2008 1008/P DEMERARA

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CIVIL JURISDICTION

IN THE MATTER OF THE COMPANIES ACT OF GUYANA

-AND-

IN THE MATTER OF BHAGAN'S DRUGS INC.

MR. S. FRASER for the Applicants
MS. J. ALI for the respondents

The applicants filed a Notice of Motion on the 23/12/09 claiming the following:-

(a) An order setting aside the order for service out of the jurisdiction of the 7th November 2008, made herein by the Honourable Chief Justice, Mr. Ian Chang;

(b) An order setting aside the winding up order of the 13th November 2009 made herein by the Honourable Chief Justice, Mr. Ian Chang;

(c) An order setting aside the declaration and order of the 11th November 2009 that the applicants herein, Sean Bhagan and Vere Bhagan, 'are personally responsible for the debt … which the company was ordered … to pay…'

(d) An order setting aside the judgment and consequential orders of the 11th November 2009 made and entered herein for Del Casa Limited against the Applicants herein, Sean and Vere Bhagan.

(e) Costs;

(f) Such further or other order as to the Court seem just.

Paragraphs (a) and (b) were subsequently not pursued by the applicants but (c) and (d) remained as the orders the applicants are praying for.

By consent November in prayers © and (d) was amended to August so that the date of the order referred to is 11th August 2009 and not 11th November 2009.

Before this motion could be heard the applicants filed a further motion dated 9th December 2009, which should read 9th December 2011, seeking the following order:-

"That the applicants Sean Bhagan and Vere Bhagan may be at liberty to amend its motion filed herein on the 23rd December 2009 by altering the same in the manner shown in red on the copy thereof delivered herewith and otherwise as it may be advised."

The proposed amendments were as follows:-

At paragraph 39 – "the order of the Honourable Chief Justice made herein on the 11th August 2009 is a nullity."

At paragraph 40 – "the claim against the applicants under section 446 of the Companies Act 1991 made in motion number 1008P/2008 is barred by the Limitation Act, and the Title to Land (Prescription and Limitation) Act."

The Court heard arguments and submissions on the second motion and deferred its ruling on this motion, and requested the parties to submit arguments and submissions on the motion of 23rd December 2009.

The Court then decided on the merits of the second motion dated 9th December 2009 which should be read 9th December 2011.

The applicants submitted that the amendments should be allowed to determine the real questions or issues, to decide the rights of the parties, and not to punish them for mistakes made in the conduct of their cases, and that the amendments

sought are to correct typographical errors and to supplement the grounds set out in the body of the motion.

By consent of Counsels the typographical errors were amended in Court before the hearing of the motion.

The applicants further submit that delay should not be taken into account in determining whether the application should be granted.

In this case the applicants were not present at the hearing of the substantive action and filed their motion some 2 years and 4 months after the order was made by the Chief Justice, and no grounds were given for the delay. No reasons were advanced by the applicants why they took so long to make their application.

The Court is not automatically bound to grant an application to amend after such a long delay, and in the absence of any proper reasons or any reason at all to satisfy the court that the applicants had some good explanation or faced some unforeseen obstruction to pursuing the remedies provided by the Rules of Court, then this Court finds that the delay must be taken into consideration.

While the Courts are the custodians of justice as stated in **Watson v Fernandes** (2007) CCJ 1 and amendments are allowed to fully determine the rights of the parties and ensure that justice is done, a party cannot sleep on his rights, and come to the court some 2 years later because he now finds something that he wishes to be heard on.

The order was one of a serious nature whereby it was ordered that the applicants were personally liable for the debt which the company was ordered to pay. I find that the applicants have taken an unreasonably long time to file the

motion seeking amendments to their application to have the Chief Justice's order set aside. The applicants have sat on their rights and have not come to the Court with due diligence, nor offered any explanation to the court for their undue delay.

The applicants have further submitted that the court's discretion to grant the amendments should be exercised where the applicant produces to the court evidence that he has a prima facie defence.

On dealing with the merits of the application the applicants have relied on the statute of Limitations and have submitted that the respondents can no longer claim a judgment debt made by order since 2003. On the 9th October 2003 judgment was granted by the Honourable Madam Justice Gregory Barnes against Bhagan's Drugs Store.

The order by the Chief Justice was made in 2009, 6 years after the order for judgment was made against the Company. This order was made under an application made under section 446 (1) of the Companies Act 1991, and is not an order for enforcement of a debt, but an order to declare who is liable to pay the debt.

Order 36 Rule 26 of the High Court Rules states as follows:-

"as between the original parties to a judgment or order execution may issue at any time within 10 years from the date of judgment or order."

The enforcement of the order cannot therefore be statute barred under the Limitation Act or the Prescriptive Title Act.

The applicants also claim that the declaration made by the Chief Justice in 2009 could only be made under winding up proceedings, and therefore the Court's jurisdiction to make an order under the section is limited to the period while the company is being wound up, and that the Chief Justice's order which was made on the 11th August 2009 was almost a year after the Company was wound up on 13th November 2008.

This submission has no merit since the Chief Justice's order of 2009 was properly made under section 446 of the Companies Act whereby if it is found that a party has been guilty of any fraudulent act, that party can be declared personally liable for such acts: it does not mean that the section can only be enforced during winding up proceedings. It can be enforced at any time during or after winding up proceedings.

It appears therefore that the proposed amendments are an attempt by the applicants to abuse the process of the court, since the defences put forward by them also have no merit.

I will now deal with the motion of 23rd December 2009.

The Court has a discretion whether or not to grant the application and a defendant who wishes to apply to set aside a default judgment should act reasonably promptly, and if there is a delay in the application he should explain the reasons for such delay. If it appears that there was an inexcusable or inordinate delay, the Court may in its discretion reject the application.

Prejudice to the respondents should also be taken into account, as well as whether there is a defence with a real prospect of success. These three criteria

were laid down in **Dipcon Engineering Services Ltd. V Bowen** (2204 Privy Council Appeal No. 79 of 2002) and **Evans v Bartlam** (1937) AC 473.

In the case of **Shocked v Schmidt** (1998) 1 AER 372 the Court held-

"that on an application to set aside a default judgment, the predominant consideration for the Court, was the reason why the party absented himself, if it was deliberate, and not due to accident or mistake, in which case the Court would be unlikely to allow a re-hearing."

"Delay in setting aside and prospects of success of the party applying, whether the successful party would be prejudiced by the judgment being set aside and the public interest in there being an end to litigation, are factors to be taken into account."

All the authorities have emphasized that "the matters to which the Court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly."

As to whether there is a defence with a real prospect of success the facts of the case are that on the 9th Octobre 2003 judgmnet was granted against Bhagan's Drug Store.

Demand was made against the applicants personally for payment of the judgment sum to which they replied that they were not Directors of Bhagan's Drug Store.

The Respondents thereafter made an application exparte and obtained an order of Court changing the name from Bhagan's Drug Store to Bhagan's Drug Inc.

Under section 355 of the Companies Act notice of winding up was served on Bhagan's Drugs Inc. and by Petition No. 1008-P of 2008 winding up proceedings were commenced.

From the facts it appears that the Respondents (Del Casa Ltd) rented the premises at 232 Middle Street, Georgetown to Bhagan's Drug Inc. and the proceedings filed in 2001 was for outstanding rent against Bhagan's Drug Inc.
On the 9th October 2003 judgment was granted by the Honourable Madam Justice Gregory Barnes against against Bhagan's Drugs Store. On 3rd February 2004 The Honourable Madam Justice La Bennet amended the order to read Bhagan's Drugs inc. which was the proper name and title of the company. On the 11th August 2009 the Honourable Chief Justice declared and ordered that the applicants are personally responsible for the debt which the company was ordered to pay.

The applicants claim that no judgment for a sum of money can be made against individuals except by action commenced under the Rules of the High Court. That the application under section 446 of the Companies Act was incorrect since it could not appear in the course of winding up that the applicants had acted contrary to section 446. That the alleged fraud committed by the applicants was some 8 years prior to the winding up proceedings. That the judgment cannot be entered twice in respect of the same judgment sum and that the matter was res judicata., that no order can be made for payment to an individual creditor when the court has made an order for winding up and a provisional liquidator has been appointed.

Section 446 (1) of the Company's Act states that:-

"If in the course of the winding up of a company it appears that any business of the company has been carried on –

(a) With intent to defraud creditors … or for any fraudulent purpose

(b) With reckless disregard of the company's obligation to pay its debts and liabilities …or

(c) ……

The court on the application of the Official Receiver … declare that any officers whether past or present, of the company … are personally responsible without any limitation of liability , for all or any of the debts or other liabilities of the company. "

Section 446 (2) states –

"Where the court makes any declaration referred to in subsection (1) it may give such further directions as it thinks proper for the purpose of giving effect to that declaration …."

From a reading of that section it is quite clear that the actions of the applicants do not have to occur during winding up proceedings. Even if the acts complained of occurred before the winding up proceedings if they are revealed during winding up proceedings then the claimants have a right of action under section 446 (1) to apply to the court to declare those responsible personally liable for their wrongdoing.

The applicants' contention that no judgment can be made against an individual except by writ commenced under the High Court Rules is misconceived. Where a company's directors are guilty of fraudulent acts against the interests of the company, the Company's Act provides recourse that can be taken under the Act, and it does not therefore require that a writ be filed.

The applicants' contention that judgment cannot be entered twice in respect of the same judgment sum is also misconceived. The first order was a judgment

against the Company. The second order was a declaration that the applicants be held personally liable for the debt of the company, and provision is made under the Companies Act for this to be done. The matter could not be res judicata because the two orders are entirely different, one order is for judgment against the Company, and the other declared who are liable to pay the debt of the Company.

The applicant's contention that no order can be made for payment to an individual creditor under winding up proceedings is also misconceived. The action by the respondents was taken not during winding up proceedings but was a judgment given in 2003 upon an action filed in 2001 and section 446 was applied to declare the applicants personally responsible for the debt. The judgment did not occur under winding up proceedings.

Therefore on the point as to whether there is a defence with a real prospect of success, this Court finds that the applicants have not shown that they have a meritorious defence and one that is likely to succeed.

The third issue the court has to consider is whether there would be prejudice to the respondents. The respondents having commenced proceedings since 2001 having obtained judgment since 2003, the applicants having closed the business and left the jurisdiction without paying their debts, the respondents having waited for 5 years to enforce that debt before taking further proceedings in 2008 to have the applicants declared personally liable, and now to have the applicants come to the court 2 years later seeking a chance to defend themselves in these proceedings, cannot but be highly prejudicial to the respondents.

I find the applicants are trying to avoid paying the debt of the company for which they were declared liable, and that their actions are an attempt to delay justice

and deny the respondents the judgment which they have obtained through the lawful process of the court.

In the circumstances the motion for amendment filed on the 9th December 2011 is refused and the motion dated and filed 23rd September 2009 is hereby dismissed.

Costs $125,000.

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Date: 19th December 2012