Re Ailee Development Corporation and the Companies Act 1972

(2010) SLR 18

Bernard GEORGES for the appellant
Ronny Govinden for respondent

Judgement delivered on 7 May 2010

Before MacGregor P, Hodoul, Domah JJ

This is an appeal against a judgment of the Supreme Court dated 28 June 2008 by the then Ag Chief Justice, A Perera, in which he ordered the winding-up of Ailee Development Corporation, hereinafter referred to as the Company or ADC, on the ground as per the Companies Act that in his opinion it was just and equitable to wind up the company, as the substratum of the company had disappeared.

The operative part of the judgment shows that the Judge took a number of considerations into account before he reached that conclusion. His findings by and large were on the evidence that: (a) there was a "pervading insolvency of the company"; (b) "at the time of the presentation of the petition there was no reasonable hope that the Company could pursue its main object as an hotelier, not merely due to the licence not being renewed by the Seychelles Licensing Authority (hereinafter referred to as the SLA), but mainly due to its inability to find partners or investors who could invest in confidence, knowing the debt situation of the Company; (c) its continued legitimate existence was a practical impossibility; (d) the pursuit of other objects in the memorandum of association was not a viable proposition in the circumstances; (e) its state of insolvency had not changed at the time of presentation of the petition for winding-up and there had been no hope of finding prospective investors or partners to pull the Company out of the quagmire it had been in since its inception; (f) the principal creditors were tied down by a Deferment Agreement and (g) that the interest on those loans, consequently, were mounting with the Company having no hope to settle them even if they sold the assets.

He did not go along with the submission made by the appellant that the plight of the Company was merely a temporary setback.

Initially, the grounds of appeal by the appellant were remarkably lengthy and in our view inappropriately mixing grounds *per se* with arguments, comprising 10 grounds with 28 sub-grounds. The appellant was alerted by the Court to this awkward mode of pleading. They could be said to fall under the following heads:

i. Appointment of provisional liquidator
ii. Lack of fair trial
iii. Public interest in the tourism Industry
iv. Evidence on the state of the hotel
V. That the substratum had gone
vi. Protection of minorities misconceived
vii. Exhausting alternate remedies

viii. Standard of impossibility of activity
ix. Continuation of provisional liquidator
X. Standing over

Those grounds were later narrowed and telescoped to the following three: locus standi, loss of substratum and availability of alternative remedies.

Appellant's counsel, for his argument on locus standi, relied on and referred to grounds 2 and 3(c) of the original grounds listed. For that on substratum, he relied on and referred to grounds 3(a),(b),(d), 4, 5(ii),(iii) and (iv) of the original grounds listed. For that on availability of alternative remedies, he relied on and referred to ground 5(1) of the original grounds listed.

We shall address the above in that order with, however, some preliminary remarks which we consider important, on one particular ground of appeal that was not pursued ie that of lack of a fair trial, and a perception of it.

LACK OF FAIR TRIAL

The argument that there was a lack of fair trial started well before the trial proper in this case. There was a motion for recusal of the trial judge at the very initial stage, with a five page affidavit dated 17 March 2008 (see NI-N7), formally setting out the supposed bias of the trial judge with the rider that that was not the client's view but that of counsel. In fact, a ruling was given on this at page 67-72 of the records dismissing the motion.

The battleground on fair trial then moved to the media, in particular two newspapers. One of them actually used the word not only theft of justice but rape of it.

The attack was pursued even after the trial below was over. The appellant actually pleaded lack of fair trial as a ground of appeal extensively in detail at page A.2 of the records.
Counsel must have advised themselves, and rightly so, that there was no merit in that argument. Consequently, at the hearing on appeal and confirmed in the appellant's head of argument, this particular ground was discontinued and effectively dropped.

We have to say that the Constitution guarantees the right of expression in this country and every person has a duty to ensure that effect is given to the exercise of these guarantees in everyday life. However, the Constitution also guarantees the right of trial by an impartial and independent court established by law. The media's right of expression and the right of the public to know - which is a right of the highest order - does not include the right to pass judgment which may only be passed by a tribunal established by law under our democratic system of government. These comments of ours are kind and should be so taken so that every institution, body and person in the country ensures that we mutually respect, and do not encroach upon, one another's role for the proper functioning and consolidation of our democracy.

The enhanced fairness which the Court gave to this application may be gauged by the following. Normally the practice in a winding-up petition is for the case to be

dealt with on affidavit. In this case, appellant's counsel argued for the Court to allow the latitude of calling witnesses. That is not all. Counsel for the appellant made a motion for a visit to the locus in quo. Counsel for the petitioner argued against it. A ruling was given on it. It was in favour of the appellant.

The trial took 15-18 days, the records of which cover seven volumes covering over 1500 pages. The submissions of counsel alone took about 78 pages of the records. The petitioner's witnesses, four in number, were lengthily cross-examined and the Managing Director of the Company's depositions covered over 370 pages heard over at least three days.
The latitude, the considerations and the opportunities given to the appellant to make its case before the court were generous. We dwelled on this abandoned ground nonetheless because we felt that, considering all these circumstances many of which are unknown or not known in depth, the public has a right to this information in the light of certain adverse comments made to sway public perception of the case one way or the other.

We will now turn to the remaining grounds of appeal.

LOCUS STANDI

On the issue of locus standi, it is contended that the trial Judge erred in treating the respondent, then petitioner, as being entitled because it had an interest in the tourism industry of Seychelles to petition the Court on that basis for an order of winding-up of the appellant company on the ground that it was just and equitable to do so. The Judge ignored the fact that the respondent had stated that its primary reason for filing the petition was to seek to recover its investment amounting to R 5.4 million and did not consider whether the respondent had any hope of realizing that in his determination of whether it was just and equitable to order the winding-up.

We have a procedural impediment in addressing this issue on appeal. We note that it was not raised below at any stage or on the face of the pleadings as per the affidavit of the appellant at Fl. Can it be raised now and would it be fair to do so?

By rule 18(8) of the Court of Appeal Rules the Court cannot entertain such ground without leave of the Court, which has not been sought nor granted.

In fact an issue such as locus standi is such a fundamental precondition to litigation and is normally and properly raised at the start of pleadings or trial because it goes to the very root and right of cause etc. That also may explain why there is no direct pronouncement on it in the judgment on this issue.

The Court finds this defect substantial and, on that basis alone, this ground of appeal fails. An issue not raised before the trial court cannot be raised for the first time on appeal. The reason is that the opponent has not been given an opportunity to meet the point nor the trial court to pronounce on it.

SUBSTRATUM

As per paragraph 3 of the heads of arguments, appellant's counsel referred us to

grounds 3(a), (b) and (d), 4, 5(ii), (iii) and (iv) of the memorandum of appeal and for ease of presentation has chosen to urge them together.

Again we need to go back to the pleadings because although counsel for the appellant has used the words ease of presentation, what is before us is far from a presentation of ease. We have lengthy and disjointed "grounds" of appeal which are more arguments then grounds spread over two pages of paragraphs and sub-paragraphs in the notice of appeal and it is supposed to tally with six pages in the heads of arguments.

From the mass of literature comprising grounds, submissions, argument and references, we have been able to reduce them to two essential matters as set out at paragraph 3.2 of the heads of arguments of counsel for the appellant: the legal test and the evidential considerations. We shall approach it in that manner.

On the first issue, that the trial Court did not apply the proper test as to what constitutes loss of substratum.

WHAT CONSTITUTES LOSS OF SUBSTRATUM?

The substratum is held to be gone when the main object for which the company was formed has become impracticable. Emphasis is on the words ‘main objective’ and the word ‘impracticable’, see *Re Suburban Hotel Co* (1867) 2 Ch App 737. Later other authorities use the words where the primary object has failed, see *Tivoli Freeholds Ltd* (1972) VR 445. In the case before us we find the main and primary objective to be that of hoteliers. Other examples of failure of substratum can be seen in the following cases. In *Re German Date Coffee Co* (1882) 20 Ch D 169 a company formed for working a German patent for manufacturing coffee from dates was wound up when it could only obtain a Swedish patent, notwithstanding that the majority of shareholders desired to continue. In *Re Crown Bank* (1890) 44 Ch D 634 a company formed primarily for conducting banking business was wound up when it ceased to carry on banking business but carried on its subsidiary objects. In *Re Bristol Joint Stock Bank* (1890) 44 Ch D 703 a company formed to conduct banking business which, after 6 years, had never made a profit and had virtually exhausted its paid-up capital was wound up. In *Re Pacific Fisheries Ltd* (1909) 26 WN (NSW) 127 a company formed to operate a patent for prevention of decomposition of fish could only obtain an unpatented process and was wound up. In *Re Baku Consolidated OilrIelds Ltd* [1944] 1 All ER 24 a company formed to operate an oil business in Russia was wound up when the business was confiscated. In *Re Co-op Development Funds of Australia Ltd (No* 3) (1978) 3 ACLR 437; (1977-78) CLC 40-306 companies formed to invest subscriptions from the public were wound up in view of unprofitability of investments.

Another factor weighing on a failure of the substratum is what some authorities refer to as where the management or control of the company is characterized by misconduct or otherwise gives rise to a justifiable lack of confidence. Some refer to it as the lack of confidence resting on a lack of probity in the conduct of the company's affairs: see *Loch v Blackwood* (1924) AC 783 (PC), *Macquarie University v Macquarie University Union Ltd* (No 2) (2007) FCA 844. They inter alia refer to where the history of the conduct of the company indicates a failure to abide by its

obligations and by commercial morality in the conduct of the business.

The appellant cited a number of cases to the trial court which the Chief Justice distinguished and found not to be supporting the company. The Court, however, did not refer to the case of *Gailbraith v Merito Shipping* (1947) SC 446 which the appellant's counsel argues is a strong case in its favour in that: (a) the facts resemble the matter on appeal; and (b) the decision reviews all other cases cited and considered by that Court.

We would agree here with counsel for the appellant that that case was relevant to the case before us.

THE MERITO CASE

The basic facts of that case are that the company was formed for the purpose of owning and managing ships in 1906. After 1919 it no longer did so but invested its funds elsewhere in securities for the next 26 years. As at the date of the petition for winding-up, the company had taken the view, which it had taken for many years, that the shipping business was not appropriate for investment. One shareholder petitioned for winding-up on the grounds that the substratum had been gone for 26 years. The company argued that it could still go back to shipping should the situation improve etc. The Court held because of this the substratum had not gone.

We have given serious consideration to the decision. As may be seen, one key test is whether the substratum had become impossible or practically impossible or in the words of one Lord Justice the objective had become in a practical sense impossible.

The fact of the matter is that in that case, even if the company had abandoned the shipping business which was its main objective and dealt for as long as 28 years in other matters, it had the viable base to come back to shipping business if the situation was to improve. The set-back had to do not with the company's internal strength but with external factors such as the gloomy negative economic environment of periods covering the Great Depression, World War II and its aftermath of loss of lives and devastation of property and the resulting prohibitive prices for ships on account of the number of ships which had sunk. Most of war-torn Europe including Great Britain was inevitably concerned with the reconstruction of infrastructure on land rather than courting projects at sea. As per Lord Keith -

> that at the present and for some considerable time past it has not been prudent to acquire new ships at the ruling prices.

Indeed, reference is made to the difficult shipping position from 1923 to 1935.

The argument "whenever a suitable opportunity occurs the company may return to its main object" was accepted by the Court, for the company had the capacity to bide its time to wait. The *Merito* case can be starkly distinguished from the case before us in that Merito Shipping Company was a very solvent company. That cannot be said of the appellant company here which, on the facts, is not only insolvent but whose practical and probable hope of solvency is next to nil. What is more, apart from that factual basis of its prospect of operation, there is the legal basis in that the

present company has no licence to operate. In this regard, the cases of *Re Haven Gold Mining Co* (1881) 20 Ch D 151 and *Re German Date Coffee Co* (1881) 20 Ch D 169 are pertinent to an extent that the main objective was not attainable, particularly in the latter case where the patent for the objective could not be obtained.

Our conclusion is, therefore, that the *Merito* case does not support the case of the appellant. With this, we come to considerations of fact and evidence.

THE EVIDENCE

On the second issue that the evidence before the trial Court did not support a finding that the substratum of the company had been lost, a crucial part we believe is the state of finance of the company, its continuing inability to service its debt, its failure to produce a master plan, and the cancellation of its licence to operate by the relevant regulatory authorities.

As regards the financial state, evidence has been adduced to the effect that a deceptive veneer of health covers a serious reality of ill-health. The financial state both by the history and the growing amount gives the picture of irretrievability and further sinking and sliding into deeper debts.

The documents we have examined show the following -

i. Encumbrances of mortgages/loan unpaid
ii. Encumbrances of floating charges
iii. Restrictions (following)
iv. Deferment agreement
v. Audited accounts
vi. History of foreclosures, receivership and past winding-up
vii. Leading creditors own admissions

Encumbrances by mortgages for loans

As regards encumbrances by mortgages for loans, we find a total of 29 covering the period from 1980-1987, stretching from about 20-28 years back, most unpaid as at date of winding-up. These facts are certified by an official search at the Land Registry in Ex 1 of the records as follows:

	ENTRIES	DATE	DESCRIPTION	
1	(a)	(8/2/80)	Charge	US$2,000,000 Bank of Baroda & Ors
	(b)	(8/2/80)	Charge	US$1,700,000 Central Bank of India
	(c)	(8/2/80)	Charge	US$ 1,500,000 Punjab National Bank
	(d)	8/2/80)	Charge	US$ 1,000,000 Indian Overseas Bank
	(e)	8/2/80	Charge	US$ 1,000,000 Indian Bank
	(f)	(8/2/80)	Charge	Indian Rupees 11,340,000 Grindlays Bank Ltd

	(g)	(8/2/80)	Charge	Belgium Francs 38,950,000 Air et Chaleur MT. S.A
2.	(a)	(16/7/81)	Charge	US$750,000 Bank of Baroda
	(b)	(16/7/81)	Charge	US$ 600,000 - Central Bank of India
	(c)	(16/7/81)	Charge	US$ 550,000 - Punjab National Bank
	(d)	(16/7/81)	Charge	US$ 350,000 - Indian Overseas Bank
	(e)	(16/7/81)	Charge	US$ 350,000 - Indian Bank
	(f)	(16/7/81)	Charge	Indian Rupees 3,060,000 – Grindlays Bank Ltd
	(g)	(16/7/81)	Charge	Austrian Schilings 45,900,000 – International Bank Fur Aussenhandel Aktiengesse Uschaft
3	(a)	(11/2/85)	Charge	US$84,180 – Bank of Baroda
	(b)	(11/2/85)	Charge	US$70,410 – Central of India
	(c)	(11/2/85)	Charge	US$62,790 – Punjab National Bank
	(d)	(11/2/85)	Charge	US$41,310 – Indian Overseas Bank
	(e)	(11/2/85)	Charge	US$41,310 – Indian Bank
4	(a)	(11/2/85)	charge	US$947,000 – Bank of Baroda
	(b)	(11/2/85)	Charge	US$792,000 – Central Bank of India
	(c)	(11/2/85)	Charge	US$706,000 – Punjab National Bank
	(d)	(11/2/85)	Charge	US$465,000 – Indian Overseas Bank
	(e)	(11/2/85)	Charge	US$465,000 – Indian Bank
	(f)	(11/2/85)	Charge	Austrian Schillings 20,000,000 – International Bank Fur Aussenhandel Aktiengesellschaft
	(g)	(11/2/85)	Charge	Belgium Francs 11,838,062 – Air et Chaleur M.T. S.A.
5	(a)	(8/6/87)	Charge	Swiss Francs 15,000,000 – International Finance Corporation
	(b)	(8/6/87)	Charge	US$500,000 – Intercontinental Hotel Corporation
	(c)	(8/6/87)	Charge	US$1,7,000 – Bank of Baroda
6		(11/7/89)	Leased to Ailee Recreations Limited T.147(a)	
7.		(18/11/91)	Restriction Order	
8.		25/6/96)	Restriction Order	
9.		12/2/08 & 20/2/08	Restriction	
10.		25/6/08)	Inhibition Order	

Floating charges on all the assets of the company

As regards floating charges on all the assets of the company, the present and future details featuring in the Registry of Companies covering the period from 1978 to 87, most unpaid as at date of winding-up, total 31 as follows:

ENTRY NO	DATE	DESCRIPTION NO
300	(19/10/78)	(a) Bank of Baroda - US$ 200,000

Restrictions

As regards restrictions in dealings, we find the following impediments registered at the Registry of Companies and the Land Registry, both of which generally restrict any dealing with the property, assets and land of the company without permission of the creditors. What it means is that inevitably this permission would be withheld unless significant payments were made, plus release or waiver on the deferment agreement, again both options proving hopeless on the records.

Audited accounts per the company

As regards audited accounts per the company, we find the following plight as per the record (Exhibit C33) for the year ending 31 December 2004, but issued in December 2006

(a) Assets worth $40 million
(b) Liabilities over $200 million

The following alarm bells have already been sounded with respect to the above under the caption 'Opinion':

(i) Evidence available to us was limited on a certain R22 million at the Company's recorded turnover comprised "outlet sales" over which there was no system of internal control for the purposes of our audit;

(ii) The Company is insolvent, and its ability to continue is dependent upon -

(a) The continuing support of Associated Companies by their not presenting for payment Demand promissory notes for advances and interest thereon amounting in total to R21,943.234.

(b) EODC Operations Limited not exercising their right to give the company notice that the principal of the new secured loan and interest accrued thereon is immediately due and repayable. Should EODC Operations Limited give such notice, the principal of the existing secured loans and the unsecured loans together with interest accrued thereon also become immediately due and repayable. At 31st December 2004 the aggregate, including accrued interest of the new secured loan, the existing secured loans and the unsecured loan amounted to R896,305,656.

(c) Because of the materiality of the matters set out in the

> foregoing paragraphs we are unable to state that the Balance sheet at 31 December 2005 gives a true and fair view of the affairs of the company at that date.
> [Underlining ours]

The above shows the work ethics of the company and the state not only of its finances but of its corporate morality. If the audited accounts are unable to give a true and fair view of the affairs of the company, it is in the public interest that the interests of the public be protected so that there may be public confidence and a sound system in our corporate sector so that investors as well as financial partners are resting on firm and solid ground and not on corporate black holes.

Deferment Agreement

The Deferment Agreement was essentially an agreement between all the existing lenders at 1987 whereby a new lender was given priority over all the existing lenders and they could not be paid until and unless the new lender was paid and that the ratio of current assets to current liabilities in the company is not less than 2 to 1.

Those conditions it appears ruled out the possibility that existing lenders would ever get paid as the facts have shown from the date of that agreement to the winding-up of the company. The existing lenders then were:

I. Bank of Baroda (hereinafter referred to as BOB)
II. Central Bank of India
III. Punjab National Bank
IV. Indian Overseas Bank
V. Indian Bank
VI. Grindlays Bank
VII. Air et chaleur MTSA
VIII. International Bank, FAA
IX. Intercontinental Hotels Coorporation

A new lender entered the scene, the International Finance Hotels Corporation, which later assigned its rights to the Seychelles Government, who in turn later assigned its rights to the EODC, a majority shareholder of the company at one time and later through two other companies, which as it turns out is being wound up.

That last position of the EODC being then in the shoes of the preferential secured lender over all the prior 9 referred - to lenders, combined with the fact that they were never paid since the 1987 date of agreement till the date of the winding-up in 2008 - for over 20 years - clearly smells of suspicion and collusion, particularly that the head of the company being wound up, Mr Marc Davison is also the Managing Director of the preferred lender/creditor of the company, the EODC.

All this gives a strong suspicion of incestuousness amidst a nettle of conflicts of interest exacerbated by the virtual deadly leverage over the prior and existing lenders who, by the time of winding-up, became the leading creditors to over 2/3 of the liabilities of the company.

The Deferment Agreement is referred to and recognized for its leverage and virtual uncertainty of the major creditors ever getting paid, whilst the loan debt just keeps growing. It is evidence of gradual and inevitable financial irreversible collapse. Such a state of affairs is consistent with a finding that the company must be wound up. Indeed, although not pleaded specifically, another fundamental ground for winding-up is that the company cannot pay its debt, which is certainly the case for the 9 banks consortium led by BOB.

The paralytic effect of the Deferment Agreement is cited incidentally and authoritively in the following:

(a) the audited accounts of the company, referred to earlier;
(b) the foreclosure case of *ADC v Air et Chaleur* (1991) SC 121;
(c) the foreclosure case of *ADC v Bank of Baroda & Ors* SC 129/1996;
(d) the Managing Director of the company himself who in one instance called it the sword of damocles.

History of foreclosure, receivership and winding-up

The manner in which the Deferment Agreement acts as a trap to the unwary lender may be seen by what happened to its Belgian lender, Air et Chaleur MTSA. The latter had lodged a petition against the appellant (*ADC v Air et Chaleur* MTSA 121/91) and served a Commandment Notice on 5 August 1991 for foreclosure for an amount of 59.7 million Belgium francs borrowed. ADC relied on the Deferment Agreement of 2 June 1987, to resist foreclosure and repayment of the loans borrowed. The result was that the borrowers found that by virtue of the Deferment Agreement, the loans were no longer payable on demand. They had to be rescheduled over 10 years commencing 1990. Yet by 2000 the loans still remained outstanding. The Court declared, in the circumstances, that no amount was payable by ADC to the borrower unless all amounts due to the preferred lender have been paid and the ratio of the company would be at least 1:2. As far back as 1992, the audited accounts of the company of 1990 showed that were no available funds to pay that particular lender/creditor, and that the current liabilities exceeded the current assets, and did not meet the required ratio of 1:2.

That judgment shows how repayment of loans has been made illusory by the device of the Deferment Agreement which effectively blocks any chance of that lender and any lender, for that matter, recovering their investments.

That was not the only instance. A few years later in 1996 another attempt was made to foreclose by a group of banks led by the Bank of Baroda, forming the largest creditors. Its fate was no less decided in advance by the now notorious Deferment Agreement. The bank had lent initially about 13.85 million dollars. One of the creditors VJ Construction threatened to wind up the company. By 1996 that lent sum with interest etc ballooned to a total of nearly 100 million dollars. The company was under receivership during the period 1983 -1985. But by virtue of the Deferment Agreement the company would never be able to pay its debts (that was in 1996).

The point was raised that the Deferment Agreement was a sham. The company denied the allegation. But the Court had this to say:

> Although it is reasonable to hold that the respondents/lenders cannot wait indefinitely to have their money paid back, it is, however, my view that there is need for all the parties involved in this matter to see to it that all efforts are made in order to improve the financial position of the petitioner and attain the 1:2 ratio referred to herein so as to enable it meet its obligations.

Since 1996, the Court has urged improvement of the debt servicing situation but in vain. In fact, it has worsened and doubled as borne out by the audited accounts of 2004. The Managing Director's own admission and the Bank of Baroda, Chief Executive Officer on the record bear testimony to that.

In the judgment of that case it was held that the company had no power to influence events; therefore it cannot be said to have the power to influence the fulfilment or prevention of the implementation of the contractual obligation.

The position of repayment capability has worsened since the EODC took over the preferred creditors position. Indeed, EODC through two companies have the major shares in Ailee Development Company and the Managing Director of Ailee Development Company and EODC is the same person. Till the winding-up petition and till today, those lenders/creditors of the above two cases are still unpaid and the indebtedness is still growing. Of those lenders it is more than pertinent to note that, despite the setback in that case, the Bank of Baroda Consortium has supported the present winding-up petition.

Devious motive

With such a history and such a background of facts as set out above, one cannot ignore that aspect of the petition which makes an allegation of devious motive on the part of the petitioner, and the players behind the scene.
This stems mainly from the petitioner, ie the Seychelles Government which has a small percentage holding, which although not paid for in cash, constitutes a valuable goodwill asset as the quid pro quo - the more so when it is State goodwill.

It is pertinent to show that the Seychelles Government is only one of a string of claimants having initiated the proceedings of winding-up and receivership of the appellant company. There is quite a history of it. The Managing Director admitted that there were about 35 lawyers pursuing action against the company at one time.

The Seychelles Government is acting in the public interest to protect the tourism industry, a vital backbone of our economy. It has the right to ensure, on behalf of the

people of Seychelles that the image that investors and tourists have of our tourism industry is spotlessly clean, more especially when the economy is fragile and everyone is making an effort to strengthen it. It also has a duty to protect the taxpayer's money which has been invested, the return of which seems illusory in the present circumstances: see *Ebrahimi v Westboume Galleries* [1972] 2 WLR 1289; *Bouhafs v Marillac House Oboriginal Corp* (2000) 35 ACSR; *Deputy Commissioner of Taxation v Casualife Furniture International Pty Ltd* (2004) 9 VR 549; *Re Millennium Advanced Technology Ltd* [2004] EWHC 711 (Ch); and *Macquarie University v Macquarie University Union Ltd No 2* (2007) FCA 844.

The players behind the scene and suspicion of a preferred and chosen real intended beneficiary of the winding-up

Things lurk behind the scenes or elsewhere. The picture is one where business wolves or sharks, preferred or not, are wanting the hotel. Also, this cannot detract from the fact that the history and causes of the failure of substratum were there well before the wolves and sharks came in to take advantage of a dying sheep.

Leading creditors position

In the result, it is only logical and pertinent that the Bank of Baroda, and the consortium of banks that it leads making up together about 65% of the debts and liabilities owed and unpaid for, for over 20 years, should require judicial dissolution of the company.

The position is adequately reflected in the undisputed evidence of Dr Phorgat, the Chief Executive of the Bank of Baroda, in his affidavit P1 of the Records in Vol 1, and his testimony from page 915 of the record in Volume V11. The following paragraphs speak volumes:

> The Bank of Baroda acting on behalf of itself and a consortium of banks from India, namely State Bank of India, Indian Overseas Bank, Indian Bank and Bank of India has lent Ailee Development Corporation Ltd a substantial sum of money and as at the 31st January 2008 it owed the said Bank as follows:
>
> SCHEDULE
>
> | Name of Bank | Amount owing in US Dollars As at 31st January 2008 |
> |---|---|
> | Bank of Baroda | USD – 29,080,988.38 |
> | State Bank of India | USD – 28,380,524.95 |
> | Indian Overseas Bank | USD – 21,831,525.51 |
> | Indian Bank | USD – 18,259,300.65 |
> | Bank of India | USD – 32,113,470.76 |
> | Total = | USD –129,665,810.76 |
>
> (errors and omission excepted)

Interest is accruing at the rate of Libor plus 2.5% and penal interest thereon.

From the same document, one may cull the following facts: Ailee Development Corporation Ltd has never paid back a single cent towards the said loan advanced; the company's balance sheet, and the auditor's report filed at the Registry of Companies state that Ailee Development Corporation Ltd is insolvent; it is most unlikely that the Bank of Baroda and the consortium banks would be paid by Ailee Development Corporation Ltd; the Bank of Baroda and the consortium banks therefore support the petition for the winding-up of Ailee Development Ltd; in view of the history of non-payment of the banks' loans, it will be to the manifest advantage of the banks for Ailee Development Corporation Ltd to be wound up and its assets sold. The banks as secured creditor will recover some of the loan at least.

The content of the above affidavit has not been rebutted by the company, not in the least the averment that it is most unlikely that they will be paid.

In testimony, Dr Phorgat had the following to say -

Q. You are supporting the petition for the winding-up of Ailee Development.

A. Yes.

Q. You are also testifying that according to your opinion this company is insolvent and therefore incapable of paying its debt.

A. Yes.

Q. Given the fact that for so long this debt is unpaid you are of the opinion that the company Ailee is not in a position to pay you that debt even in the forthcoming future.

A. Yes.

Q. Besides the foreclosure did your bank attempt to get the loan paid by any other means?

A. I don't remember. We had several discussions with the party for the last few years in order for them to sell their shares but was not successful.

Q. I put it to you that is it has not been fruitful because the company has not presented to you any investor that really was serious in buying shares of the company.

A. That could not materialize.

Q. How many attempts were there?

A. Three, four times.
I don't know. I came in June 2006. I made several contacts with

the company asking them to do something for the loan to be paid. In the later part of the year the deal could not materialize.

Q. In the middle of the year your bank thought they were not serious?

A. Yes.

Q. Why did you not institute a petition in court to be able to get something out of your loan?

A. We perceived that we lost in the Supreme Court and the Court of Appeal there was no need to spend money on court procedures. We lost hope of succeeding.

Q. In these proceedings you are asking the court to order the winding-up of the company so that you can recover part of the loan that have been given to the company.

A. Yes.

Q. And you say that the company never paid a single cent towards the loan.

A. Yes.

One could conclude from the above, on more than a balance of probabilities that the leading creditors would never get their money back in the normal course of events and process.

They tried the foreclosure course but were blocked by the famous Deferment Agreement, which also blocked an earlier large creditor seeking enforcement of payment.
Contractually, unless the preferred creditor EODC was paid and the ratio of the Company was 1:2, or that agreement was legally rescinded or declared frustrated, there was no course of action left for the creditors to get their money. That left only a possibility of gaining something through a winding-up, which is probably why they supported the winding-up.

From the events consequences and implications it is obvious the company could carry on as it is with impunity protected by the notorious Deferment Agreement. Regretfully the answer came through the winding-up, as numerous negotiations and process had failed to solve the killing and growing debt leading to an eventual financial death.

Admissions of Managing Director of the company, Mr Marc Davison

The deposition of the Managing Director of the company, Mr Marc Davison, is not helpful to the case of the appellant either, considering a number of admissions and pertinent remarks. He came as the sole witness in support of the company and

against the winding-up. He happens to wear a number of hats which explains the tangled web which blocks the repayments. He is the Managing Director of the company in winding-up and the Managing Director of EODC its major shareholder and "controller" of the Deferment Agreement (both the same person). In his affidavit, at page F2, Volume 1 of records dated 18 February 2008, at paragraph 5, he states:

> I *substantially agree* with the contents of paragraphs 6 to 10 of the Petition insofar as concerns the request of the Seychelles Licensing Authority for repairs and renovations to the resort *and our promises to effect* these.

At paragraph 6-10 of the petition, it states:

> At meetings held in April and October *2005* between the Seychelles Licensing Authority and the company, the company had been informed that the company had to submit a master plan for redevelopment of the hotel in view of the poor state of the physical structures of the accommodation blocks, reception, restaurant, laundry, stores, staff facilities and other buildings.

He concedes, in the same document, that on 17 May 2006 the Company was called upon to appear before the Board of the Seychelles Licensing Authority to show cause why the company should be permitted to continue operation when its licence expires in December 2006 and consequently given an extension of its licence initially to May 2007 and a further and final one to 31 December 2007 with strict conditions that the company submit to the Seychelles Licensing Authority and the Seychelles Tourism Board acceptable plans for the complete renovation within two months and show proof of preparation for the work to start immediately after December 2007. This was because of the poor physical state in which the hotel was being maintained and non-compliance with the standards laid down by the authority responsible for tourist standards and standards of hygiene laid down by the Ministry responsible for health.

In the same document we read as follows. On 12 June 2006, the company wrote to the Seychelles Licensing Authority stating that a master plan for the long-term renovation of the Plantation Resort and Casino was under preparation and would be submitted upon finalisation.

He goes on to state that on 6 December 2006, the company wrote to the Seychelles Licensing Authority informing the Authority that the resort would be closed with effect from 31 May 2007 towards the facilitation of a major renovation and upgrade of the property.

Finally, he concludes that despite several requests by the Seychelles Licensing Authority and undertakings by the company, the company had failed to submit its master plans for renovation up to 31 December 2007 and was, therefore, informed by letter dated 4 January 2008 that the hotel's licence could not be renewed and was advised to cease operation with effect from 31 January 2008.

Those admissions by the Managing Director indicate the master plan issue was on for quite some years, continually failing to materialize, gradually the company losing credibility until it could no longer be relied on or trusted.

Breach of condition of licence

A closer scrutiny of events leading to the closure of the hotel gives the following picture. There existed strict conditions referred to in paragraph 7 of the petition referred to earlier for compliance which were clearly laid out in the copy of the licence at C7 of the records dated 9 May 2007. Those conditions clearly had the force of law and were legally binding, even the Managing Director intimated to that, and counsel for the appellant admitted that the SLA had followed the rules of natural justice then and had the statutory powers to make that decision. Those conditions also were done by consensus and undertaking by the Managing Director and general management of the company at the crucial meeting of the summons of 17 May 2007. Those conditions, after the deadline of submission of the master plan within two months, were clearly flouted and breached showing a reneging on their commitments at the summons meeting in May and in September 2007, the company changing its position and now contesting these conditions.
Clearly there were good and valid reasons which led to the non-renewal of the licence: breach of trust combined with breach of conditions combined with breach of law.

Other admissions of the Managing Director

If the above is not enough, we may as well refer to the answers given in examination of the Managing Director by his counsel, and cross-examination by the respondent's counsel.

Q. And to what do you attribute your change of mind, in other words your not meeting these dates that had been agreed?

A I would say that there was only one instance where we had given a firm date which we thought we could hold to which was the 31st of May 2007 when we thought we would have truly been able to resolve, that was the single date when we thought we would be able to and *we failed to be able to meet the deadline.*_(page 582 of records)

"The Bank of Baroda debt and interest would stop 150 million USD. The market value of all assets would be about 45 million USD. But no one was interested in buying for that amount. Therefore the Government's hope to get back its share is not possible". (page 577 of records)

Q. You knew that you were breaching a condition of your licence?

A. Which condition my Lord I would like to know?
Q. Which said that you could not take guests over and above past

December 2007?

A. Where does it say that in the licence? It is not in the licence.

Q. A specific condition in your licence, the latest licence issued to you.

A. Perhaps you are right it is. (as per 632 of the records)

On the authority of the Seychelles Tourism Board, significance: we may look at the following (page 646 of the records)

Q. You don't know.

A. No, I haven't read the Seychelles Tourism Board Act.

Q. If it was the case that indeed the Seychelles Tourism Board sets the standards and you have to comply and it is not vice versa, what would you say?

A. Set the standard or order this or whatever, if it is a requirement; if it is legally mandated etc then *we are legally at fault..*

On those admissions of breaches of principles of good governance, conditions of licence, legality of continuing operations, the attitude of the appellant not to concede and compromise amount to sheer impunity, unworthy of the work ethics of a business in the hospitality industry of Seychelles. The whole concern of the company seems to have been litigation at the expense of others, dragging people to court. This paternalistic attitude could be tolerated in a family business but in a business where the country has so many social, cultural, financial and economic stakes, such attitude is tantamount to: "The company decides! Others may go to Coventry but the Company decides!"

On dragging case into Court

The impunity is evident. At 669 of the record where the Managing Director is deposing, we read "I decided I was absolute not going to renovate I was not gonna provide the government, it was my intention to try and drag this into Court".

We further read in the record of proceedings when the Managing Director is giving evidence as follows at pages 666-669:

Q. Mr Davidson there was no master plan. You were all along misleading the authorities, leading them on and on and on you had no master plan even at the time of you or your General Manager writing this. That is why ultimately you had to write this letter telling the authorities that you are going to go. You have been constantly misleading the SLA and the STB.

Q. You are aware that your licence depended on the provision of

this plan.

Q. So your problem was that it was mostly a legal point. They had no right to request the plans from you.

You switched over from not being able to give that plan because of budgetary complaint.

Q. You switched over upon that reason to a legal reason when you felt that the authorities were putting on a little bit more pressure.

I am putting to you Mr Davidson that you had no master plan in fact you find so many reasons for you not to submit that plan; your first justification being you cannot give the plan unless you get the budget and there's a difficulty in securing the finance due to lack of participation. That having failed then come 14th December you change your tactic and you resort to this so called legal justification.

The gravity of this culpable resistance from the part of the company may be seen from the fact that it related to a major renovation through a master plan since at least 2002, which work had been delayed for over 5 years.

Deception, deviousness and lack of good faith

On the company's financial state at page 672 of the records, one may read the following:

Q. And it has always been in that dire financial difficulty from inception.

A. I would say for the majority of the years of its history, yes.

Q. You as the Managing Director of the EODC what were you doing in order to remove this Danamocle's sword as if that was hanging over the top of the head of…

A. That is exactly what we have called it many times.

Q. That reflects yearly in all the annual reports.

A. We as EODC as the controlling shareholders of the company we were in a position to look for a partner, look for new capital to come in. Ailee Development Corporation as a company *could not look for new capital to come in.* In order to bring in new capital you must have security or guarantees, you must have collateral. *With a hotel that has four times as much debt on its books as the actual value the Ailee Development Corporation cannot go to a company or to a bank and say can we have some financing.* It could perhaps go to an eventual capitalist and

ask if they would join hands to restructure the debts to renegotiate and find a partner to come in and apply new capital and raise money for renovation but the company is so crippled with debts *it has no financing* options. (page 676 of the records)

The number of cases in which the company was sued numbered approximately 34 or 35: see page 679. When questions were put to the Managing Director, this was his reply (see page 681):

Q. So it was in the best interest to keep the company in dire financial situation it was in order not to meet repayment conditions of the Bank of Baroda consortium.

A. It was in the best interest of the company to survive.

At page 685 of the records –

I have also explained that to Mr Govinden my lord and that is the company from its inception having opened worth 25 million have cost 42 million. Having open and lost 1.2 million in the first six months. Having had poor trading as Mr Govinden asked me having had poor trading was never in a position and got in the worse, and worse, and worse position to be able to repay these loans as the repayments were made the loan amounts increased and we got to a point where the bank debts is 2 times the value of the company.

At page 687, 694 and 695, the Managing Director accepts the company's debts were unmanageable and that it had entered into a financial vicious circle and impasse:

Q. And at its size and at its design was the hotel going to be a viable business at that inflated project costs?

A. It was bearing so much debt and financing from day 1 from the day that it opened it was never going to be able to meet its financial commitments or make any significant profit. It was over 50% over budget and over the costs that a 200 room hotel should cost to build. (1130)

Q. And the situation today is that EODC is the holder along with Bank of Baroda of the first line charge on the hotel?

A. Yes, all of the company's assets.

Q. And over the years, has the EODC claimed this debt back or has EODC supported the continued operation of the company and the hotel?

A. It is hoped to claim some of it back but the company has never been in a position to be able to repay that loan.

The EODC has never tried to force the issue because otherwise

it would have damaged the company; "there is no way for the Company to repay that loan" (1134).

Q. So it wasn't really only a question of the hotel deciding to do it on its own, but there were other important partners that needed to be consulted, that needed to be brought before?

A. Yes, there was also the simple fact that without the permission of the banks, the banks were not fairly happy with us, we couldn't do it but also we simply could not find the partner, get the loan to do it without actually dealing with the BOB matter first.

In answer to a question from counsel for the appellant to the Managing Director, we read as follows:

Q. And as a consequence of all these hiccups what happened to the initial projecting cost of the resort?

A. By the time the resort opened its doors in 1988 the value of the property which has been created, value of the land and the construction of the buildings which is basically what it should have cost according to budget was about 25 million.

Q. What?

A. USD but it in fact ended up costing with the delays and refinancing, about USD 42 million.

Q. And at its size and at its design was hotel going to be a viable business at that inflated project costs?

A. It was bearing so much debt and financing, from day 1 from the day that it opened it *was never* going to be able to meet its financial commitments or make any significant profit. It was over 50% over budget and over the cost that a 200 room hotel should cost to build.

The evidence reveals that the problem with the hotel started at the very embryonic stage, even and well before it started business. They related to bad workmanship of the construction admitted by the Managing Director himself. That state of affairs led to constant borrowing with the debt burden growing to over 29 mortgages and floating charges totalling in debt at the time of winding-up of at least $130 million and total liabilities of at least $200 million.

The image of a thriving hotel

The impression that one inevitably obtains from the facts and circumstances of this case is that the appellant was basically an empty shell being used with a cover of special bookings and high profile clientele to give the image of a thriving hotel only to

siphon the monies received to proceed elsewhere than the proper books and places. This is reflected in a part of the audited accounts and on the overall facts and circumstances of the case. The contradiction was as sharp as it was stark. The hotel projected the image of a thriving hotel whose special guests included kings, presidents and the Miss World pageant. But behind that image, the books showed that it was pauper paper hotel, whose coffers emptied and dwindled as soon as filled for the money to go to some place unknown.

Authority and status of the Seychelles Tourism Board (hereinafter referred to as "STB") and the Seychelles Licensing Authority (hereinafter referred to as "SLA")

The business has lately been run in breach of law. Both the above, STB and SLA, are regulatory authorities. The appellant's non-compliance or breaches of conditions and fall in standards in its licence cited at page C 7 of the Records, are enough to disqualify a business from operating. It is our view that we cannot ignore and condone the breaches nor overlook their decisions which incidentally was not appealed against by the company.

In fact, there has been a domino effect on the breaches in that one original breach unattended to has led to a series of others and the company has been in a quagmire unable to keep up with the standards required by the STB and SLA. One thing led to the next until the risk and safety of some of the buildings themselves became too grave for redemption. Finally, the situation culminated in a withdrawal of the licence to operate.

For all the reasons given above, we find that the Judge had more than enough solid material before him to come to the conclusion that the substratum had failed and in all the circumstances of the case, the company should be wound up.

Accordingly this ground fails.

Alternative remedies

The third ground of appeal challenges the misapplication of the law by the Judge. In substance, the argument is that:

> The trial Judge erred in his consideration of the law applicable in this matter in that -
>
> (i) he misread the provisions of section 201 of the Companies Act and in consequence -
>
> (a) made a serious error of law in finding 'as a matter of law' that a petition for protection of minorities had first to be made to the Registrar of Companies rather than to the court, and
>
> (b) as a result did not consider the argument of the appellant that it was incumbent on the respondent to have proved that it could not have obtained sufficient satisfaction by an action

> under that section before requesting and being granted a winding-up order.

The contention of the appellant is: "That the trial court erred in not finding that the Government had other remedies which it should have pursued instead of petitioning for winding up." His reasoning has been that -

> To succeed in a petition for winding-up under section 205 of the Companies Act, the provisions of section 208 (2) become relevant. Under that subsection, a winding-up order shall not be made if there is some other remedy available to the petitioner and the court is of the opinion that he is acting unreasonably in seeking to have the company wound up instead of seeking that other remedy.

On the face it we must note that the appellant pleads s 201 of the Act, but in his heads of arguments, he refers to s 208(2) which states:

> Where the petition is presented by a creditor, shareholder, contributory or debenture holder of the company on the ground that it is just and equitable that the company should be wound up, or by a shareholder of the company on the ground set out in paragraph (e) of section 205, the court, if it is of opinion;
>
> (a) that the petitioner is entitled to relief either by winding-up the company or by some other means; and
>
> (b) That in the absence of any other remedy it would be just and equitable that the company should be wound up; shall make a winding-up order, unless it is also of the opinion both that some other remedy is available to the petitioner , and that he is acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

The material part of that section lies in the words "also of the opinion" and "acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy".
We hold that the trial Court did not hold the opinion that the petitioner was acting unreasonably, the more so in the circumstances referred to on the failure of the substratum of the company. That is more than borne out in the evidence.

Accordingly, this ground fails.

As all the grounds having failed, this appeal is dismissed with costs.

Record: Court of Appeal (Civil No 13 of 2008)