JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 67/96

BEFORE: ***THE HON. MR. JUSTICE RATTRAY, PRESIDENT***
THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

BETWEEN	***CJ'S RENT-A-CAR LIMITED***	***APPELLANT***
A N D	***PREMIUM FINANCE LIMITED***	***RESPONDENT***

Michael Hylton QC and Roderick Gordon, instructed by Myers, Fletcher & Gordon for the appellant

Enos Grant, instructed by Clough, Long and Company for the respondent

October 30, 31; November 1 and December 20, 1996

RATTRAY P.:

On the 16th May, 1996 Edwards J on the hearing of a Petition brought by the respondent Premium Finance Limited ordered that the appellant Company CJ'S Rent-A-Car Limited be wound up, with costs awarded in favour of the Petitioner. It is this judgment which has come before us on appeal.

The appellant has urged us through Learned Queen's Counsel, Mr. Michael Hylton, to dismiss the Petition or alternatively to stay the proceedings until the existence and/or quantum of the indebtedness of the appellant to the respondent be established. It is submitted that:

> "1. The learned Trial Judge erred in law in that he found that it was just and equitable that the Company should be wound up, when there was a bona fide and substantial dispute both as to the existence and quantum of the alleged debt.
>
> 2. The learned Trial Judge erred in law in ruling that it was necessary for the Respondent/Appellant to have disputed the debt prior to the Petition being filed.
>
> 3. The learned Trial Judge erred in fact in his finding that the Respondent/Appellant had not disputed the debt prior to the filing of the Petition."

The Petitioner is a Finance Company carrying on the business of financing the purchase of motor vehicles which it leases out to individuals and Companies. The respondent is involved in the carrying on of a Rent-A-Car business. The respondent entered into an Agreement with the appellant to lease sixteen motor vehicles to that Company under a Lease Agreement dated 25th March 1991. There is no dispute as to the existence of the Agreement. The appellant operates a business of renting motor cars to individuals and Companies and is described in the Schedule to the lease as a U-Drive Company. Under a Master Lease Agreement in which the respondent is described as the owner and the appellant as the hirer, five vehicles were leased by the respondent to the appellant. In the course of time by a device agreed

between the parties of adding to the Schedule of the Master Lease, other motor vehicles were subsequently leased by the respondent to the appellant. These were incorporated into and formed part of the Master Lease Agreement. It was also agreed that during the term of the lease, the respondent had the right "to increase or decrease the said rental by such amounts as are necessary to exactly cover any increase or decease to the respondent in rates of interest chargeable on the respondent's account by the agency funding such account." Some of the payments were to be made in US currency and others in Jamaican currency.

A demand was made on the appellant by letter dated 15th of March 1995 from Clinton Hart & Company, Attorneys-at-law, on behalf of the respondent signed by Mr. Howard Mitchell, for the repayment of US$334,231.67 and J$1,688,880.27 then due under the Lease Agreement. By letter dated 21st March 1996 signed by Dennis Morgan in reply to this demand an offer was made by the appellant to make repayment of the debt by instalments. No challenge was made as to the accuracy of the accounts. The offer put forward in the letter was as follows:

> "(A) To pay US$50,000 and JA$500,000 on March 24, 1995.
>
> (B) To pay US$50,000 and JA$500,000 on April 21, 1995.
>
> (C) To pay US$34,231.67 and JA$688,880.27 on May 15, 1995.
>
> At the end of May, Mr. Morgan would love to have a review of the accounts done by Ms. Millar and

> Mr. Spence, and to make final arrangements for settling the balance on the accounts.
>
> Mr. Mitchell, the gentlemen are very willing to deal with the obligations, but the stringency of cash at this time does not allow them to deal with the matter as requested in your correspondence of March 15, 1995.
>
> Kindly present this proposal to Ms Millar as set out above."

The appellant was delinquent in keeping its schedule of payments made in the offer. Furthermore, between 20th April 1993 and 5th July 1995 seven cheques presented as payment on the account by the appellant were dishonoured. Consequently, the respondent served a statutory demand under Section 203(a) of the Companies Act for payment of the sum of "US$335,785.90 and J$409,589.25 due and owing to the Company in respect of principal and interest accrued to the 31st day of July, 1995 under a Lease Agreement made to you." The demand was that this sum should be paid within twenty-one days from the date of the notice. Since that date a sum of $445,787.96 has been paid by the appellant but outstanding is the sum of US$335,785.90 which the respondent maintains is not in dispute.

The Petition was therefore filed to wind up the respondent Company. In answer to the Petition the appellant maintains that the Agreement in respect of the motor vehicles was not governed or covered by the Lease Agreement and sought to establish that the respondent loaned to the appellant a sum of US$195,999.00 at an interest rate of 12.5% per annum to be repaid over a period of twenty four months. Of this sum US$201,718,00 has been repaid. As

of 31st October 1995 the Company owed the Petitioner US$53,964,39. The appellant therefore maintains that a bona fide dispute exists as to the sum owed, by the appellant to the respondent and further states that the appellant is not unable to pay its debts.

An affidavit of Wilfred McKenley, a Chartered Accountant, seeks to establish that an analysis of the accounts tendered by the respondent discloses "that if the interest rate of 12.5% on the loan was properly calculated, even based on the dates and amounts of payments made as shown in the Petitioner's Statement, and if such was applied in accordance with standard accounting practice using the 'add-on' method, the Respondent would owe the Petitioner United States Forty-Nine Thousand Five Hundred and Seven Dollars ($49,507.00) as at the 31st July, 1995". Using an interest rate of 12.5% and a penalty rate of 5% which were prevailing market rates applicable to United States Dollar loans at that time the respondent would owe the Petitioner an additional amount of US$77,429.55 for penalties due, based on a rate of 5% and a grace period of thirty days after payment which becomes due. In his opinion the respondent had a justifiable dispute as to the amount owed on the loan from the Petitioner. We are not assisted by Mr. McKenley's computations as the fact of the matter is that this was not a question of the respondent lending money to the respondent but a transaction relating to the appellant leasing motor vehicle to the appellant a U-Drive Company.

Mr. Michael Hylton QC has urged on behalf of the appellant that there exists a bona fide dispute between the parties as to:

(a) whether any amount is due at all by the appellant to the respondent;

(b) what is the sum due?

Section 203 of the Companies Act provides:

"A company may be wound up by the Court if -

(a) ...

(b) ...

(c) ...

(d) ...

(e) the company is unable to pay its debts."

Section 204(a) of the Companies Act reads as follows:

"A Company shall be deemed to be unable to pay its debts:

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one hundred dollars then due, has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or ..."

It is clear that the Statutory Notice under Section 204(a) has been served on the appellant and that the appellant has failed to pay the sum due within the periods stated in the Section or at all.

The main thrust however, of Mr. Hylton's submission is that there is a bona fide dispute between the parties in relation to the sum owed. He relies upon the dictum of Megarry J in ***Re Lympne Investments Ltd*** [1972] 2 All ER 385 at p. 389 where the Learned Judge states:

> "In the context of a notice requiring a person to do some act, I do not see how it can be said that the person 'neglects' to do that act if the reason for not doing it is a genuine and strenuous contention, based on substantial grounds, that the person is not liable to do the act at all. If there is liability, a failure to discharge that liability may well be 'neglect' whether it is due to inadvertence or obstinacy or dilatoriness; but a challenge to liability is a challenge to the foundation on which any contention of 'neglect' in relation to an obligation must rest."

I have no hesitation in accepting this to be a correct statement of the law. The real question to be determined is the bona fides of the appellant. Is there "a genuine and strenuous contention based on substantial grounds" that the appellant is not liable to pay the debt? In ***Lympne Investments***, Megarry J. found at p. 388 that:

> "I need only say that on the evidence before me, it seems quite plain that there is a bona fide dispute whether there is any debt at all, and that this dispute is not trivial or insubstantial but is based on solid grounds."

What was the evidence before Edwards J and on this appeal before us on which this Court may determine the bona fides of the appellant?

(a) the Lease Agreement is established and the appellant's contention of a loan quite rightly rejected;

(b) by a letter dated 15th October 1992 from the appellant to the respondent the appellant stated:

> "We confirm our understanding of and agreement with your right during the term of the lease to increase or decrease the said rental by such amount as are necessary to exactly cover any increase or decrease to you in rates of interest chargeable on your operating loan account by the agency funding such account."

(c) the letter dated March 15, 1995, from Messrs. Clinton Hart making the demand attracts a reply from the appellant which identifies no dispute in in respect of the debt, but instead a plea is made as to the stringent financial position of the appellant;

(d) the appellant then makes payment towards liquidating the debt as it then stood but not in terms of the offer;

(e) furthermore by Bill of Sale dated 1st October 1993, the appellant in breach of the Lease Agreement has signed and transferred over to the National Commercial Bank several vehicles subject to the lease of which the respondent is the owner and the appellant only a hirer;

(f) between April 1993 and July 1995 the appellant has tendered to the respondent five cheques in US currency, Jamaican currency and sterling which have been dishonoured for insufficiency of funds. The last cheque dated 5th July 1995 led to the service of the statutory demand;

(g) by letter dated August 4, 1995 the appellant remitted to the respondent by cheque the sum of J$409,589.25 in settlement of a part of the debt owed. The letter states:

> "Note however, that this sum is paid over in good faith to keep the confidence on both sides.
>
> In the event that this payment is in excess of what is due we would expect you to remit us that amount."

This letter indicates an unawareness of the state of account.

It is my opinion that the matters related and the sequence of events disclose no bona fide dispute between the parties up to this stage. Also exposed is the precarious financial position of the appellant, and its inability to pay its debts.

The ex post facto attempt to create a dispute where none exists by treating the Agreement between the parties as a loan Agreement, which it is not, and by having an accounting exercise performed clearly for the purposes of the litigation to raise doubts as to the amount owed, if any, is destroyed by any proper analysis of the real facts of the case. The appellant's position is that it is unable to say (a) if it owes the debt and (b) if so, what is the amount owed. The evidence of the respondent establishes a specific debt and the circumstances under which the debt was incurred.

The appellant is not assisted by the cases which determine that it is an abuse of the process of the Court to present a winding-up Petition against a solvent company as a means of putting pressure on it to pay money which is

bona fide disputed. Nor is the appellant despite a strenuous presentation, supported on the facts by ***Re The Brighton Club and Norfolk Hotel Company (Limited)*** [1865] 35 Beav. 204 in which Sir John Romilly, Master of the Rolls dismissed a Petition which he found was brought against a company:

> "... carrying on a thriving business, which I am asked to stop, merely because there is a quarrel between the company and their contractor as to what is due to him" and stated that "the whole of the evidence which has been laid before me clearly establishes that this is a contested question of account between the company and the Petitioner, though something is due to him which would exceed the L50 mentioned by the statute."

I accept therefore the submissions of Mr. Enos Grant on behalf of the respondent in this regard. The facts on this Petition establish no bona fide contested account - indeed they establish to the contrary.

Edwards J was therefore correct in his conclusion arrived at on his analysis of the evidence and his application of the relevant law. His Order granting the Petition will be upheld.

The appeal is therefore dismissed with costs to the respondent.

PATTERSON JA:

I have had the advantage of reading in draft the judgment prepared by the learned President. I agree with it and for the reasons stated therein, I too would dismiss the appeal with costs to the respondent.

BINGHAM JA:

I too agree with the reasoning and the conclusions as set out in the judgment of the learned President that the appeal be dismissed and agree with the order for costs as proposed.