ALGOL MARITIME LIMITED v. ACORI

COURT OF APPEAL (Fieldsend, P., Davis and Neill, JJ.A.):
March 4th, 1997

Companies—compulsory winding up—grounds for winding up—inability to pay debts—no winding up on basis of non-payment of judgment debt if execution stayed pending appeal—judgment creditor nevertheless has locus standi to petition as contingent creditor on other grounds, e.g. just and equitable

The respondent petitioned for the winding up of the appellant company in the Supreme Court.

The respondent was awarded damages for personal injury against the appellant, his former employer. The appellant, which was insolvent and no longer trading, appealed unsuccessfully to the Court of Appeal and then sought leave to appeal to the Privy Council. The court ordered that execution of the judgment against it be suspended pending the appeal. Meanwhile, the respondent obtained an order for the winding up of the appellant on the alternative bases that the company was unable to pay its debts or that it was just and equitable for it to be wound up.

On appeal against the winding-up order, the appellant submitted that (a) since the judgment debt owed to the respondent was in suspension, he was not a creditor within the meaning of s.158(1) of the Companies Ordinance and had therefore had no *locus standi* to bring the petition; (b) in any event, it could not be deemed unable to pay its debts under s.156(*e*) by reason of failure to pay a debt which was not immediately payable; (c) furthermore, the respondent could not rely on the fact of the appellant's insolvency, since he had previously alleged that the company's liabilities would be met by its insurers; and (d) the petition was merely a device to prevent the appeal to the Judicial Committee from proceeding.

The respondent submitted in reply that (a) he was a creditor for the purposes of *locus standi* to petition under s.158(1) since that term specifically included a contingent creditor; (b) since the appellant was, by its own admission, insolvent and unable to honour the judgment debt, it had failed to pay "a sum due" within the meaning of s.157(*a*) and had properly been deemed to be unable to pay its debts under s.156(*e*); and (c) since the company had ceased to trade and had no assets, it was just and equitable for it to be wound up.

Held, dismissing the appeal:

(1) The respondent had *locus standi* to bring the petition as a contingent creditor under s.158(1) of the Companies Law, the

contingency being the failure or success of the appellant's appeal to the Privy Council. It was not necessary that the petition itself should have specified that his claim was contingent, since the affidavit in support clearly stated that he was a contingent creditor (page 82, lines 14–21; lines 37–45).

(2) None the less, it was settled law that a petitioner could not rely on the company's inability to pay its debts under s.156(*e*) on the basis of its failure to satisfy a claim that was not immediately payable, and whilst execution of the judgment was suspended the non-payment of the judgment debt was not neglect to pay "a sum due" for the purposes of s.157(*a*). However, the court had properly wound up the company on the ground that it was just and equitable, since the appellant had ceased trading, had no assets and was unable to meet the judgment in the respondent's favour (page 82, lines 7–13; lines 29–36; page 83, lines 1–10; lines 33–36).

(3) The appellant, having filed no affidavit in opposition to the petition, were not now at liberty to contend in argument on appeal that it was not, after all, insolvent or that the petition was an abuse of process (page 83, lines 11–23).

Cases cited:

(1) *Amalgamated Properties of Rhodesia (1913) Ltd., In re*, [1917] 2 Ch. 115; (1917), 33 T.L.R. 414, followed.
(2) *European Life Assur. Socy., In re* (1869), L.R. 9 Eq. 122; 39 L.J. Ch. 324, applied.
(3) *New Travellers Chambers Ltd.* v. *Cheese* (1894), 70 L.T. 271, applied.

Legislation construed:

Companies Ordinance (1984 Edition), s.156: The relevant terms of this section are set out at page 81, lines 30–34.

s.157: "A company shall be deemed to be unable to pay its debts—

(*a*) if a creditor . . . to whom the company is indebted in a sum . . . then due, has served on the company . . . a demand . . . requiring the company to pay the sum so due, and the company has for three weeks neglected to pay the sum . . . ."

s.158(1): The relevant terms of this section are set out at page 81, lines 27–29.

G.L. Aldous and *L.E.C. Baglietto* for the appellant;
C.C. Hernandez and *P.J. Isola* for the respondent.

FIELDSEND, P.: The dispute between the parties concerns an accident in 1987 to a seaman, Acori, on board the ship then owned by 45

Algol Maritime Ltd., the appellant, and has been before the courts in one form or another since 1993.

Judgment awarding damages to Acori was given in the Supreme Court in March 1995 and upheld in principle by a majority of the Court of Appeal in January 1996. In March 1996 the appellant noted an appeal to the Privy Council, and the appellant was ordered to provide security for the costs of that appeal in the sum of £25,000. It was ordered that "execution of the judgments the subject of the appeals and of the orders made on appeal shall be suspended."

In July 1996 Acori brought before the Supreme Court a petition for the winding up of the appellant and this was ordered by Pizzarello, Ag. C.J. on August 23rd. It is against the granting of this order that the appellant now appeals.

The petition alleged that Acori had a judgment from the Court of Appeal for US$93,911.12 and for an annual sum of US$8,472, payable from January 29th, 1996. It was undisputed that the appellant was unable to satisfy that judgment, that it was insolvent and unable to pay its debts. Its secretaries had written in January 1993 to the Registrar of Companies that the beneficial owners of the company had stated that they no longer required the company (which had no assets or liabilities) and was not trading, and that the directors of the company had resigned. A sole director was appointed in April 1993.

The appellant's primary contention is that because execution of the judgment of the Court of Appeal was suspended, Acori is not a creditor entitled to obtain a winding-up order against the appellant. Section 158(1) of the Companies Ordinance provides, so far as is relevant to this appeal, that "an application to the court for the winding up of a company shall be . . . presented . . . by any creditor or creditors (including any contingent or prospective creditor or creditors) . . . ." Section 156 provides that—

> "a company may be wound up by the court if—
>
> . . .
>
> (*e*) the company is unable to pay its debts; or
>
> (*f*) the court is of the opinion that it is just and equitable that the company should be wound up."

Both these grounds are relied on in the petition.

Mr. Aldous relies on *In re European Life Assur. Socy.* (2), the headnote to which in the *Law Reports* reads (L.R. 9 Eq. at 122):

> "Inability of a company to pay its debts under section 80 of the Companies Act 1862 is an inability to pay its debts actually due, for which a creditor could claim immediate payment.
>
> The Court will not order a company to be wound up under the just and equitable clause by reason of any liabilities not immediately payable unless it is reasonably certain that the existing and probable assets will be insufficient to meet the existing liabilities."

New Travellers Chambers Ltd. v. *Cheese* (3), upon which Mr. Aldous also

relies, is a different type of case. There a defendant, relying on a disputed debt, threatened to wind up a company on the ground that notwithstanding formal demand, the company had failed to pay the debt and was therefore to be deemed unable to pay its debts. On the facts it was held that the debt was not then presently payable and that the threatened winding-up proceedings should be stayed.

These cases certainly decide that in determining whether a company is unable to pay its debts under s.156(*e*), one must look at debts that are "absolutely due," to use the words of James, V.-C. in the *European Life Assur. Socy.* case (2) (L.R. 9 Eq. at 127). Similarly, before a company can be deemed to be unable to pay its debts under s.157(*a*) on the basis that it has neglected to pay "a sum due" it must be shown that the sum was due and payable there and then: see the *New Travellers Chambers* case.

These cases, however, do not, in my view, establish that before a person can be a creditor entitled to bring a petition he must have a claim that is due and payable there and then. Section 158(1) provides that a winding-up petition may be presented by any creditor (including any contingent or prospective creditor). It is clear that Acori is a contingent creditor, the contingency being that the appellant's appeal to the Privy Council is unsuccessful: see 1 *Stroud's Judicial Dictionary*, 5th ed., under "contingent creditor," para. 24, at 590–591 (1986). In *In re Amalgamated Properties of Rhodesia (1913) Ltd.* (1), the petitioning creditors had a judgment for costs against the company, against which an appeal had been lodged. It was held that the appeal was not a defence to the petition. It is true that there had been no stay of execution ordered (a fact stressed in the judgment), but that was of significance only in regard to whether the non-payment of the debt relied upon was the basis of the claim for a winding-up order.

Applying the principle to the present appeal, if Acori had been relying on the company's failure to pay the judgment debt as a basis for deeming the company unable to pay its debts (s.157(*a*) of the Ordinance) then I think Mr. Aldous's contention would be sound. The stay of execution would have meant that the debt was not then immediately payable. But the ground relied upon for the winding-up order was not primarily that the company was unable to pay its debts (s.156(*e*)), but that it was just and equitable that it should be wound up (s.156(*f*)).

It was argued that the petition did not set out that Acori was relying on being a contingent creditor. I can see no reason why this had to be alleged. Section 158(1) says that a creditor includes a contingent creditor and, in any event, the facts are common cause. There can have been no prejudice to the appellant in there being no specific allegation that Acori was a contingent creditor, for it was stated quite clearly in para. 6 of the affidavit of Mr. Hernandez of July 26th, 1996: "the petitioner being a contingent creditor of the company and the company having no assets, it is just and equitable . . . that it should be wound up."

Indeed, the company's position had not changed since its solicitors wrote on June 8th, 1995: "The company's position has always been made clear to the petitioner and that was that the company was unable to satisfy the judgment in the Supreme Court action."

On this approach, it is my view that as a contingent creditor, Acori was entitled to present the petition. On the material in the petition, where there was evidence that the company had no assets, had ceased trading and was unable to meet the petitioner's judgment, there were grounds upon which, in its discretion, the court could have granted a winding-up order on just and equitable grounds.

The alternative ground relied upon by the company, namely that the company was not insolvent because Acori had always contended that it was insured by the Swedish Club in respect of its liability to Acori, is not convincing. The company has not advanced this in any opposing affidavit; indeed it has not filed any opposing affidavit. On the contrary, it has, through its solicitors, admitted that it is unable to satisfy the judgment.

Thirdly, it was contended that the petition is presented to prevent the appeal to the Privy Council going ahead. This is a matter which, if it is to be relied on, should have been advanced by an affidavit in opposition to give Acori an opportunity to deal with it. It is not a matter to be raised in argument only.

In my view the appeal should be dismissed.

DAVIS, J.A.: I agree.

NEILL, J.A.: I confess that I have had more hesitation in dismissing this appeal than have my Lords. It seems to me that there will be cases where if the execution of a judgment is stayed pending an appeal it would be quite inappropriate for the judgment creditor to proceed forthwith by way of a winding-up petition.

But the facts of this case as set out in the judgment of the President are striking. The appellant company is not trading and it has no assets. Its beneficial owners have stated that they no longer require the company. I am therefore satisfied that in these particular circumstances it is just and equitable that the company should be wound up.

I too would dismiss the appeal.

Appeal dismissed.
