had apparently been

aware of the petitioner's intention to seek the winding-up at the time it made its orders.

The petitioner submitted that (a) in view of the judgment debt and the order for costs, it was clear that the respondent was unable to pay its debts and it was clearly just and equitable that it be wound up; (b) as a judgment creditor, he was entitled to seek the winding-up *ex dubito justitiae* notwithstanding the pending appeal and in doing so, he was not contravening the stay because a winding-up petition did not amount to execution; and (c) there was no danger that if the respondent were wound up, the liquidator would attempt to stifle the respondent's appeal to the Privy Council at the instance of the petitioner because the Swedish Club, as a creditor for a much larger sum than that owed to the petitioner, would be able to ensure that the appeal be fully pursued.

The respondent submitted in reply that (a) it was wholly inappropriate that it should be wound up on the basis of a judgment debt which was in dispute and if the Privy Council were to allow the respondent's appeal, there would be no basis for the order sought; (b) in any case, the petition was an abuse of process because the petitioner knew that the respondent had no assets and the petition was therefore clearly being brought solely to pursue the judgment debt against the Swedish Club, contrary to the intention of the Court of Appeal; and (c) there was a danger that if the respondent were wound up, the liquidator would withdraw the appeal at the instance of the petitioner, allowing the respondent no further opportunity to challenge the debt.

**Held**, ordering that the respondent be wound up:

As a judgment creditor, the petitioner was entitled to seek to wind up the respondent (which clearly had no assets), notwithstanding the pending appeal and because winding-up was not a form of execution, the stay of execution was no bar to the granting of the petition. Furthermore, the Court of Appeal had known of the petitioner's intention to wind up the respondent company when it ordered the stay, yet made no order preventing that course of action. In the exercise of its discretion, the court would allow the petition (page 359, line 30 – page 360, line 7).

**Cases cited:**

(1) *Amalgamated Properties of Rhodesia (1913) Ltd., In re*, [1917] 2 Ch. 115; (1917), 33 T.L.R. 414, not followed.
(2) *Company, In re a*, [1915] 1 Ch. 520; *sub nom. In re Companies 0022 & 0023 of 1915* (1915), 31 T.L.R. 241.
(3) *Flagstaff Silver Mining Co. of Utah, In re* (1875), L.R. 20 Eq. 268; 45 L.J. Ch. 136.
(4) *Globe Trust, In re*, [1915] W.N. 221; (1915), 84 L.J. Ch. 903.
(5) *L.H.F. Wools Ltd., In re*, [1970] Ch. 27; [1969] 3 All E.R. 882, considered.
(6) *Parker Davis & Hughes Ltd., In re*, [1953] 1 W.L.R. 1349; [1953] 2 All E.R. 1158.

**Legislation construed:**
Companies Ordinance (1984 Edition), s.156:
"A company may be wound up by the court if—
. . .
(*e*) the company is unable to pay its debts;
(*f*) the court is of the opinion that it is just and equitable that the company should be wound up."
s.159(1): "On hearing a winding-up petition the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit. . . ."

*P.J. Isola* and *C.C. Hernandez* for the petitioner;
*L.E.C. Baglietto* for the respondent.

**PIZZARELLO, A.J.:** This is a petition brought by Mr. Antonio Galleguillos Acori for the winding up of a company. He has a judgment in his favour from this court, upheld in part by the Court of Appeal. The Court of Appeal ordered that judgment in the sum of $138,911.12 (less $45,000), plus interest, was due to the petitioner and made a declaration that the petitioner should receive the sum of $8,472.72 per annum, the first such sum to be paid on January 28th, 1996, the payments to continue until the petitioner reaches the age of 65 or until his death, whichever is the earlier. The petitioner claims that the company is insolvent and is unable to pay its debts and that in these circumstances, it is just and equitable that it be wound up.

Mr. Isola produced the Registrar's memorandum and also a declaration in due form which stated that no notice had been given by any creditor in answer to the notice of the petition, which was duly advertised. He pointed out the company had filed no affidavit in opposition pursuant to r.25 of the Winding-Up Rules. The company has one director. Leave was given by the Chief Justice on July 23rd, 1996 to amend the petition, which order has not yet been filed. Security for costs was ordered by the Court of Appeal and has been paid into court.

Mr. Isola draws my attention to the affidavit of Mr. Acori verifying the petition. Mr. Isola read the petition and noted that the company was formed to serve the ship *The Meonia*. A search of the company's file shows that mortgages are still outstanding. He also refers to the order of the Court of Appeal whereby the judgment of this court was affirmed in part and leave to appeal to the Privy Council was given. The court ordered that execution of the judgment under appeal and of the orders made in the appeals be suspended save as to £15,000 paid into court by the appellant as security for the respondent's costs of the appeal, in respect of which execution could be carried out. So far the £15,000 remains in court. But the Court of Appeal, Mr. Isola tells me, was aware that a winding-up petition was contemplated. The Court of Appeal made

no particular order in respect of such a petition for winding-up and the petitioner's advisers have taken the view that a petition for winding-up is not execution and have advised the petitioner to proceed. It is clear that if the Judicial Committee of the Privy Council dismisses the appeal, the Swedish Club will not pay and has said so. As it is clear that the whole of the case is funded by the Swedish Club, which was accepted by the Court of Appeal, Mr. Isola submits that it is scandalous that the case has been fought to protect the Swedish Club. But in any case, the winding up will not frustrate the appeal.

The petition is brought under s.156(*e*) and (*f*) and also under s.157(*c*) of the Companies Ordinance. Mr. Acori is a judgment creditor and is entitled to petition. In support of his argument that presenting a petition is not execution, Mr. Isola refers to *In re a Company* (2), *In re Parker Davis & Hughes Ltd.* (6) and 10(1) *The Digest*, para. 8387, at 316 and para. 9047, at 395. He submits that Mr. Acori's position as a judgment creditor means that he does not have to prove his debt. Having proved his debt by judgment, the petitioner is *ex debito justitiae* entitled to an order for the winding-up of the company, even though there may be an appeal pending to the Privy Council and even though there has been a suspension of execution. For this proposition he relies on *In re Amalgamated Properties of Rhodesia (1913) Ltd.* (1), *In re Globe Trust* (4) and 2 *Palmer's Company Law Precedents*, 17th ed., at 41–42 (1960). As it is clear from the judgments that the costs of the case and the appeal have been ordered to be paid by the Swedish Club, Mr. Isola submits that it is clearly just and equitable that this company be wound up: it is clearly insolvent and is unable to pay its debts. He reiterates that the only asset of the company was *The Meonia* and this has been sold. The substratum of the company, namely, to own and operate the ship, has gone. The fact that a liquidator is appointed need not affect the prosecution of the appeal to the Privy Council. Mr. Isola candidly states that the order in this matter is required by the petitioner so that he may pursue the matter further against the Swedish Club should the appeal to the Privy Council be dismissed. The petitioner is a seaman and the delays in prosecuting his claim cause him hardship. Again, he draws my attention to the judgment of the President of the Court of Appeal dated March 21st, 1996, to *In re Flagstaff Ship Silver Mining Co. of Utah* (3), and also to *Palmer's Company Law Precedents*, 17th ed., at 28–30 (1960).

Mr. Baglietto for the company opposes the petition. In his submission, there is a *bona fide* dispute as to liability. There is an appeal to the Privy Council and it is clear that in so far as liability is concerned, the President of the Court of Appeal took the view that the plaintiff had not succeeded in his action. It is not right, in his submission, that the court should order the company to be wound up when the basis of the petitioner's claim is a judgment which is in dispute, for if the Privy Council allows the appeal there will have been no basis for the plaintiff to petition this court. He will no longer be a judgment creditor.

Mr. Baglettto submits that a distinguishing feature in this case is that there is an order for stay of execution. Furthermore, this petition is an abuse of process because the company has no assets and this is known to the petitioner. That is agreed: it has no assets, and the whole point then of having an order is to enable a liquidator to pursue the judgment debt which it is clear the Court of Appeal wanted to stay. The Court of Appeal wanted to stay everything until the Privy Council delivered its judgment. The danger therefore is that if a liquidator is appointed and withdraws the appeal, the absurd position is that the petitioning creditor's debt will not be adjudicated upon by the Privy Council and the liquidator's basis to act will rest on a judgment which may not be good. Apart from that danger, the petitioning creditor is not likely to encourage the liquidator to pursue the appeal in those circumstances. In view of these circumstances and having regard to the petitioner's intention to use these proceedings to move against the Swedish Club, in his submission, the proper way of dealing with this is to stand the matter over until the Privy Council appeal is heard. He submits that I may dismiss the petition as an abuse if the petitioner's motive in seeking winding-up is to improve his prospects of success in other litigation or if insolvency proceedings in another jurisdiction are more appropriate and he submits that improper use of procedure amounts to an abuse. He refers to s.159 of the Companies Ordinance by which the court may (a) dismiss the petition; (b) adjourn the hearing conditionally or unconditionally; (c) make an interim order; (d) make any other order that it thinks fit; or (e) make a winding-up order.

Mr. Baglietto further submits that there is a *bona fide* defence, otherwise the Court of Appeal would not have stayed execution. He refers to *Buckley on the Companies Acts*, 11th ed., at 356–7 (1930):

> "A winding up petition is not a legitimate means of seeking to enforce payment of a debt which is *bonâ fide* disputed by the company. . . . A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed . . . and under the circumstances may be stigmatized as a scandalous abuse of the process of the Court."

He too refers to the *Amalgamated Properties of Rhodesia Ltd*. case (1) and *In re L.H.F. Wools Ltd*. (5). Lastly, he produces an authority to appeal by the company. This reads as follows:

> "We, *Haven Directors Ltd.* of Haven Court, 5 Library Ramp, Gibraltar, are currently Directors of *Algol Maritime Ltd.*
>
> We are authorized by the Board of Directors of Algol Maritime Ltd. to confirm that the authority given to Hill Taylor Dickinson of Irongate House, Duke's Place, London EC3A 7LP and J.A. Hassan & Partners of 57/63 Line Wall Road, Gibraltar dated October 27th, 1994 is hereby extended to cover conducting and proceeding with an appeal from the judgment given by the Court of Appeal for Gibraltar on January 3rd, 1996.

Furthermore, we authorize the said firms to act on the instructions of the Swedish Club of P.O. Box 171, S-401 22 Göteborg, Sweden regarding the conduct of this appeal, such instructions to include decisions as to settlement and/or payments into court.

A copy of the Resolution of the Board of Directors authorizing us to sign this letter of authority and to deal with the claim of Mr. Acori on behalf of Algol Maritime Ltd. is attached hereto."

In reply, Mr. Isola questions the respondent's belief that the petitioner will stifle the appeal. In his submission, the Swedish Club is a creditor of the company and a far larger creditor than is the petitioner, because the costs so far incurred by the Club amount to over £100,000. The Swedish Club is a creditor of the company because, as has already been shown, it stands behind the company in the litigation and what can be clearer than the Court of Appeal's judgment? He points to the authority which Mr. Baglietto has relied upon to show that this is so. That being the case, all that the Swedish Club has to do to ensure that the appeal to the Privy Council continues is to arrange with the liquidator to give security and it will have the control of the winding-up, much more so than the petitioner. That said, the winding-up will in the first place be in the hands of the Official Receiver as liquidator and the court can exert its own equitable influence. But the nub of his reply is that Mr. Baglietto has misconceived the position. The law is clear that where there is a judgment debt, the creditor is entitled *ex debito justitiae* to proceed to petition for a winding up. A disputed debt is one thing. In this case, it is a judgment debt and what the Court of Appeal said is that they would stay the execution, but would leave this court to consider the propriety of the petition. The *L.H.F. Wools* case is completely different. In that case, there was an asset, the cross-claim. In this case, the company is completely empty.

Left to myself, I would have very little difficulty in deciding that a petition for winding up is not execution but, fortunately, there is also authority which says so. Therefore, notwithstanding the stay of execution ordered by the Court of Appeal, in my view the petitioner is justified in taking steps to wind up the company. It is quite clear that the company has no assets and it seems to me that the only point that I have to consider is whether in the exercise of my discretion, and I think I have a discretion in the circumstances which have been adduced by Mr. Baglietto, I should stay the petition. It seems to me that in exercising my powers under s.159 I have one of two courses only. One is to make an order for the winding up; the other is to stay the petition. I do not consider that I should dismiss the petition. I do not think this is a proper case for an interim order; and I do not consider that I should take the course that was taken in the *Amalgamated Properties of Rhodesia* case, because it seems to me that if I do that, I am in effect doing by the back door that which I ordered on July 19th, 1995, namely, that the amount of

the judgment be brought into court as a condition of stay pending appeal, and the effect of the Court of Appeal ruling was to reject that. I do not think it is clear that the Court of Appeal's intention was to limit the petitioner only to enforcing payment of the £15,000: the Court of Appeal was aware of the existence of this petition and if it had wished to stay these proceedings, it would have said so. The petition for a winding-up order is therefore granted.

*Petition granted.*