

CC - 176/93.HC/Pg.1

IN THE MATTER of FAB BLOCK COMPANY LIMITED

And

IN THE MATTER of Section 326(6) of the Companies Act

High Court of Solomon Islands

(Muria CJ.)

Civil Case No. 176 of 1993

Hearing: 3 August 1993

Judgment: 20 August 1993

J. Corrin for Petitioner

P. Watts for the Registrar of Companies

MURIA CJ: This is an application by way of petition brought under Section 326(6) of the Companies Act (Cap.66) on behalf the Development Bank of Solomon Islands, a member of the company concerned, Fab Block Company Limited ("the Company") for an order to restore the company to the register of companies.

The company was incorporated on 12 December 1978 under the Companies Act (Cap.66). For a number of years the company had not been lodging its annual returns as required by the Act since 1984. Consequently, the Registrar of Companies struck the company off the register as being defunct on 3 November 1988 and thereby dissolved on 11 November 1988 on the publication of the Notice of Striking Off the Register in the Gazette.

The application in this case is brought pursuant to section 326(6) of the Act which provides as follows:

"326 (6) *If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the court on an application made by the company or member or creditor before the expiration of twenty years from the publication of the notice aforesaid may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and upon an office copy of the order being delivered to the registrar for registration the company shall be deemed to have continued in existence as if its name had not been struck off; and the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons*

in the same position as nearly as may be as if the name of the company has not been struck off."

For the Petitioner, Ms Corrin asked the court to exercise its discretion to restore the company to the register on the basis that "the company was at the time of the striking off carrying on business or in operation." Further, Counsel argued that in this case "it is just that the company be restored" to the register. These two situations are the basis for the exercise of the court's discretion under subsection (6) of section 326 and the right to apply for restoration of the company's name arises in any of the two situations.

It is also worth noting that the conditions of applying under subsection (6) are: firstly, that the company shall have been struck off the register and dissolved as pursuant to subsection (5), secondly the application, by Petition, must be brought by the company, or any member or creditor of the company, and thirdly, the application must be brought before the expiration of 20 years from the date of publication of the Notice referred to in subsections (3) and (5). Those three conditions have all been satisfied in this case.

As to the first limb of her argument that the company was at the time of the striking off still "carrying on business" or "in operation", Ms Corrin relied on the affidavit of Vincent Yee who is the General Manager of the Petitioner. That affidavit states as follows:

1. *I am the General Manager of the Petitioner and have held that position since 14th July 1991.*
2. *I refer to the Petition filed herein and say that the contents of the same are, to the best of my knowledge and belief, true.*
3. *On the 13th day of March, 1980 the Petitioner acquired 5,000.00 shares in Fab Block Company ("the Company"). All the other shares (15,000.00) were held by Roger Ovens and John Odgers, the promoters of the Company in equal shares.*
4. *Some time in 1984, the shares of Ovens and Odgers were transferred to Jemuel Maetala. At the same time Jemuel Maetala and Allan Nunuhu became Directors of the Company and Allan Nunuhu was also appointed Secretary.*
5. *On the 6th day of December, 1979 the Company purchased the Fixed Term Estate in parcel No. 191-041-89 from Honiara Beverages Limited. The property was intended to be used for the Company's office and making cement bricks, and storage of the building materials and building.*

6. *I am informed by Jemuel Maetala and verily believe the business of the Company was not remunerative and considerable difficulty was experienced with business competition and finance. I am further informed that the Company did not carry on any business after 7th December 1987 other than the leasing of its property and that on a date unknown to the Petitioner the land was leased to Eastern Development Limited.*
7. *I am further informed by Jemuel Maetala that by that stage the Company had accumulated a number of debts and that the rent was being used to pay off the creditors.*
8. *The Petitioner did not have anything to do with the running of the Company and did not receive any income from the profits (if any) or any of the rental monies.*
9. *It appears that all letters and notices from the Registrar of Companies regarding failure to file returns and warnings that it would be struck off the Register were sent to the post office box of Price Waterhouse. In fact Price Waterhouse ceased business in about 1987 to 1988 and this may be why the Company did not respond to the same.*
10. *I was not aware of those letters of notices before the Registrar General's Office filed an Affidavit in action No.50 of 1993. I have enquired of my staff and verily believe that they were not aware of those letters or notices either."*

There is to be noted that the Petitioner in paragraph (6) of the affidavit stated that the company was not carrying on business after 7 December 1987 other than the leasing of its property to one Eastern Development Limited. Despite that statement by the General Manager, Counsel for the Petitioner argued that the company was on 3 November 1988 (the date of the striking off the register) carrying an business or in operation.

On the other hand when one turns to the affidavit of Mr Haelo Pelu filed on behalf of the Registrar of Companies who opposed the application, it is there to be noted that the company had not been responding to Registrar's letters since June 1986, apart from the letters from Price Waterhouse dated 24 September 1986, 22 October 1986 and 10 July 1987. The letter of 22 October 1986 from Price Waterhouse (the company's registered office) and exhibited to Mr. Pelu's affidavit stated that the company had not been operating for the past two years but requested that it be not struck off the register as being defunct. Again the letter from Price Waterhouse dated 10 July 1987 requested the

Registrar of Companies to keep the company on the register as it was slowly paying off its creditors. On 6 April 1988, the Registrar requested to be informed of the progress on the repayments of the company's debts but there was no response from the company. Subsequent enquiries by the Registrar as to whether the company was carrying on business or in operation received no response from the company. The result was that the company was struck off the register and dissolved, pursuant to the provisions of section 326 of the Act.

Counsel for the Petitioner relied on a number of authorities to support her contention that the company was 'carrying on business' at the time it was struck off the register. She cited *South Behan Rly Co. -v- Inland Revenue Comrs.* [1925] AC 476, 488; *Re Sarflax Ltd* [1979] 1 All.E.R 529, 534 & 535; *Thiophile -v- Solicitor General* [1950] 1 All.E.R 405; *Re Bird* [1962] 2 All.E.R. 406; *American Leaf Blending Co. -v- Director General of inland Revenue* [1978] 3 All.E.R 1185, 1189 and *Central India Mining Company Limited -v- Societe Colonial Anversoise* [1920] 1 KB 753. I do not propose to dwell in details on those cases. Suffice it is to note that they are of assistance when considering the words 'carrying on business'. However what constitutes 'carrying on business' in each case must be a question of facts in a particular case as pointed by *Bankes LJ in Central India Mining Company -v- Societe Coloniale Anversoise (supra)* where he was considering what constituted 'carrying an business' in an enemy country whether by individual or an incorporated body as stated in the Proclamation on Trading with the Enemy. At page 765, *Bankes LJ* stated:

"It is no doubt a pure question of fact whether either an individual or an incorporated body is really carrying on business in an enemy country. Both must be judged by the same standard. What would amount to a carrying on business in the one case must amount to a carrying on business in the other; and I think it is of assistance to ask oneself the question whether the acts which are said in the present case to constitute a carrying on of business would, had the case been that of an individual, have carried conviction that they were."

On the question as to whether the company was 'carrying on business' within the meaning of the Proclamation, the Court held that although the acts which were taken were merely for the purpose of keeping the company in existence and as such might not amount to 'carrying on business' the fact that the company was making arrangements to collect debts and discharge liabilities amounted to 'carrying on business'. *Bankes LJ* went on to add at p.767 that:

"It is quite true that the appellants' principal place of business was closed as a place of business, and devoted to other purposes; it is also true that the managing director had removed all the assets that were capable of being removed to England; but it

must also be true that the appellants had made such arrangements as were necessary to enable the collection of debts and the discharge of liabilities to go on. In my opinion this is a carrying on of business within the meaning of the proclamation. It is immaterial that all buying and selling were impossible, if sufficient was done to amount to amount to a carrying on of business."

In *Theophile -v- Solicitor General* (supra) which was a petition brought under the Bankruptcy Act 1914, the appellant's case was that under the Act and being a Rumanian subject, he was not a "debtor" and as such he had not committed an act of bankruptcy that entitled the petition to be brought against him and that he did not carry on business in England at the date of the petition or during the three months prior to the issuing of the petition. It was held that although the appellant was not actively carrying on business within three months of the presentation of the petition, he did not cease to carry on business in England until all sums due in respect of the business were collected and all debts were paid. In this regard Lord Porter stated at page 411:

*"In a sense it is true that the appellant was not actively carrying on business within three months of the presentation of the petition but there is a series of cases beginning with *Re dagnall* [1896] 2QB 407 and ending with *Re Reynolds* [1915] 2KB 186 which in unbroken sequence have decided that trading does not cease when, as the expression is, 'the shutters are put up,' but that it continues until the sums due are collected and all debts paid."*

Theophile -v- solicitor-General was applied in *Re Bird* (supra) where it was held that a person continued to carry on business in England for the purpose of the Bankruptcy Act, 1914 until he had performed all the obligations which the fact of trading imposes on him.

In the case of *Re Sarflax Ltd* (supra), a company in voluntary liquidation, the Court of Chancery also had occasion to consider the phrase "carrying on business". The company ceased trading as machine-tools manufacturer as from the close of business on 30 April 1971 and it was substantially indebted to its parent company. It sold its fixed assets, stock in-trade and work in progress to the parent company to settle its debts. It was established that between 30 April 1971 and July 1973 the company received about 38,050 which it applied to satisfy the balance of its debt to the parent company, other trade creditors and to pay administration expenses and legal fees. The court held that the expression "carrying on business" was not synonymous with actively carrying on trade. The fact that the company went about collecting its assets which were acquired in the course of business and distributing the proceeds of those assets to discharge its business liabilities constituted "carrying on business". At pages 534 and 535 Oliver J stated:

"...but I feel quite unable to say that the expression 'carrying on any business' in the section is necessarily synonymous with actively carrying on trade or that the collection of assets acquired in the course of business and the distribution of the proceeds of those assets in the discharge of business liabilities cannot constitute the carrying on of 'any business' for the purposes of the section. The decision of the House of Lords in *Theophile V SOLICITOR-GENERAL*, and *Re Bird* appear to me to point very strongly in the opposite direction. Admittedly those cases were decided on section 4(1) of the Bankruptcy Act 1914 where the expression used is 'carried on business in England, personally or by means of an agent or manager', but they establish that, at least for the purpose of that section, a bankrupt carries on business until he has performed all the obligations that the fact of trade imposes on him. The instant case is really a *fortiori* because there was here not merely a passive suffering of undischarged liabilities but a continuous course of active conduct in the collection and distribution of the business assets."

The facts deposed to by the Petitioner's General Manager showed that the company had not been successful and consequently stopped operating but instead carried on the business of leasing out its property to another company, Eastern Development Limited. The company, having incurred substantial debts, used the proceeds gained from the rent to settle its creditors. In those circumstances can it be said that the company was "carrying on business?" Such a position was considered in the *American Leaf Bleding Co. Sdn. Bhd -v-Director General of Inland Revenue (supra)*.

Briefly the American Lead Blending Co. was incorporated in Malaysia with the principal object to cutting and blending tobacco and to manufacture cigarettes. As usual its memorandum of association allowed it, among other things, to grant licences over and generally deal with the land, rights and other property of the company. A piece of land was purchased whereon the company erected a factory for making cigarettes and a warehouse for storage of tobacco and cigarettes. The cigarette manufacturing was not profitable and was abandoned in 1961. The tobacco business continued until 1964 when it, too, was abandoned as being unprofitable. The company had accumulated adjusted losses for income tax purposes. As the company no longer in tobacco business, it rented out the warehouse on a monthly tenancy. One of the issues raised was whether in letting out its premises the company was carrying on a business. The Privy Council held that it was. Lord Diplock warned of reliance on the dicta in *Salisbury House case [1930] AC 432* where it was suggested that the letting of land does not constitute a "trade" and that such dicta had no relevance to the question whether letting of land by the company amounted to the carrying on of a "business."

Having pointed out that 'business' is, a wider concept than 'trade', Lord Diplock said at p.1189.

"In the case of a private individual it may well be that the mere receipt of rents from property that he owns raises no presumption that he is carrying on a business. In contrast, in their Lordships' view, in the case of a company incorporated for the purpose of making profits for its shareholders any gainful use to which it puts any of its assets prima facie amounts to the carrying on of a business. Where the gainful use to which a company's property is put is letting it out for rent, their Lordships do not find it easy to envisage circumstances that are likely to arise in practice which would displace the prima facie inference that in doing so it was carrying on a business."

The evidence in the present case had shown that the company had not been active in its business since 1986.

Also the Petitioner's General Manager stated that the accounting firm Price Waterhouse which was the registered office of the company, ceased to operate in 1987. It is therefore not surprising that the Registrar had not received any response to his letters to the company since April 1988. The lack of response however, by the company can be explained in this case by the fact that correspondence were addressed to Price Waterhouse who had ceased to be in business and consequently those correspondence had not reached the company.

It is not disputed that Price Waterhouse no longer operated business here since after July 1987 and so the court must accept that as a fact. The last letter of response from Price Waterhouse on behalf of the company was on 10 July 1987 in which the Registrar was notified that the company was slowly paying of its creditors.

The question here is whether the company was "carrying on business" at the time it was struck off the register. The uncontested evidence here is that the company, after not being remunerative, in 1987 leased out its premises and received rent. From that rent its creditors were slowly being paid. There is no evidence to show that the rent of the company's premises ceased on or before it was struck off the register.

Mr. Watts had eloquently put the argument on behalf of the Registrar justifying the actions taken by the Registrar. I do not suggest for one moment that the actions of the Registrar in striking the company off the register was not justified. In fact the Registrar had complied with the requirements of the law when he ordered the company to be struck off the register. As I have said, I am not at all surprised that the learned

Registrar decided to strike the company off the register since the company had not been responding to the Registrar's letters.

The Registrar having struck the company off the register, it is now incumbent on the petitioner to satisfy the court that the company should be put back on the register. The onus is on the petitioner and not on the Registrar of Companies.

In the present case the evidence deposed to have, in the light of the authorities referred to, satisfied the court that the company was 'carrying on business' at the time it was struck off the register. The court is satisfied that although not active, the company had continued to carry on business when its operation became unremunerative, it placed its premises on lease, letting it out to Eastern Development Limited with the rent proceeds thereof being used to settle its liabilities. That constituted 'carrying on business.' Thus at the time the company was struck off the register it was 'carrying on business.'

There is also a further power given to the court under section 326(6) of the Act. That power enables the court to give directions when making the order of restoring the company to the register. That, the court will do so in this case, particularly in the light of the circumstances leading to the striking the company off the register by the Registrar of Companies.

If I may say so, in cases brought under section 326 it is necessary that the Registrar of Companies should be represented, as has been done in this case, in order that he may make clear to the court what is the default for which the company is struck off the register.

As I have found that the company was carrying on business at the time it was struck off the register, I order that it be restored to the register. In addition I direct that the company shall call a meeting of the shareholders to determine how the affairs of the company are to be conducted. Such meeting shall be convened on 14 days notice to the members before the expiration of 30 days from the date of the order. A notice of such meeting shall be sent to Registrar of Companies. I further direct that the company shall cause to be filed with the Registrar within three months after the said meeting a return for each of the years which it failed to file.

No Order for costs.

(G.J.B. Muria)
CHIEF JUSTICE