

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

**Civil Appeal No. 91 of 2015
Claim No. CV 04515 of 2009**

**IN THE MATTER OF AN APPLICATION BY
LIBERTY DEVELOPMENT COMPANY LTD (In Liquidation)**

AND

**ORDER DIRECTING A PUBLIC EXAMINATION PURSUANT TO SECTION 399
OF THE COMPANIES ACT**

BETWEEN

THE OFFICIAL RECEIVER

Appellant

**PANEL: A. Mendonça, J.A.
 G. Smith, J.A.
 J. Jones, J.A.**

APPEARANCES:

Mrs. Zelica Haynes Soo-Hon instructed by Ms. K. Mark and Ms. A. Ramroop for the Appellant.

Mrs. Ruth Van Lare instructed by Mr. W. Smart for Bhim Ramsaran and Nigel Ramsaran.

Mr. Gregory Armorer instructed by N.S. Ratiram &Co. for COPOS Credit Union Co-Operative Society Limited.

Date delivered: 24th day of March, 2016.

I have read the Judgment of Jones, J.A and I agree with it.

**A. Mendonça
Justice of Appeal**

I too agree.

**G. Smith
Justice of Appeal**

Delivered by J. Jones, J.A.

JUDGMENT

1. This is an appeal arising from a decision of the trial judge setting aside an order made by him ex parte on the application of the Official Receiver for the public examination of certain persons. It was filed as a procedural appeal. At the hearing of the appeal objection was taken on the basis that this was not a procedural appeal. Without going into the merits of the objection the reality is that, whether procedural or not, this appeal has been brought within the 6 week time limit fixed by the rules for bringing an appeal. In addition some considerable time has been spent in the hearing and determination of this appeal. In our view to refuse to treat with this appeal at this stage will serve no useful purpose and would be a waste of the Court's resources.
2. On 15th February 2011 Liberty Development Company Limited ("the Company") was ordered to be wound up and the Official Receiver made its provisional liquidator.

Prior to the winding up order the Company had been engaged in the business of developing lands and building houses for sale. The COPOS Credit Union Co-Operative Society Limited (“COPOS”) is the mortgagee of two parcels of these lands and, in the year 2008, had taken possession of those parcels of land.

3. Pursuant to a report made by the Official Receiver under section 399 of the Companies Act Chap. 81:08 (“the Act”) on the 14th April 2014 the trial judge ordered a public examination of two directors of the Company, Nigel and Bhim Ramsaran (“the Ramsarans”), and two representatives of COPOS. This order was made ex parte.
4. On the return date, 3rd June 2014, both the Ramsarans and COPOS appeared and were represented by Attorneys. By consent, and at the request of COPOS, the order was amended to, among other things, add COPOS’ finance manager to the list of persons earmarked for public examination. The hearing was then adjourned. After the adjournment, by letter dated 13th June 2014, COPOS brought to the Judge’s attention the case of **In Re General Phosphate Corporation [1895] 1 Ch. 3** and requested an opportunity to address the judge on the case. Around the same time by email to the judge the Ramsarans indicated their intention to apply to set aside the ex parte order for their public examination.
5. On the 3rd July 2014 directions were given for the filing of written submissions on the case raised by COPOS. Thereafter the hearing was adjourned from time to time. On the 22nd October 2014 an application was filed on behalf of COPOS. This application sought to have the order made ex parte discharged and the proceedings transferred to

the civil registry of the High Court and conducted under the Rules of the Supreme Court 1975 (“the 1975 Rules”).

6. The grounds of the application were: (i) the Official Receiver, contrary to section 399 of the Companies Act, had not stated in any preliminary or further report that in his opinion a fraud or improper conduct had been committed or engaged in by any person in the promotion or formation of the company neither was fraud apparent or manifest on the face of the preliminary and further report; and (ii) Part 2.2(3) of the Civil Proceeding Rules 1998 as amended (“the CPR”) provided that the CPR does not apply to proceedings in insolvency including the winding up of companies these proceedings therefore had been commenced and conducted under the CPR contrary to that rule.
7. Despite filing the application to set aside the ex parte order COPOS filed no written submissions in accordance with the judge’s order. Written submissions were however filed by the Ramsarans. Basically these submissions adopted the position advanced by COPOS as set out in the grounds of its application with respect to the requirements of section 399 of the Act. However despite the earlier indication of their intention to file an application to set aside the order no application to do so was filed by the Ramsarans.
8. After hearing further oral submissions by all three parties on 16th April 2015 the judge delivered his decision and, by order dated 29th April 2015, discharged the ex parte order made on 14th April 2014. It is this ruling and the order discharging the public examination that is the subject of this appeal brought by the Official Receiver.

9. In his ruling the judge found that no application had been filed by the Ramsarans to set aside the ex parte order and that the only application to set aside had been filed by COPOS on 22nd October 2014 in circumstances where: it had not objected to the order on the first inter partes hearing on 3rd June 2014; had consented to the addition of a person to be examined and had volunteered the name of that person. The judge, therefore, held that there was no reasonable diligence in applying for the discharge of the order and ruled that the application¹ was out of time and would not be considered. There has been no appeal from this part of the judge's order.
10. Immediately thereafter in his ruling the judge, however, stated:
- “If however the court has erred in this regard, and, in any event, the court will go on to consider the matters raised in the authority relied upon by attorneys at law for COPOS which formed the basis for the filing of the submissions.”
11. After considering the authorities of: **In Re General Phosphate Corporation²; Ex parte Barnes³; In Re Civil, Naval and Military Outfitters Limited⁴ and Tejani and Others v Official Receiver⁵** the judge formulated as a question for his consideration “whether there is a sufficient factual nexus leading up to the Official Receiver's conclusion as to fraud or improper conduct or whether the report is so flimsy, so sketchy, so unfair as to exceed the court's jurisdiction.”

¹ the judge's ruling in fact refers to “applications” but we have been unable to find any application other than that filed by COPOS on the 22nd October 2014

² (1892) 3 Ch. 332

³ [1895-99] All E.R. 1275

⁴ [1899] 1 Ch.215

⁵ [1963] 1 All E.R. 429

12. The judge then concluded:

“Upon the mature consideration of the case law and principles expressed therein which the court has only now been able to lay its hands on, the court is of the respectful view that leave ought not to have been granted for the public examination of the persons mentioned in the schedule to the order pursuant to section 399 of the Companies Act and therefore the court discharges its Order made for the public examination on the 14th of April 2014 with no order as to costs....”

13. The order made by the judge, and perfected on 29th April 2015, reflects this conclusion. In effect therefore, having dismissed the application, the judge set aside his own order in the absence of any application to do so.

14. One of the grounds of appeal relied on by the Official Receiver is that:

“The learned judge having found that the applications were out of time and would not be considered was wholly wrong in holding that he had jurisdiction to consider whether the Order made on the 14th April 2014 should be discharged.”

15. At the hearing of the appeal the parties were invited to file further submissions on the question of:

“whether having dismissed the applications the High Court could proceed on its own motion to discharge the order made on the 14th April.”

Further submissions on this question were filed by the Ramsarans on 17th August and the Official Receiver on the 11th September 2014. COPOS filed no further submissions.

16. On the facts of this case therefore for our consideration is whether the judge could on his own motion, and in the absence of any valid application, discharge the ex parte order made by him in circumstances where that order had already been perfected and amended by consent. If it was open to the judge to do this then the further question for our determination is whether the finding of the judge that the requirements of section 399 were not met was plainly wrong.
17. In the main the cases relied on by the Ramsarans only treat with the jurisdiction of a judge, on his own motion, to recall an order before the order has been perfected. It is settled law that, under the inherent jurisdiction of the court, a judge can, on his own motion, recall and change an order made by him or her before it is perfected: **In re Harrison's Share under a settlement Harrison v Harrison [1955] Ch. 260; Pittalis v Sherefettin [1986] 2 All ER 227.**
18. There is nothing in the Companies Winding Up Rules⁶ or the Rules of Procedure on Applications under the Act⁷ that treats with this situation. These rules are silent with respect to changes in orders made by a judge either before or after such order has been perfected. While the 1975 Rules and the CPR specifically provide that they do not apply to the winding up of Companies, the Rules of Procedure on Applications under the Act

⁶ the second schedule to the Act

⁷ the first schedule to the Act

provides that the Rules of the Supreme Court “for the time being in force and the general practice of the Court shall apply as regards all proceedings in relation to applications to which these Rules relate so far as may be practicable, except if and so as the Act and these Rules otherwise provide.”

19. The 1975 Rules and the CPR provide for only one instance in which a court has the jurisdiction to recall and revisit a perfected order. This is by way of the slip rule⁸. This rule permits the correction of clerical mistakes or accidental slips or errors by a judge, on the judge’s own motion or on application by the parties, and allows for changes in the order to reflect the original intention of the judge. The slip rule has no application to the facts of this case. The answer to the question posed therefore lies in the general practice of the Court and under its inherent jurisdiction.
20. With respect to perfected orders, the slip rule aside, the basic principle seems to be that where the order is regular it can only be set aside upon appeal: see **Preston Banking Company v William Allsup [1895] 1 Ch 141**. Where, however, the order is not regular it may be set aside by the court that made it on an application made to that court, either under the rules of court dealing expressly with setting aside orders of court for irregularity or ex debito justitiae, if the circumstances warrant. This accords with the statement of the law made by Lord Diplock in **Isaacs v Robertson [1985] AC 97**.
21. In Isaacs Lord Diplock expressed the view that there was a category of orders made by a court of unlimited jurisdiction from which a person affected was:

⁸ Order 20 r 11 of the 1975 rules and Part 43.10 of the CPR

“entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make.”⁹

22. The statement therefore suggests that, even in cases where the order has been perfected, there is a category of cases, where the order is considered to be a nullity, which will allow a judge on an application made to recall and revisit the order. In such a case a judge need not rely on the rules, has no discretion as to the order to be made and must set it aside. In cases such as these the judge acts under the inherent jurisdiction of the court.
23. Both parties refer to the case of **Raja v Van Hoogstraten (No 9); Tombstone Ltd. v Raja [2009] 1 WLR 1143** in support of their submissions. Relying on that case the Ramsarans submit that the statement of Lord Diplock in **Isaacs** was made obiter dicta and is therefore not binding. The Official Receiver, on the other hand, relies on the case for its adoption of the explanation of the phrase ‘*ex debito justitiae*’ by Upjohn LJ in **In re Pritchard, deceased [1963] Ch. 502** at pages 520-521 and in support of its submission that the inherent jurisdiction of the court cannot be invoked to make an order that is inconsistent with the rules, in this case, the winding up rules.
24. Both are correct with respect to the effect of the judgment. In dealing with Lord Diplock’s statement in Isaac, in the **Tombstone** case, Mummery LJ says this:

⁹ at page 103

“We do not consider that in *Isaacs v Robertson*, Lord Diplock was intending to say that the inherent jurisdiction of the court could be invoked to make an order which was inconsistent with the rules. In any event the ratio of the decision was that an order made by a court of unlimited jurisdiction had to be obeyed until and unless it was set aside. What Lord Diplock said about the relationship between the court's inherent jurisdiction and its powers under the rules was not necessary for the decision and was obiter dictum.”¹⁰

25. In the case of **Chief Kofi Forfie v Barima Kwabena Seifah [1958] 1 All ER 289**, a decision of the Judicial Committee of the Privy Council, following the decision in **Craig v Kanseen [1943] 1 All ER 108**, it was determined that the court had an inherent power to set aside a judgment which it had delivered without jurisdiction:

“These cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected is entitled *ex debito justitiae* to have set aside. So far as the procedure for having it set aside is concerned it seems to me that the court in its inherent jurisdiction can set aside its own order, and that an appeal from the order is not necessary.” per Lord Greene MR in **Craig v Kanseen** at page 113.

26. This position was also adopted in **R v Nakla (No.2) 1 NZLR 453**. A review of these authorities therefore suggests that while a court has the power, under its inherent jurisdiction, to set aside its own order where that order is a nullity this inherent jurisdiction may not be exercised to arrive at an order which was inconsistent with the rules.

¹⁰ at paragraph 75

27. Of course, in treating with the question of whether the order is a nullity or not, a distinction must be made here between a decision made without jurisdiction and the wrongful exercise of jurisdiction. The former refers to a decision that no judge may make the latter to an error correctable by a court of appeal. In the instant case the judge seemed to think that he had no jurisdiction to make the order. We think he was wrong. In our opinion, if the judge went wrong in making the ex parte order, it was merely a wrongful exercise of his undoubted jurisdiction conferred by the Act to order a public examination.
28. Of assistance here is the Privy Council decision in the case of **Strachan v Gleaner Co. Ltd and Another (2005) 66 WIR 268**. Briefly the facts in that case were that judgment was obtained against the defendants in default of defence. After an assessment of damages the defendants sought to set aside the default judgment. The judgment was set aside by Walker J. The plaintiff then applied to another judge of concurrent jurisdiction, Smith J, to set that order aside on the grounds that it was made without jurisdiction and a nullity. The Privy Council had to determine two questions: (i) whether Walker J had jurisdiction to set aside the default judgment after damages had been assessed; and (ii) if Walker J had no jurisdiction to set aside the default judgment was his order a nullity which Smith J had the jurisdiction to set aside.
29. Although the Board came to the conclusion that the first judge, Walker J, had the jurisdiction to set aside the default judgment they went on to consider the second question. After considering and putting into proper context the decisions and statements made in a number of cases, including **Craig v Kanssen** and **In Re Pritchard**, Lord Millett, who delivered the opinion of the Board, stated:

“ 32. The Supreme Court of Jamaica, like the High Court in England, is a superior court of unlimited jurisdiction, that is to say it has jurisdiction to determine the limits of its own jurisdiction. From time to time a judge of the Supreme Court will make an error as to the extent of his jurisdiction. Occasionally (as in the present case) his jurisdiction will have been challenged and he will have decided, after argument, that he has jurisdiction; more often (as in the Padstow case) he will have exceeded his jurisdiction inadvertently, its absence having passed unnoticed. But whenever a judge makes an order, he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error, nor does a judge of co-ordinate jurisdiction have power to correct it.

33. In the present case Walker J held he had jurisdiction to make the order he did. If wrong, his decision could be reversed by the Court of Appeal which would be bound without going into the merits to set aside his substantive order as a nullity. As between the parties, however, unless and until reversed by the Court of Appeal, his decision (both as to jurisdiction and on the merits) was *res judicata*. As a judge of co-ordinate jurisdiction Smith J had no power to set it aside.” ¹¹

¹¹ At page 279

30. The reference to “the Padstow case” is to the case of **In re Padstow Total Loss and Collision Assurance Association (1880) 20 Ch. D 137**. This case was considered by the Board in Strachan. In Padstow’s case of particular relevance are the statements of Jessel MR at page 142 and Brett LJ at pages 145 to 146 of the judgment. According to Jessel MR:

“The first point to be considered is whether, assuming that the association was an unlawful one, and that the Court had no jurisdiction to make the order, an appeal is the proper mode of getting rid of that order. I think that it is. I think that an order made by a Court of competent jurisdiction which has authority to decide as to its own competency must be taken to be a decision by the Court that it has jurisdiction to make the order, and consequently you may appeal from it on the ground that such decision is erroneous.”

31. Brett LJ put it this way:

“In this case an order has been made to wind up an association or company as such. That order was the order of a superior Court, which superior Court has jurisdiction in a certain given state of facts to make a winding-up order, and if there has been a mistake made it is a mistake as to the facts of the particular case and not the assumption of a jurisdiction which the Court had not. I am inclined, therefore, to say that this order could never so long as it existed be treated either by the Court that made it or by any other Court as a nullity, and that the only way of getting rid of it was by appeal”.

32. In the instant case the ex parte order could not be considered a nullity. The trial judge did not act outside of his jurisdiction in making it. If he were wrong to make the order it would be because he erred in fact or law as to the requirements for the making of the order. The original order being made ex parte it was open to any party affected by it to apply to set it aside. Applying the decision in Strachan to the facts of the instant case therefore the position is that: (i) until set aside the ex parte order remained valid; (ii) such an order could only be set aside by two means: via appeal to a higher court or, since it was an order made ex parte, by application to set aside made by an affected party.
33. The judge determined that there was no valid application to set aside the order before him. The effect of this is that neither of these two avenues has been utilized in the instant case. Like in Strachan's case a judge has no general or inherent power to set aside his own order or that of a judge exercising co-ordinate or concurrent jurisdiction.
34. In the instant case the only jurisdiction to set aside the perfected order came from the fact that the order had been made ex parte and, in that circumstance, an application made by an affected party to set aside the ex parte order was necessary. Having dismissed the application the judge's jurisdiction was at an end. The judge therefore could not validly proceed to discharge the order made by him even though its issue may have been a wrong exercise of his jurisdiction.
35. This being the position there is no need to consider whether on the facts there was sufficient in the report of the Official Receiver to allow the judge to make the ex parte

order. This appeal is therefore allowed and the order of the trial judge setting aside the ex parte order is set aside. We will hear the parties on costs.

J. Jones
Justice of Appeal