

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2011 – 00970

BETWEEN

SANTA CECELIA LIMITED

CLAIMANT

AND

ENOCH RAMPAUL

DEFENDANT

BEFORE THE HONOURABLE MR JUSTICE RONNIE BOODOOSINGH

APPEARANCES:

Ms Mohanie Mohan Maharaj for the Claimant

Mr Abdel Ashraph for the Defendant

Dated: 27 February 2013

Decision on Preliminary Point

1. This was an oral decision given on 8 October 2012. The Defendant contends that the Claimant has no locus/ jurisdiction to bring legal proceedings on behalf of the company. This is so, he says, because of the provisions of sections 427 (1) (a) and 376 (1) (a) of the **Companies Act** which give a liquidator in a voluntary liquidation the capacity to bring or

defend an action where he has the sanction to do so either of the Court or the Committee of Inspection.

2. The Claimant says section 376 (1) (a) is not applicable as the liquidator in a voluntary winding up does not need the sanction of the court or the committee of inspection to bring an action. They contend section 427 (1) (a) applies to section 376 (1) (d),(e) and (f) and not section 376 (1) (a) which applies solely to winding up a company by the court.
3. Section 348 of the Act specifies two different modes by which a company may be wound up: (a) winding up by the court; or (b) voluntary winding up. Section 348 (2) goes on to state that the provisions of the Act relating to the winding up of a company apply to either of these modes, unless a contrary intention appears.

Winding Up by the Court

4. Section 376 sets out the powers of the liquidator in a winding up by the court.
5. Section 376 (1) (a) to (f) sets out the powers which the liquidator can exercise with the sanction of either the Court or the Committee of Inspection. These include the power at section 376 (1) (a) to bring or defend any action or legal proceeding in the name or on behalf of the company. Section 376 (1) states:

376. (1) The liquidator in a winding up by the Court may with the sanction either of the Court or of the committee of inspection—

- (a) bring or defend any action or other legal proceeding in the name and on behalf of the company;
- (b) carry on the business of the company, so far as may be necessary, for the beneficial winding up thereof;
- (c) appoint an Attorney-at-law or other agent to assist him in the performance of his duties;
- (d) pay any classes of creditors in full if the assets of the company remaining in his hands will suffice to pay in full the debts and liabilities of the company which rank for payment before, or equally with, the debts or claims of the first mentioned creditors;
- (e) make any compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;
- (f) compromise any calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and a contributory, or alleged contributory, or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as are agreed, and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof.

6. Under section 376 (2) it appears that a liquidator in a winding up by the court may also exercise certain powers without the sanction of any person. Section 376 (2) provides:

(2) The liquidator in a winding up by the Court may—

- (a) sell the real and personal property and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or to sell the same in parcels;
- (b) do all acts and execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal;

....

7. It is to be noted, however, that the exercise of all the powers conferred on the liquidator in a winding up by the court is subject to the control of the court – see section 376 (3)

Voluntary Winding Up

8. The winding up of a company where a declaration has been made and delivered in accordance with section 410 is referred to as “a members’ voluntary winding up”, and where not so made and delivered, the winding up is termed “a creditor’s voluntary winding up”. Sections 411 to 417 apply only in relation to a members’ voluntary winding up; sections 418 to 425 apply only to a creditors’ voluntary winding up. Sections 426 to 433 apply to every voluntary winding up, whether a members’ or creditors’.

9. Section 427 sets out the powers and duties of the liquidator in a voluntary winding up. Section 427 (1) (a) provides:

427. (1) The liquidator may—

(a) in the case of a **members’ voluntary winding up, with the sanction of a special resolution of the company** and, in the case of a **creditors’ voluntary winding up, with the sanction of either the Court or the committee of inspection**, exercise any of the powers given by **section 376(1)(d), (e) and (f)** to a liquidator in a winding up by the Court;

10. Section 427 (1) (b) goes on to provide:

427. (1) The liquidator may—

(b) exercise **any of the other powers** by this Act **given to the liquidator** in a **winding up by the Court**;

11. The conjoint reading and effect of these provisions is that the liquidator in a voluntary winding up can exercise **any of the powers** given to the liquidator in a **winding up by the court**; subject to section 427 (1)(a). The powers of the liquidator in a winding up by the court, as stated above, are set out in section 376 of the Act.

12. Section 427 (1) (a) however applies only to the powers given by **section 376 (1) (d), (e) and (f)**. Where the liquidator in a voluntary winding up wishes to exercise these specific powers, the section requires:

- (i) in the case of a members' voluntary winding up, the sanction of a special resolution of the company; and
- (ii) **in the case of a creditors' voluntary winding up, the sanction of either the court or the committee of inspection.**

13. Section 427 (1) (a) therefore does not apply to the power to bring or defend an action in a voluntary winding up. This power is given by section 427 (1) (b). Further, by section 427 (1) (b), this power to bring/ defend an action is not circumscribed in the same way as the exercise of the powers under **section 376 (1) (d), (e) and (f)** are. To exercise these powers **in a voluntary winding up**, the liquidator must get the sanction of the court/ committee of inspection or

company. But the liquidator's power given by section **376 (1) (a)** to bring/ defend an action - **in a voluntary winding up** - does not require any such sanction.

14. It is important to look at the **mode of winding up** in relation to the **liquidator's powers**. The liquidator's powers in both a winding up by the court and a voluntary winding up are set out in section 376 of the Act. The way these powers are exercised however depends on the mode of winding up.

15. In a **winding up by the court**, the liquidator's powers under **section 376 (1) (a) to (f)** must be exercised **with the court's sanction**. The powers under **section 376 (2)** however, do not, it appears, require the sanction of the court. In a **voluntary winding up**, to exercise his powers under **section 376 (1) (d), (e) and (f)** the liquidator must get the sanction of the court/ committee of inspection or company. However, to exercise any of the powers given by section 376 it appears the liquidator needs no such sanction.

16. Even if the court's sanction was required in this case, I see no issue/ reason why the court by dealing with the matter can give its effective sanction by doing so (even though not sought before).

17. For completeness, the decision of the Honourable Justice Rajkumar in **CV 2006-02529 Goodwill General Insurance Co Ltd (In Liquidation)**, referred to by both parties, is a decision concerning a winding up by the court. The learned judge found that the liquidator in that case

had the effective sanction of the court to bring those proceedings and that it was in fact necessary. That situation is not the position here.

Ronnie Boodoosingh

Judge