IN THE SUPREME COURT OF FIJI

Companies Proceedings

Action No. 49 of 1985

Between:

IN THE MATTER OF CHAZ LUMBER LIMITED

- and -

IN THE MATTER OF THE COMPANIES ACT

Mr. H. Lateef for the Petitioner
Mr. S.C. Parshotam & Mr. W.D. Morgan for the Company
Mr. R.I. Kapadia & Mr. D.C. Maharaj for Supporting Creditor

O R D E R

Cases referred to:
(1) Re Invicta Works Ltd.(1894) W.N.39; 38 Sol.Jo.290.
(2) In re Spence's Patent Non-Conducting Composition and Cement Company (1869) L.R.9 Eq.9.
(3) In re Paris Skating Rink Company (1877) 5 Ch.D.959.
(4) In re Patent Cocoa Fibre Company (1876) 1 Ch.D.617.
(5) In re Bostels Ltd.(1968) Ch.346.
(6) In re Castle Coulson & MacDonald Ltd.(1973) Ch.382.

This is a petition to wind up the Company. The petition is brought under the provisions of section 220(e) and (f) and section 221(a) of the Companies Act, 1983 (hereinafter referred to as "the Act"). At the hearing of the petition, the Court was informed by Mr. Lateef that the Company had fully discharged its debt to the petitioner, who consequently wished to withdraw the petition. Five creditors supported the petition, and three of them appeared at the hearing. One such creditor had given notice under rule 29 of the Companies

(Winding Up) Rules, 1983 (hereinafter referred to as "the Rules" and by rule): the form of notice was defective in that the amount of the debt was not stated (see Form 13 scheduled to the Rules), but I consider that the defect was remedied in Form 14 filed by the petitioner under rule 30, which stated that the debt was in the amount of $5,000. The latter creditor made application at the hearing under rule 32 to be substituted as petitioner. Rule 32 reads as follows :

> "32.-(1) When a petitioner for an order that a company be wound up by the court or subject to the supervision of the court is not entitled to present a petition, or, whether so entitled or not, where he either -
>
> (a) fails to advertise his petition within the time prescribed by these Rules or such extended time as the registrar may allow; or
>
> (b) consents to withdraw his petition, or to allow it to be dismissed or the hearing of it to be adjourned, or fails to appear in support of his petition when it is called in court on the day originally fixed for the hearing thereof, or on any day to which the hearing has been adjourned; or
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> (c) if appearing, does not apply for an order in the terms of the prayer of his petition,
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> the court may, upon such terms as it may think fit, substitute as petitioner any creditor or contributory who appears to the court to have a right to present a petition, and who is desirous of so doing.
>
> (2) An order to substitute a petitioner may, where a petitioner fails to advertise his petition within the time prescribed by these Rules, or consents to withdraw his petition, be made in chambers at any time."

The question of the procedure to be followed in substituting a petitioner gave rise to some submissions at the hearing. In view of such submissions the court reserved its ruling thereon, the petition was not withdrawn, and the hearing was adjourned, the court observing that, if the particular supporting creditor wished to proceed under section 220(e) of the Act and to rely upon section 221(a) thereof, ex abundanti cautela it would need meanwhile to itself serve upon the Company a statutory demand under section 221(a).

There is a paucity of authority in the matter of the procedure applicable. The text books invariably quote the case of Re Invicta Works Ltd.(1) as the authority laying down the correct procedure in the matter. In that case the petitioning creditor was apparently willing to withdraw his petition. Two supporting creditors each wished to be substituted as petitioner. The debt alleged to be owed by the Company to one of them, named Davis, was disputed by the Company. The Company itself asked that the other creditor, whose debt was acknowledged, be substituted. The report of the Court's ruling is brief: it reads as follows ((1894) W.N. p.40):

> "Vaughan-Williams, J. ordered that Davis should be substituted as a petitioner. A winding-up order might be made at once, without any adjournment; but as the debt of the substituted creditor was disputed, he had better make an affidavit in support of it, and the petition must stand over for a week."

The report of the case in the Solicitors Journal (3/3/1894, p.290) incidentally, is even briefer. The learned author of the Law of Company Liquidation 2 Ed.,

(1980), B.H. McPherson Q.C., at p.77 relies on the above authority in saying that

> "The correct procedure in such cases is to allow the petition to be amended by substituting the creditor who wishes to proceed and directing that it be adjourned to enable the necessary verifying affidavit to be made."

The learned authors of Halsbury's Laws of England 4 Ed. Vol. 7 at para. 1031 (n.5) also rely on Re Invicta (1) as indicating the correct procedure in the matter. So also do the learned authors of Palmer's Company Precedents Part II (Winding Up) 17 Ed. (3rd Imp.1970) at p.84 in observing -

> "The court takes all reasonable measures to enforce the provisions of r.37 (rule 32 in Fiji) and, when the parties consent that the petition shall be withdrawn or dismissed, it is generally ordred to stand over for a week, if other persons have given notice to support the petition, in order to give any other creditor or contributory an opportunity of applying to be substituted as petitioner. In Re Invicta Works (1) Romer J., on ordering another creditor to be substituted as petitioner, directed him to amend the petition, and this was done by making him the petitioner, and stating his debt in the place where the original petitioner's debt had been stated."

The above reference to Romer J. put me on enquiry. I have discovered that the Fifteenth Edition (1937) of Palmer's Company Precedents reads differently (at p.113), as follows :

> "The Court takes all reasonable measures to enforce the provisions of Rule 36 (now Rule 37) and, when the parties consent that the petition shall be withdrawn or dismissed, it is generally ordered to stand over for a week, if other persons have given notice to support the petition, in order to give any other creditor or contributory an opportunity of applying to be substituted as petitioner. For orders on petitions where other persons have been substituted, see International Commercial Co., 9th March, 1896; Richmond Collotype Printing Co., 21st July, 1896. See also Invicta Works, W.N. (1894) 39. Romer, J., on ordering another creditor to be substituted as petitioner, directed him to amend the petition, and this was done by making him the petitioner, and stating his debt in the place where the original petitioner's debt had been stated. International Commercial Co. (00168 of 1895), March, 1896."

It may well be therefore that the dicta of Romer J. contained in Palmer are based on the authority of International Commercial Co. I regret that I have failed to find any report of the latter case, (except that of the appeal at (1897) 75 L.T.639, the report of which is of no assistance), nor of the case of Richmond Collotype Printing Co.

It would seem that Vaugham-Williams, J. was prepared to make a winding-up order 'at once', apparently without amendment of any kind, and, had the company not disputed the debt, without an affidavit establishing such debt. As will be seen, I find some difficulty in following the dicta of Vaughan-Williams J. Those of Romer J. I find to be persuasive.

The rule allowing for substitution was first introduced in England under rule 2 of the Companies Winding-

up Rules, 1893, the forerunner of rule 36 and 37 of the 1929 and 1949 rules respectively. In the case of In re Spence's Patent Non-Conducting Composition and Cement Company (2), decided in 1869, Lord Romilly, M.R. was apparently persuaded against adopting his own suggestion to "give the conduct" of the petition to a supporting creditor, where a petition by shareholders had failed to allege that the company was insolvent, though the evidence tended to show that this was the case. The supporting creditor indeed had filed an affidavit in support of his claim but only a day before the hearing. Lord Romilly, M.R. ultimately decided that he could not allow the creditor "to convert a shareholder's into a creditors' Petition upon such short notice, rather no notice at all." In reaching such decision the court was apparently influenced by the submission that the supporting creditor

> "must support the petition as it stands, and cannot be allowed to make a fresh case of his own."

That was of course before the Rules provided for substitution. In the 1877 case of In re Paris Skating Rink Company (3) part-substitution of the petitioner's assignee was effected, by amending the petition to make the latter a co-petitioner, and to refer to the assignment of the debt rather than the details of the debt. A winding-up order on the petition was made by the Vice-Chancellor. On appeal to the Court of Appeal however, the order was discharged, Bramwell L.J. in particular observing that different considerations arose at common law and that the court should not allow "the assignment of a debt, together with the right to proceed with a petition to wind up which has been brought in respect of such a debt." For our purposes of course the decision indicates that substitution was

nonetheless possible, many years before the rule was introduced in 1893, by way of amendment of the petition.

In any event it seems that the above-mentioned decisions of the Court of Chancery in 1894 and 1896 laid down a practice in the matter which has been subsequently followed. Such practice is outlined by the learned authors of Buckley on The Companies Acts 13 Ed.(1957) at p.1033 (in a note to rule 37 of the 1949 Rules) :

> "A substitution order will usually direct amendment of the petition by the substitution of the new petitioner and of particulars of his debt: The amended petition should be verified by affidavit and again served on the company. It need not, however, be re-advertised."

That practice accords with the dicta of Romer J. in 1896. If a petitioner is being substituted, then he is no longer in the position of being merely a supporting creditor, wishing "to support the petition as it stands." Instead I consider that he must "make a fresh case of his own."

The question arose during the course of the argument as to whether the substituted petitioner may merely adopt the original petitioner's petition. I do not see that he can do so. As Jessel M.R. observed in the case of In re Potent Cocoa Fibre Company (4) at p. 618,

> ".... A creditor presents a petition for winding up a company, and when the petition is called on he elects to withdraw it. In other words, he declines to open it, and submits to have it dismissed. The result is, that the

> Court cannot even look at the petition, and can know nothing about it beyond the mere fact that a petition has been presented, which, for some reason or other, the Petitioner does not choose to open."

I do not see how a supporting creditor (who has in effect nothing left to support) can adopt a petition which is no longer in evidence before the court. He cannot thus adopt a verifying affidavit sworn by the original petitioner, and not, as required by rule 25, by "the petitioner", namely the substituted petitioner, and how then can he hope to comply with that rule and adduce evidence of a debt owed by the Company to another? I cannot but see that the entire petition would have to be amended, apart, that is, from the grounds of the petition. Quite clearly therefore the substituted petitioner would then have to support the amended petition with an affidavit sworn under the provisions of rule 25. Again, in view of such amendment, in accordance with the general rule of practice, the amended petition would have to be re-served.

During the course of the argument I had originally thought that where a creditor wishes to present a petition under the provisions of section 220(e), that is, on the ground that "the company is unable to pay its debts", and wishes to rely on the provisions of section 221(a), a right to present such petition does not arise until the latter provisions are satisfied. On reflection, I consider that that approach is not correct. Section 221 deals with the evidence which the petitioner is required to adduce in order to prove the ground of his petition. The right of the creditor to bring the petition is independent of such evidence however, with the exception it seems of the prima facie evidence required by the provisions of section 222(1)

(iii) of the Act, in the case of a contingent or prospective creditor: in the absence of that evidence it can be said that such petitioning creditor never had the right, or that an intending petitioner does not have the right, to present a petition.

Section 222 of the Act confers the right upon a creditor, that is, a person having a pecuniary claim against the Company, to bring a petition. Sugh right however is qualified in a number of ways, as illustrated by the learned authors of Palmer's Company Law 23 Ed. at para. 85-13/15: to state but one of those qualifications, a debt arising out of an illegal transaction will not give rise to a right to present a petition. I consider that rule 32 is to be interpreted in the light of such qualifications.

Where it appears to the court therefore that such qualifications do not apply, the court may substitute a creditor as petitioner. The question nonetheless arises, as it has in this case, as to whether, if the substituted petitioner intends to rely on the provisions of section 221 (a), he would need to serve upon the company the statutory demand specified therein. It was seemingly suggested by Mr. Kapadia at one point that the demand already served by the petitioner in the present case would suffice. Mr. Morgan submitted that the intending petitioner would need to serve a fresh demand. I observe that the demand served by the petitioner was eventually met, and the debt paid in full; but that is beside the point. The point is, that such demand was in respect of another debt altogether, not the debt owed to the supporting creditor, upon which, if he is substituted as petitioner, he will have to base his petition. In any event, the petitioner has in effect

declined to open his petition and, to repeat the words of Jessel M.R.,

> "the Court cannot even look at the petition and can know nothing about it beyond the mere fact that a petition has been presented."

In my view therefore a substituted petitioner, must, if he wishes to avail of the provisions of section 221(a), serve upon the Company the necessary statutory demand in respect of the debt owed to him. No doubt it will then be said that there is little purpose to rule 32, if the substituted petitioner must, in effect, commence proceedings all over again. Why not in such circumstances present an entirely new petition?

To that I say that there is no need in the case of substitution to re-present the amended petition or to re-advertise it: the petition has already been presented and advertised and all interested parties have already been notified. At least the costs of presentation and advertisement are thus avoided. Further, a study of the cases of In re Bostels Ltd. (5) before Pennycuick J. and In re Castle Coulson & MacDonald (6) before Templeman J. indicates that, as Pennycuick J. put it at p.353, "a much more substantial saving in duplication" than merely the costs of presentation and advertisement can be effected by the Court. I have heard no submissions on costs at this stage, that is, from the petitioner, and I will content myself in saying that the judgments of Pennycuick and Templeman JJ., indicate that the rule allowing substitution operates to reduce costs and to conserve the assets of the Company, as the remedy of winding up, as Pennycuick J. observed at p.351,

> "enures for the benefit of the creditors as a whole and the costs of the petition fall upon the assets available for distribution amongst the creditors as a whole."

Ultimately therefore, rule 32 operates not so much for the convenience of a supporting creditor as in the interests of all the creditors as a whole.

As to the present case, it appears to me that the particular supporting creditor has a right to present a petition and I accordingly grant the application for substitution. I also order that the petition be amended to substitute the supporting creditor's name and the particulars of the debt alleged to be owed to him. At the last adjourned hearing, Mr. Maharaj stated that a written demand had been served upon the Company. If it is the case that the substituted petitioner intends to rely on the provisions of section 221(a), then the appropriate particulars in respect thereof will also need to be pleaded in the petition. The amended petition will need to be verified by affidavit and re-served on the Company.

Delivered In Open Court At Suva This 27th Day of September, 1985.

(B.P. Cullinan)
JUDGE