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ROYAL COURT

209.

10th October, 1994

Before: P.R. Le Cras, Esq., Lieutenant Bailiff.

In the matter of the Representation of Petrotrade Inc

Between:	Petrotrade Inc	Representor
And:	Channel Islands and International Law Trust Co. Limited	First Respondent
And:	David St. Clair Morgan	Second Respondent

Appeal by the Respondents from the Order of the Judicial Greffier of 9th September, 1994, dismissing their application to strike out the representation on the grounds that it discloses no reasonable cause of action.

Advocate P.C. Sinel for the Appellant Respondents.
Advocate T.J. Le Cocq for the Respondent Representor.

JUDGMENT

THE LIEUTENANT BAILIFF: This is an application by the Defendants to strike out the Representation of the Plaintiff under Rule 6/13(a) of the Royal Court Rules.

It comes before the Court by way of an appeal from the decision of the Judicial Greffier dated 9th September, 1994, when he refused a similar application, stating that in his view the Representation was not obviously unsustainable.

Although, of course, the Court must have regard to the decision of the Judicial Greffier, it is common ground that his decision does not in any way fetter the discretion which is to be exercised by the Royal Court in hearing an application of this nature.

The Representation, in terms, alleges that a Mr. Smith has wrongfully failed to account for monies belonging to the

Plaintiff, that some monies (arising from Port Agent rebates), had passed through the hands of Independent Maritime Services Ltd ("the Company"), that invoices issued on behalf of the Company bore the same initials as Mr. Morgan, who was a director of the Company and who was appointed liquidator of the Company when it was dissolved in September, 1993, very shortly after proceedings began against Mr. Smith. The Plaintiff is concerned that the Company may have been used to receive secret commissions to Mr. Smith. It fears that the Company may have been dissolved to frustrate any claim by the Plaintiff and asks, first, for the dissolution to be declared void and, secondly, in terms, for the replacement of Mr. Morgan as liquidator by Mr. William Perchard of Messsrs. Coopers & Lybrand.

By a separate *ex parte* application, the company has been restored to the list, so that Mr. Morgan is presently, once again, its liquidator. An appeal against this Order is presently awaiting decision before the Court of Appeal.

In his application Mr. Sinel appeared both for the liquidator, Mr. Morgan, and Channel Islands and International Law Trust Co. Ltd.

His case for the liquidator was put in these terms: first, that the operative clause is clause 10 where it is alleged that the Company may have been used to receive secret commissions. No wrong has been alleged against the Company which can be visited on the Company, and that the only purpose of this action is to appoint a new liquidator to help a third party find out whether or not he ought to make a claim. It is, in effect, a fishing expedition.

Where, he asked, would it end? Mr. Morgan is still the liquidator, he has not done anything wrong, nor is he the subject of a claim.

Second, in bringing this action Petrotrade is not an interested party under Article 213 of the Companies (Jersey) Law, 1991. Although this point is, of course, before the Court of Appeal (on the question of the reinstatement of the Company) it is nonetheless, he submitted, in issue here as well, as if the Plaintiff has no *locus standi* it cannot bring these proceedings in their present form. For authority he cited In re Roehampton Swimming Pool Ltd [1968] 1 WLR 1693 - that is the Headnote and a passage at 1697f. Petrotrade, he submitted, are merely curious. They have no pecuniary or proprietary interest in the Company, against whom they make no present claim.

Had an application been made to the Company and the Company had refused the information here, there would have been no remedy against it. Furthermore, although per Re Wood & Martin (Bricklaying Contractors) Ltd [1971] 1 All ER 732 in the Headnote

the interest need not be firmly established or highly likely to prevail, the Representation has made no averment which would bring the Plaintiffs within the passage at 735d. Put another way, on the Representation itself, the Plaintiff does not have sufficient grounds to sue the Company, which could properly refuse to divulge information; and whether or not there is a liquidator is irrelevant to this point. The Representation fails to establish even a shadowy claim. Indeed, it is brought by the wrong party. On this ground, he submits, the claim is bound to fail.

Thirdly, there is no allegation that the Plaintiff employed Mr. Smith. The Representation fails to establish even a shadowy claim for this. Not only is no *locus standi* for Petrotrade revealed, but there is no allegation which would entitle the Plaintiff to seek any particular relief or that there is a wrong which would be actionable in Jersey or anywhere else.

Further there are no facts led which require an answer.

Fourthly, (per In re Zaki Ltd (1987-88) JLR 244) a liquidator validly appointed would normally retain his status and would be removed only for sound reasons. Although the Court may interfere there must be some rationale for doing so and there is none here.

Fifthly, the request to put in a liquidator is to establish their claim. The duty of a liquidator in refusing an invalid claim is to refuse it. The Court cannot and will not replace with its discretion that of the liquidator (per In re DPR Futures (1989) 1 WLR 778-792) who will only be replaced (per Pitman -v- Top Business Systems [1984] BCLC. 593]) where the Headnote reads:

> ***Creditors' voluntary winding up - Sale by liquidator - Judicial interference with liquidator's action - Companies Act 1948, s 307.***
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> ***The plaintiff was an unsecured creditor of the defendant company. The defendant company went into creditors' voluntary winding up, a liquidator was appointed but no committee of inspection was appointed. The principal asset of the defendant company was the copyright and know-how in a computerised system of typesetting in respect of which the exclusive marketing rights had been conferred on it by a third party. Before a meeting of creditors was held, the liquidator informed the plaintiff that he proposed to sell the typesetting system. The plaintiff thought that this meant not only the exclusive marketing rights to the system but also the copyright and know-how relating to it and commenced an action to restrain the liquidator of the defendant company from selling the system or any rights with respect to the copyright or know-how in the system without the approval of the creditors' meeting or any committee of inspection which***

might thereafter be appointed. When the sale was effected by the liquidator it only related to the exclusive marketing rights to the system and the plaintiff's action therefore became moor. However, there remained the issue of costs and this was raised by the present proceedings brought to strike out the plaintiff's statement of claim as disclosing no reasonable cause of action in so far as it claimed that the court pursuant to an application under s 307 of the Companies Act 1948 would in the circumstances of the case have restrained the sale unless approved by the creditors' meeting or by any committee of inspection which might be appointed because it had been made without proper valuation or creditors' approval.

Held - Application to strike out statement of claim granted. The court would only interfere to restrain a proposed act on the part of a liquidator where the liquidator was acting fraudulently, or had not exercised his discretion bona fide, or he was proposing to do something which no reasonable man would do. It would not be sufficient merely to establish negligence on the part of the liquidator. On the facts, the statement of claim, which did not appear even to allege negligence, did not state a cause of action justifying the court's interference with the sale by the liquidator and therefore it should be struck out on the grounds that it disclosed no reasonable cause of action.

Here the pleading does not disclose a reasonable or indeed any cause of action. The liquidator was to exercise his powers without undue restraint (op. cit. 596f).

As for Channel Islands and International Law Trust Co. Ltd., this is only named in passing and has no business to be there.

In answer, Mr. Le Cocq submitted that Mr. Perchard was a nominee in the sense that he was named by the Plaintiff but was not thereby its puppet.

From the Plaintiff's point of view, the essence of the claim was the wrong or fraud which it claims was undertaken by Mr. Smith in, it appears, diverting monies to himself, employing *inter alios* the Company (which employed Mr. Morgan's initials as a reference, he being, it is claimed, an officer of Channel Islands and International Law Trust Co. Ltd).

In these circumstances the Plaintiff wishes to trace what may be their monies; if the liquidator accepts their claim, the Plaintiff will need to make it; and, because Mr. Morgan may be actionable, it is essential that the liquidator be impartial.

The Plaintiff, he urged, was an interested party under Article 213 of the Companies (Jersey) Law, 1991 (and see Stanhope Pension Trust Ltd & Anor -v- Registration of Companies & Anor [1994] BCLC 628 - Headnote; 631f; 634g; 635i). He agreed, however, that the question as to whether the Plaintiff had the right to resuscitate the Company was now before the Court of Appeal.

As to the strength of his case, he submitted that he did not have, for the purpose of this application, to shew that his client would win, but merely that the action was not obviously unsustainable.

In his submission, the true rationale of Zaki for the present purposes, was (at 246(3)) that the Court had an inherent jurisdiction to remove a liquidator if it found sound reasons for doing so. In Hotel Beau Rivage Co. Ltd. -v- Careves Investments Ltd (No. 2) (1985-86) JLR N.2, the Court found the liquidator to be independent which was further proof that the Court can control the liquidator.

As to the circumstances of the liquidation it was apparent, he submitted, from the Representation that the Company had closed down very fast after the allegations against Mr. Smith had surfaced. Of itself this shows a *prima facie* case that the liquidator should be someone other than Mr. Morgan, who was an officer of the Company and, it appears, of Channel Islands and International Law Trust Co. Ltd. There is nothing in the relief sought which the Court did not have power to grant. It was right that in the circumstances both Mr. Morgan and Channel Islands and International Law Trust Co. Ltd. should be convened.

Furthermore, there were a variety of courses of action open to the Plaintiff had there been no liquidation. Counsel instanced several including one under Norwich Pharmacal -v- Customs & Excise Commissioners [1974] A.C. 133; [1973] 2 All ER 943; (1973) Sol. Jo. 567. and another in constructive trusteeship.

This is not, he urged, a fishing expedition. The liquidator will investigate the claim. The Plaintiff is not entitled to the information as the liquidator is under the authority of the Court. The actions are for the reinstatement of the Company, not the formulation of a claim, and (in this instance) for the appointment of an independent liquidator.

There was, he said, no certainty that he would lose; and he did not have to go further today than to shew that the Representation was not obviously unsustainable.

Having considered the submissions, the Court is of the view that those of Mr. Le Cocq bear the greater weight. The

Representation sufficiently sets out grounds for the appointment of an independent liquidator which are not obviously unsustainable and which do not fall within the parameters set out in O.18/19/3. In the view of the Court it is clear that the summons must be struck out and the Court so orders.

Authorities

Royal Court Rules 1992: 6/13(a).

Companies (Jersey) Law 1991: Articles 162-4, 175, 213.

R.S.C. (1993 Ed'n): O.18, r.12/13, 19/3, 19/14.

In re Zaki Ltd (1987-88) JLR 244.

Hotel Beau Rivage Co. Ltd. -v- Careves Investments Ltd (No.2) (1985-86) JLR N.2.

In re Roehampton Swimming Pool Ltd [1968] 1 WLR 1693.

Re Wood & Martin (Bricklaying Contractors Ltd) [1971] 1 All ER 732.

Pitman -v- Top Business Systems [1984] BCLC. 593.

In re D.P.R. Futures (1989) 1 WLR 778-792.

Stanhope Pension Trust Ltd. & Anor -v- Registrar of Companies & Anor [1994] BCLC 628.

In re North Brazilian Sugar Factories (1888) 37 Ch. 83-88.

Norwich Pharmacal Co. -v- Customs & Excise Commissioners [1974] A.C. 133; [1973] 2 All ER 943; (1973) 117 Sol. Jo. 567.