IN THE SUPREME COURT)
OF THE TERRITORY OF)
PAPUA AND NEW GUINEA)

CORAM : OLLERENSHAW, J.
TUESDAY,
10th JUNE, 1969.

IN THE MATTER of the Companies Ordinance 1963-1966
AND IN THE MATTER of Stol Air Services Pty. Limited.

1969
June 3, 4 & 10
P. MORESBY.
Ollerenshaw, J.

JUDGMENT.

This is a petition presented under Sections 221 and 222 of the Companies Ordinance, 1963 (as amended), by Territory Airlines Pty. Limited for the winding up by the court of Stol Air Services Pty. Limited, often referred to as "Stol", now named Sairs Pty. Limited, and mentioned in this judgment as the respondent.

It is opposed by the respondent and by Mr. Ronald Douglas Firns and R.D.F. (Holdings) Pty. Limited as shareholders and unsecured creditors of the respondent.

It is supported by such creditors, other than Mr. Firns and R.D.F. (Holdings) Pty. Limited, as have taken any interest in these proceedings.

Mr. White appears for the petitioner, Mr. Francis for the opponents, already mentioned, and Mr. E. Pratt for Mobil Oil New Guinea Limited, an unsecured judgment creditor in the sum of $11,000.

The matter has been argued ably by Mr. White and Mr. Francis and in the closing stages the burden of the argument was lightened by some gems of speech such as one has become accustomed to hear fall from Mr. White. I am still wondering who, from my experience and reading, I might regard as the "prince of equity lawyers", and the image of Mr. Firns, sitting with "the pie in his lap and the spoon in his hand" to one who has sat beside him and seen him reading a serious novel while piloting a small aeroplane, is yet another entrancing spectacle.

I do not wish to be querulous but I cannot pass the expression "moribund corpse" in Mr. White's submission that there is no suggestion of breathing life into the moribund corpse. To my mind while a body is

still moribund it is not yet a corpse. I imagine that the phrase may be poetically acceptable: I recall, for instance, that "The two brothers with their murdered man rode past fair Florence". He was not murdered, he was still alive, but doomed to die at their hands.

The petition is presented upon the grounds that the respondent is unable to pay its debts and that in the circumstances it is just and equitable that it should be wound up.

On the 3rd day of June, 1968, the petitioner obtained judgment in default of a defence against the respondent in the sum of $9,548.08 and on that day caused to be issued a Writ of Fieri Facias, which was returned "Nulla bona". In his return the bailiff also stated that upon execution Mr. Firns said: "I can't pay that and I have no assets. All Stol assets have been transferred to Patair."

The respondent, before the Deed of Sale to which I will refer, was a company carrying on the business of an airline operator out of Port Moresby.

Mr. Firns, I believe, was its founder and he is and at all material times has been directly and through his connection with R.D.F. (Holdings) Pty. Limited the person in sole control of the respondent and solely entitled to all the beneficial interest in the respondent. There is nothing before me to show that there are any creditors of R.D.F. (Holdings) Pty. Limited.

Mr. Firns and his company, R.D.F. (Holdings) Pty. Limited, claim to be creditors of the respondent for a sum in excess in $71,000 and to comprise the majority in value of the unsecured creditors of the respondent. The other unsecured creditors, apart from those over which Mr. Firns has an interest, have debts amounting to at least $52,789, a figure which could be higher, depending upon (inter alia) the estimate of some claims to which I refer later. The secured creditors are admitted to have debts amounting to at least $87,000.

It will be seen that the real opponent to the petition is Mr. Firns, although Mr. Francis would maintain, perhaps with some technical justification, that this is an over-simplification of the

position.

There has been a considerable passage of time between the presentation of the petition on the 6th September, 1968, and its present hearing. This has been due to the efforts of the respondent and its supporters, if I may so distinguish between them, to avoid a compulsory winding-up. On the 23rd September, 1968, the respondent obtained an order restraining any further proceedings upon the petition, including the advertisement of the petition. This order was obtained for the purpose of the submission to a meeting of creditors of a Scheme of Compromise or Arrangement. The Scheme, which is set out in Exhibit "3" in these proceedings, was presented to a meeting of creditors but was not accepted. Thereafter the petitioner obtained a discharge of the restraint imposed by the Order of the 23rd September, 1968, and proceeded to advertise and bring on its petition for hearing. There have been a number of adjournments most, if not all, upon, I understand, the application of the respondent and its supporters.

It has been proved to my entire satisfaction and indeed this is conceded by counsel for the respondent, that the respondent is unable to pay its debts.

Since the 1st day of June, 1968, it has not carried on its business and it is not suggested that it is even likely that it will ever again carry on its business. This is because of the provisions of a Deed of Sale made on the 28th May, 1968, between the respondent, as vendor, and Papuan Airlines Pty. Ltd. (therein called "Patair"), as purchaser, and Ronald Douglas Firns as "a Covenanting Party". By this Deed the respondent sold the whole of its assets and undertaking (other than book debts which are said to be doubtful if not bad) to Papuan Airlines Pty. Limited upon the terms and conditions set out in the Deed, which is Exhibit "1" in these proceedings.

I do not think that it is an exaggeration to say that since the 1st July, 1968, the respondent has been in the course of being wound up by Mr. Firns.

As I see it the dispute between the parties is whether Mr. Firns should be allowed to continue to wind up the respondent or whether the winding-up should be conducted by an official liquidator appointed by the court.

Mr. Francis for the opponents, supporting the respondent's opposition to the petition, maintains that it is established by the evidence that they comprise the majority in value of the respondent's unsecured creditors and upon this he firmly takes his stand in reliance upon Section 289 of the Ordinance, whereby it is provided, in effect, that, notwithstanding the proof by a petitioner of his prima facie right to a winding-up order under Section 222, the court may have regard to the wishes of the creditors. He does not ask for a meeting of the creditors: possibly because of the abortive attempt to obtain their agreement to the proposed Scheme of Arrangement and more particularly because he says that the majority of the unsecured creditors, namely Mr. Firns and his R.D.F. (Holdings) Pty. Limited, do not wish the respondent to be wound up by the court.

I am not satisfied that these opponents do represent a majority of the unsecured creditors and I would note in passing that I think it strange that the nature of their claims has not been disclosed. The claim to constitute the majority of unsecured creditors depends upon, amongst other things, the estimate which has placed upon the ranking of the claims of "Ordinary Creditors" which are not admitted by the respondent, that is Mr. Firns: See The Fifth Schedule to Exhibit "3", the Scheme of Compromise or Arrangement, to which I have already referred.

However, for the purpose of this judgment I am prepared to assume that the petition is opposed by a majority in value of the unsecured creditors, being Mr. Firns and his R.D.F. (Holdings) Pty. Limited.

I should say now, somewhat belatedly, that Mr. Francis asks that the petition be dismissed or that it be adjourned, pursuant to Section 225 of the Ordinance, for a period of three months pending the outcome

of proceedings between the respondent and Papuan Airlines Pty. Limited to ascertain the proper construction of certain terms of the Deed of Sale, to which I have referred. Apart from disputes between the parties to this Deed as to its meaning, upon the resolution of which depends (inter alia) the date for payment of some of the purchase moneys, there has been a difference as to the value to be paid for aircraft sold to Papuan Airlines Pty. Limited and this difference is the subject of an arbitration that has commenced and now stands adjourned. I should add that Mr. Francis, who is silent as to what is to happen after the expiration of the proposed adjournment, has offered on behalf of his clients that any moneys received from Papuan Airlines Pty. Limited will be paid to Cox Johnston & Co. in trust, to be disbursed by that firm in accordance with the provisions of the Companies Ordinance for disbursement in a winding-up. Mr. White points to the fact that the official liquidator, who is proposed by the petitioner, is a partner in that firm and says that the respondent and its supporters agree to what the petitioner prays, except that control of the "proceedings" should be retained by Mr. Firns.

I have said that I am prepared to assume that Mr. Firns does represent a majority of the unsecured creditors. The situation is nevertheless unusual as is conceded by Mr. Francis. Should I regard Mr. Firns and his company, R.D.F. (Holdings) Pty. Limited, as a creditor in the way that creditors have been regarded in the many cases that have arisen in England and the states of Australia in winding-up proceedings which have called for the application of legislation comparable to the sections which apply in these proceedings and to which I have referred? I find it somewhat unreal to regard Mr. Firns as a creditor whose right is to be considered as distinct from that of the respondent itself against which company the petitioner's right is different from his right against creditors. The petitioner's right against the respondent is a right ex debito justitiae but its right against the respondent's other creditors is not so strong, as should appear from this judgment. It is said, for instance, that

an unsecured petitioning creditor is but a representative of the other unsecured creditors. This consideration presents an avenue of approach, which, as far as I am aware, has not been explored fully in the reported cases. Two cases have been cited by Mr. White : In re Clandown Colliery Company (1), in which there were circumstances without analogy in these proceedings, and In re Melbourne Carnivals Pty. Ltd. (No. 1) (2) which is, perhaps, a little nearer the mark. However, in the view I take I do not find it necessary to travel this path to its end. I am prepared to regard the supporting opponents as unsecured creditors to whose wishes I may, in my discretion, have regard and, as I have said, I regard them as representing a majority in value of the unsecured creditors.

In these circumstances I take the law applicable to be as stated in Palmer's Company Law, 20th Edition, at pp. 700 and 701:

> "A petitioning creditor who cannot get paid a sum presently payable has, as against the company, a right, ex debito justitiae, to a winding-up order; ..... This right to a winding-up order is, however, qualified by another rule, viz. that the court will regard the wishes of the majority in value of the creditors, and if, for some good reason, they object to a winding-up order, the court in its discretion may refuse the order."

In addition to the cases mentioned in the footnotes in Palmer in support of this statement of the law I would mention the cases that have been cited in argument before me: In re Vuma Ltd. (3), In re Crigglestone Coal Company, Limited (4), In re K.L. Tractors Ltd. (5), In re S.O.S. Motors Limited (6), In re A.B.C. Coupler and Engineering Co. Ltd. (7) and In re J. D. Swain Ltd. (8).

It is said too, in effect, that even if the majority of the creditors show some good or substantial reason for their objection the court may nevertheless make an order if the petitioner shows some special

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(1) (1915) 1 Ch. 369.
(2) (1926) V.L.R. 283 at p. 293.
(3) (1960) 1 W.L.R. 1283, generally & particularly at p.1285.
(4) (1906) 2 Ch. 327.
(5) (1954) V.L.R. 505.
(6) (1934) N.Z. L.R. Supp. 129.
(7) (1961) 1 W.L.R. 243.
(8) (1965) 1 W.L.R. 909.

circumstances why it would not be just and equitable to give effect to the wishes of the majority: See Australian Company Law and Practice, Wallace and Young, at p. 638, the cases there cited and, e.g., In re Melbourne Carnivals Ltd. (No. 1) (9). In the view which I take it is not necessary to consider in detail this, what may be called, a third rule but I say in passing that I can see no reason why it would not be just and equitable to make an order for the winding-up of the respondent: As I have pointed out the respondent is being wound up and so I should say that I can see no reason why it would not be just and equitable to make an order for its winding up by the court.

I have spoken of "rules" and so I should cite what was said by Harman L.J. in In re J. D. Swain Ltd. (10):

> "For myself, I wish to express my concurrence in the observations of Upjohn L.J. in In re P. & J. Macrae Ltd. (11), where he said this: 'Reported cases can only be quoted as examples of the way in which the past judges have thought fit to exercise the discretion, and judicial decision cannot fetter or limit the discretion conferred by statute or even create a binding rule of practice.'"

In the application of the law, as I have taken it to be for the purpose of assisting me in the exercise of my discretion, the question arises: Have the creditors, who oppose the order, shown some good or substantial reason for their objection to the making of an order?

At this stage I should record that it is conceded, and if it were not I would be bound to find, that the making of a winding-up order will not prejudice the existence of the Deed of Sale of the respondent's assets to which I have referred. The parties to it are bound by it and so too would be an official liquidator.

Mr. Francis has strongly pressed that the opponents, for whom he appears in addition to the company itself, if such a distinction may be made, object as majority creditors to the making of an order. He has given what seems to be to be comparatively scant attention to the reasons for their objection. However, such reasons as have been suggested call for my consideration.

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(9) (1926) V.L.R. 283 at p.290.
(10) (1965) 1 W.L.R. 909 at p.911.
(11) (1961) 1 W.L.R. 229; (1961) 1 All E.R. 302, C.A.

It is suggested that the costs of a winding-up by an official liquidator would, in the circumstances, be unjustified. I do not think that this is a legitimate argument against the prima facie right of the petitioner. I do not know of any case in which it has been advanced, let alone allowed to prevail. Furthermore, there is no suggestion that Mr. Firns is prepared to forego his salary as manager of the respondent in the conclusion of its affairs and there is nothing to suggest that this would be less than the liquidator's fees. It should be said, however, that, if the prediction made on behalf of the respondent and its supporters that the moneys to come from the Deed of Sale will be more than sufficient to pay all creditors proves correct, any moneys payable to Mr. Firns for his services would be from his own moneys.

It is also suggested that a liquidator appointed by the court may not adopt the proceedings that have been commenced on behalf of the respondent for the interpretation of the Deed of Sale and that in any event funds will not be available to such a liquidator for the prosecution of such proceedings. I find myself unpersuaded, even unmoved, by these suggestions. I have no doubt that, if the official liquidator considers it proper to continue these proceedings, he will do so. Perhaps he will be in a better position than Mr. Firns to consider the propriety of such proceedings. Coming to the costs of the proceedings I have to say that it appears that the respondent has no funds with which to finance them and that the resources of Mr. Firns are strained if not limited. He says that he has made arrangements for the provision of funds for the pursuit of the interpretation proceedings. I have no doubt that he has a genuine sentimental interest in the respondent as well as a real financial interest. I can see no reason why, nor is there any suggestion why the arrangements that he claims to have made should not be made available to the official liquidator. In any event I have no doubt that appropriate indemnities would be available to the liquidator from creditors and, indeed, the petitioner, itself, has offered to finance these interpretation proceedings.

Finally and perhaps more faintly, it is suggested that a liquidation would involve delay. I say no more about this than that I am unable to

see that a liquidation by an official liquidator would involve any significant or material delay. Mr. Firns should, and I cannot imagine that he would not co-operate with an official liquidator and if he does not do so then any resulting delay will be his responsibility.

I do not think that any good or substantial reason has been established for exercising my discretion against the making of a "winding-up order - that is to say, to an order by virtue of which the creditor, by the hands of a liquidator, is entitled to seize the assets of his debtor and administer them for the payment of himself and other creditors." These words in inverted commas are taken from In re Crigglestone Coal Company, Limited (12) and I do not think that it is inappropriate to add to them these words of Mr. White: "with all the protections, guarantees and supervision" of a liquidator under the Companies Ordinance:

I order: (1) That the respondent Stol Air Services Pty. Limited, now called Sairs Pty. Limited, be wound up by the court pursuant to the provisions of the Companies Ordinance 1963 (as amended),

(2) That Keith Allan Irish be appointed Official Liquidator of the said Sairs Pty. Limited,

(3) That the costs of the petitioner, Territory Airlines Pty. Limited, of and incidental to the petition and this order be taxed and recovered out of the assets of the said Sairs Pty. Limited.

(4) That the costs of Mobil Oil New Guinea Limited be taxed and recovered out of the assets of the said Sairs Pty. Limited, the costs of its counsel's attendance in court to be limited to the costs of attendance for the purpose of proving its debt and informing the court that it supported the petition.

Solicitors for the petitioner : Norman White & Reitano.

Solicitors for Mobil Oil New Guinea Limited : Craig Kirke & Pratt.

Solicitors for the respondent : Francis & Francis.

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(12) (1906) 2 Ch. 327 at page 330.