SUBARMANI v NATIVE LAND TRUST BOARD (ABU0095 of 2005S)

COURT OF APPEAL — CIVIL JURISDICTION

ELLIS, PENLINGTON and MCPHERSON JJA

12, 22 June 2007

Corporations — winding up — summons to strike out winding-up petition — failure to disclose reasonable cause of action and for abuse of court process — whether Respondent was susceptible to being wound up under Companies Act — Respondent not intended by parliament to be a company capable of being wound up — Appellant's attempt to use the powers conferred by Pt IX of Act misconceived — appeal dismissed — Companies Act (Cap 247) Pt IX — Court of Appeal Act (Cap 12) s 12(2)(f).

The Appellant was the creditor of the Respondent company. The Appellant obtained a judgment against the Respondent in the sum of $383,728 with costs of $7000. The Appellant filed a petition under the provisions of the Companies Act (Cap 247) (the Act) to wind up the Respondent. On appeal, the court was informed that the judgment sum has been satisfied, and that the remainder was the amount of interest on the judgment sum. In response to the winding-up petition, the Respondent issued a summons to strike out the petition for failure to disclose reasonable cause of action and for abuse of the court process. The question of law was raised whether the Respondent was susceptible to being wound up under the Act.

Held — (1) In *Re Free Fishermen of Favisham* (1887) 26 Ch D 329 and many other decisions, the court had discretion to refuse a winding up even where the requirements for making such an order were satisfied by the Applicant. Even if the Respondent was literally capable of being wound up under Pt IX of the Act, the court would undoubtedly exercise its discretion against making an order to that effect when the Respondent could not produce assets capable of being used to pay its debts or liabilities. The court found that the Respondent was not intended by the parliament to be a company capable of being wound up, whether as an unregistered company or otherwise, under the Act.

(2) The Appellant's attempt to use the powers conferred by Pt IX of the Act was misconceived. The Appellant should resort to some other method of obtaining payment of his debt. It would be futile to allow the petition to proceed, and the judge was correct in striking it out.

(3) The Appellant's appeal against the order for costs made against it on an indemnity basis was incompetent. Section 12(2)(f) of the Court of Appeal Act, as amended, provided that, without leave of the court or judge making the order, no appeal would lie from an order of the High Court or a judge thereof "as to costs only". In this case, the Appellant's appeal ought to be dismissed with costs and no leave was obtained to appeal against the costs order.

Appeal dismissed.

Cases referred to

Johnson v McIntosh (1823) 21 US (8 Wheat) 543; *Mabo v Queensland (No 2)* (1992) 175 CLR 1; 107 ALR 1; EOC 92–443; *Guerin v R* [1984] 2 SCR 335; (1984) 13 DLR (4th) 321; [1985] 1 CNLR 120; 55 NR 161; *R v Symonds* (1847) NZPCC 387; *Re Barton-Upon-Humber & District Water Co* (1889) 42 Ch D 585; *Re Bradford Navigation Co* (1870) 10 Ch D 331; *Re Brentford & Isleworth Tramways Co* (1884) 26 Ch D 527; *Re Free Fishermen of Favisham* (1887) 26 Ch D 329; *Tamlin v Hannaford* [1950] 1 KB 18; [1949] 2 All ER 327, cited.

Re Agriculturist Cattle Insurance Company (Baird's case) (1870) LR 5 Ch App 725; *Birtchnell v Equity Trustees Executors & Agency Co Ltd* (1929) 42 CLR 384;

[1929] ALR 273; *Re International Tin Council* [1987] Ch 419; [1987] 1 All ER 890; [1987] 2 WLR 1229; *Re International Tin Council* [1989] Ch 309; [1988] 3 WLR 1159; *Smith v Anderson* (1880) 15 Ch D 247; [1874–80] All ER Rep 1121, considered.

V. Mishra and *J. Jattan* for the Appellant

K. Qoro for the Respondent

[1] Ellis, Penlington and McPherson JJA. After a trial lasting several days in the High Court, Mr Subarmani, who is the Appellant before this court, obtained judgment against the Native Land Trust Board in the High Court of Fiji in the sum of $383,728 with costs of $7000. That was on 8 October 2003, and the Appellant still has not been paid the full amount of the interest on that judgment. Accordingly, claiming to be a creditor of the board originally in the sum of $398,541.92 (which includes interest accrued on the judgment sum) the Appellant on 13 April 2004 filed a petition under the provisions of the Companies Act (Cap 247) to wind up the board. We were informed on appeal that the judgment sum has since been satisfied, and that all that now remains is the amount of interest due on that sum.

[2] In response to the winding-up petition, the board issued a summons to strike out the petition as disclosing no reasonable cause of action and as being an abuse of the court process. The summons came before Connors J in the High Court, where on 2 September 2005 his Lordship struck out the petition and ordered that the Appellant pay the board's costs assessed on a solicitor-client indemnity basis. It is against this order of dismissal that the appeal is brought.

[3] The question before his Lordship was purely one of law and, assuming it was correctly determined against the Appellant, there is no doubt that the discretion to strike out the petition was properly exercised. The issue on appeal is whether the question of law was correctly determined, in which event the appeal must fail.

[4] The question of law is whether the board is susceptible of being wound up under the Companies Act. The board is a creature of statute having been brought into existence in 1940 by the Native Land Trust Act c 134. Section 3(1) of the Act established a board of trustees called the Native Land Trust Board, consisting of the Governor-General and the Minister as Chairman, together with five Fijian members appointed by the Great Council of Chiefs, three Fijians appointed by the Fijian Affairs Board, and not more than two persons of any race appointed by the Governor-General. Over the years since 1940, titles and names of some of these officers may have changed, but there are still 12 members of the board, or certainly more than eight, which, as will presently be seen, is a number of some significance in this context.

[5] By s 3(6) of the Act the board was constituted a body corporate with perpetual succession and a common seal, capable in its own name of suing and being sued, and of acquiring, holding and disposing of real or personal property, etc. This, according to the Appellant's submissions, makes it a company capable of being wound up under the Companies Act. It will be necessary later to advert in more detail to the statutory functions of the board, but for the present it is enough to refer to s 222 of the Companies Act, which authorises the winding up by the court of a "company". The word "company" is defined in s 2 of that Act as meaning: "a company formed and registered under this Act or an existing company". The board was formed or registered under the Native Land Trust Act

and not under the Companies Act, and so does not satisfy the first limb of this definition. The expression "existing company" is also defined in s 2, as meaning "a company formed and registered under any of the Repealed Acts". The Repealed Acts are the previous Companies Acts repealed by the Companies Act (Cap 247). The board was not formed or registered under any of the Repealed Acts but was incorporated under the Native Land Trust Act, which has not been repealed.

[6] This was in substance his Lordship's reasoning in the judgment he gave on 2 September 2005 that is now appealed against. In our respectful view it was correct, at least as far as it went. We say "as far as it went" with reference to the Appellant's submissions to Connors J at first instance. At the primary hearing there does not appear to have been any reliance on Pt IX of the Companies Act, but only on Pt VI of the Act. Part VI deals with the winding up of "companies" in the defined sense, meaning a company formed under the Companies Act (Cap 247) or under a repealed Act. We have already rejected the proposition that the board satisfied either of these descriptions or definitions. The question that remains is whether the board can be wound up as "unregistered company" under Pt IX of the Companies Act.

[7] For the purposes of Pt IX, s 358 provides that "unregistered company" includes any partnership, any association and any company with the following exceptions:

(a) a company registered under any of the repealed Acts or under this Act;
(b) a partnership, association or company which consists of fewer than eight members and is not a partnership, associated or company formed outside Fiji;
(c) a co-operative society registered under the Co-operative Societies Act.

The board is not within the scope of the exception in para (a) of s 358. It is, as we have already said, not registered under any of the repealed Acts or under the Companies Act (Cap 247). It is not within the exclusion (b) because under s 3(1) of the Native Land Trust Act the board consists of more than eight members. Nor is it a co-operative society in terms of para (c).

[8] Whether the board can be wound up as an "unregistered company" therefore depends on whether it is capable of being and should be considered "any partnership, any association [or] any company" within the meaning of s 358. In the first place, it is clearly not a partnership according to the ordinary acceptation of that term. Ordinary partnerships, said James LJ in *Re Agriculturist Cattle Insurance Company (Baird's case)* (1870) LR 5 Ch App 725 at 732–3:

> … are assumed and presumed to be based on the mutual trust and confidence of each partner in the skill, knowledge and integrity of every other partner. As between the partners and the outside world … each partner is the unlimited agent of every other in every matter connected with the partnership business …

See also *Birtchnell v Equity Trustees Executors & Agency Co Ltd* (1929) 42 CLR 384 at 407–8; [1929] ALR 273 at 283–4 per Dixon J. The members of the board in this case are not associated on the basis of mutual trust and confidence inter se and they are not the agents of each other in the activities that they discharge. Most of them had no choice in the selection of their fellow members who, like them, were appointed as members of the board of trustees under s 3(1) of the Native Land Trust Act; they were so appointed to the board either because they fulfilled a particular office such as Governor-General or Minister, or because they were appointed by those persons or by the Council of Chiefs. No doubt in

practice they trust one another, or one may hope they do so; but it is not a relation between them of mutual trust and confidence that called their membership of the board into existence. And they are not individually the agents of each other or of all other members of the board.

[9] It follows that the board or its members do not constitute "any partnership" within the meaning of s 358 of the Companies Act. The same is true of the expression "any association" in that section. The members of the board are not an association. According to James LJ in *Smith v Anderson* (1880) 15 Ch D 247 at 275; [1874–80] All ER Rep 1121 (*Smith*):

> Persons who have no mutual rights and obligations do not … constitute an association because they happen to have a common interest or several interests in something which is to be divided between them.

The Court of Appeal in England was there considering the beneficiaries of a unit trust or investment trust, which persons were (reversing in this the decision of Sir George Jessel) held not to be associated for the purpose of carrying on business in contravention of a prohibition against partnerships or associations of more than 20 persons doing so. The members of the board of the Native Land Trust constituted by the Native Trust Act do not in law have "mutual" rights and obligations, but only rights and obligations individually as trustees, and they do not have a common interest or several interests in something that, in the words of James LJ, "is to be divided between them". Indeed, the assets that they administer are not there to be divided among them at all.

[10] This leaves for consideration the words "any company", which is the third of the expressions used in s 358. The same collocation "partnership, association, company" appears in s 358(b), and it also appeared in the former prohibition against trading in groups of more than 20. In *Smith*, both James LJ (at Ch D 273) and Brett LJ (at Ch D 277) said they could not see what difference there was between a "company" and an "association", or how there could be one without the other. In this context, the expression "partnerships associations, companies" can be traced back as far as the Winding-up Acts passed in 1848 and 1849. There are various decisions in England in which it has been held that under provisions of those and later Acts comparable to ss 358 and 359 of the Fiji Companies Act companies incorporated by statute are capable of being wound up. Among those decisions are cases in which canal companies created by statute have been wound up: see *Re Bradford Navigation Co* (1870) 10 Ch D 331; also a waterworks company: *Re Barton-Upon-Humber & District Water Co* (1889) 42 Ch D 585; and a tramways company: *Re Brentford & Isleworth Tramways Co* (1884) 26 Ch D 527.

[11] But although some types of companies incorporated by statute may be within the strict letter of s 358 as an "unregistered company" and therefore susceptible of winding up under Pt IX, there are other decisions holding that some unregistered companies are not intended to be wound up under that part. As Millet J said in *Re International Tin Council* [1987] Ch 419 at 450; [1987] 1 All ER 890 at 901; [1987] 2 WLR 1229 (*Tin Council (1)*), in a passage adopted on appeal ([1989] Ch 309 at 329; [1988] 3 WLR 1159):

> … it is one thing to give effect to plain and unambiguous language in a statute. It is quite another to insist that general words must invariably be given their fullest meaning and applied to every object which falls within their literal scope, regardless of the probable intentions of Parliament.

[12] To see if winding up is available here, it is necessary now to examine the powers and principal functions of the incorporated board. By s 4 of the Native Land Trust Act, the board is placed in control of all native land vested in it and is to administer it for the benefit of the Fijian owners. By s 5, native land is alienable only to the Crown. This accords with longstanding legal principle applied throughout the British empire from early times: see *Johnson v McIntosh* (1823) 21 US (8 Wheat) 543; *R v Symonds* [1847] NZPCC 387 at 389–91 (*Symonds*); *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 60; 107 ALR 1 at 43; EOC 92–443. In that respect, the Crown considered itself as in some degree the guardian or trustee of the interests of indigenous people: *Symonds* at 291; *Guerin v R* [1984] 2 SCR 335 at 375; (1984) 13 DLR (4th) 321; [1985] 1 CNLR 120; 55 NR 161. Section 8 of the Act makes it lawful for the board to grant leases and licenses over land under its control. By s 14, rent, licence fees and premiums in respect of native land are to be paid to the board and distributed as prescribed. Before being distributed under s 14(1) and (2), the board must discharge out of moneys received the various obligations specified in paras (a)–(e) of s 14(3). Section 14(4) lays down an order of priority in which those obligations are to be discharged. Regulation 11 of the Native Land Trust Regulations requires that, after deduction of the sums prescribed in s 14 of the Act, monies, rents and premiums coming to the board will be distributed in a sequence that is laid down in the section.

[13] From these provisions it seems quite clear that in carrying out its statutory functions of administering native lands and receiving and paying out income derived from that land and other assets, the board is, as its title suggests, acting as a statutory trustee or quasi-trustee for the Fijian people whose land it controls. The performance of those functions in the manner required by the Act is quite inconsistent with the nature of winding up as envisaged under the Companies Act, and with the priorities or order in which liabilities are to be discharged under that Act. That process involves collecting the assets of the company, their liquidation by sale or otherwise; and the adjudication and payment or claims or proofs of debt against the company. In law liquidation displaces the board of directors and terminates their powers, which then become exercisable by a court-appointed liquidator, who remains in office until the affairs of the company are completely wound up, which is followed by dissolution of the company. See *Tin Council (1)* at Ch 445; All ER 897.

[14] It is impossible to suppose that parliament intended that such a regime should replace the Native Land Trust Board or that its appointed members should be displaced in this way. There is nothing in the provisions of the Native Land Trust Act that even hints at such a possibility. Given the statutory trust or terms on which the board holds and administers native lands and the proceeds of their disposal, there is no prospect that winding up of the board would result in payment of the Appellant's judgment debt.

[15] In essential respects, the present case closely resembles that which came before the Court of Appeal in *Re Free Fishermen of Favisham* (1887) 26 Ch D 329 (*Favisham*). There the Fraternity of Fishermen were entitled to a franchise conferring on tenants of the manor of Favisham the power to dredge for oysters. On a petition by a creditor for winding up of the statutory corporation in which the franchise was vested, the Court of Appeal set aside an order which had been made for winding it up. Cotton LJ (at 342) considered that the statutory corporation held the oyster franchise on trust for the fishermen, and said that it would be impossible to sell it on the open market:

> It would be selling a trust, that is to say, selling a property vested in the body to be wound up, where that body held it on trust for certain persons. That would be utterly wrong, it could not be sold, and a trust cannot be wound up. You cannot wind up an association which is a trustee; you could only sell the property subject to the rights of the beneficiaries and those for whom the body proposed to be wound up held the property in trust.

While not necessarily agreeing completely with everything in this passage of his Lordship's judgment, it is clear to us that the ultimate reason for reversing the winding up order in that case was that it would not have produced any "free" assets that could be used in the liquidation to pay the company's debts and liabilities. Speaking of the oyster franchise which was confined to tenants of Favisham manor, Bowen LJ (at 344) asked how the liquidator could sell that right to anybody; it was therefore useless to make an order to wind up the company. See also per Fry LJ at s 347 of the report of the same case.

[16] As appears from *Favisham* and many other decisions, the court possess a discretion to refuse a winding up even where the requirements for making such an order are literally satisfied by the petitioner. By s 359(1) an unregistered company *may* (not must) be wound up under the Companies Act. Even if the Native Land Trust Board were literally capable of being wound up under Pt IX, the court on the hearing of the petition would undoubtedly exercise its discretion against making an order to that effect when it could produce no assets capable of being used to pay debts or liabilities. We consider that the board was not intended by parliament to be a company capable of being wound up, whether as an unregistered company or otherwise, under the Companies Act (Cap 247). See *Tamlin v Hannaford* [1950] 1 KB 18 at 23; [1949] 2 All ER 327 at 328, where Denning LJ said of a similar statutory corporation that its property was liable to execution but it was not liable to be wound up at the suit of any creditor.

[17] The Appellant's attempt to use the powers conferred by Pt IX of the Act is misconceived. The Appellant must resort to some other method of obtaining payment of his debt. It would be futile to allow the petition to proceed, and the judge was correct in striking it out.

[18] The Appellant affected to appeal against the order for costs made against it in the court below, which included an order that costs be assessed against it on an indemnity basis. However, s 12(2)(f) of the Court of Appeal Act (Cap 12), as amended, provides that, without leave of the court or judge making the order, no appeal lies from an order of the High Court or a judge thereof "as to costs only". If the appeal here is dismissed, as it must be, it becomes an appeal as to costs only. No leave was obtained to appeal against the costs order. It is therefore incompetent.

[19] The appeal is dismissed with costs fixed at $500.

Appeal dismissed.