9th July, 1991.

IN THE ROYAL COURT OF JERSEY

Before: **Commissioner F. C. Hamon**
Jurat J. H. Vint
Jurat E. W. Herbert 93.

BETWEEN	**NIGEL JOHN HALLS, LIQUIDATOR OF CHILTMEAD LIMITED**	**PLAINTIFF**
AND	**DENNIS STEWART**	**FIRST DEFENDANT**
AND	**JOYCE BERYL STEWART neé DE STE CROIX**	**SECOND DEFENDANT**

Advocate D. F. Le Quesne for Plaintiff
Advocate G. R. Boxall for Defendant

On the 18th February, 1991 this Court sat to determine a contested action between Nigel John Halls, the Liquidator of a company registered in England and known as Chiltmead Limited ("the Company") and Mrs. Joyce Beryl Stewart neé de Ste Croix. In the event the action was compromised and an Acte (not deemed to be by consent) was drawn up and issued. That Acte, of course, had the same force and consequence of any order of this Court. The only matter left to be decided was the matter of costs which was adjourned to another day. It is the question of costs which is now before us.

THE BACKGROUND

Mrs. Stewart and her then husband, Dennis Stewart, were at all material times the sole beneficial owners of the company which in turn owned a property, Chiltmead, in Reading. The company had issued two shares - they each owned one; they were each directors, Mrs. Stewart had one vote at meetings, Mr. Stewart had two. The Reading Borough Council decided to purchase Chiltmead for redevelopment. There was compulsory acquisition and, at the end of the day, the net sum available for the company was £600,000.

Mr. Stewart eager to take advantage of higher interest rates, came to Jersey with six bankers' drafts of £100,000 each which he deposited with various finance houses. As a matter of fact (albeit obiter) the Royal Court found in Stewart - v - Stewart Unreported 28th March, 1991, that "all those monies belonged not to the respondent (Mrs. Stewart) personally but to Chiltmead (the Company)".

We can express the facts as given by the Royal Court at page 7 of its judgment:-

> " In 1981, the United Kingdom Inland Revenue Authorities sought to raise an assessment to tax on the Land Tribunal's award. The assessment was raised on Chiltmead, which did not have the money in England. Liability was disputed but was decided some time later in the sum of £411,000. Consequently, Chiltmead was insolvent; ultimately, it had liabilities of about £120,000 and was put into liquidation in 1982.

> Legal proceedings were brought by the liquidator of Chiltmead in England and subsequently in Jersey for payment of monies due to Chiltmead by the parties. Judgment was taken against the respondent for a sum of £510,000. Judgment was also given against the petitioner but by consent and by way of compromise. She submitted to judgment on the 19th November, 1985, in the sum of £90,000, which was secured by charge on Horse Chestnut House, Hollybush Lane, Burghfield Common, Berkshire, the petitioner's property, and which she undertook to pay to the liquidator on or before the 19th November, 1987."

We do not need to go further than that except to say that before the liquidator was appointed the bulk of the monies had been frozen by Mrs. Stewart by injunctions obtained in an Order of Justice dated the 24th February, 1983. The allegation was that Mr. Stewart was dissipating the £600,000 which "represented the larger part of the jointly owned assets of the plaintiff and the defendant".

Mr. Boxall argued that from the moment that Mrs. Stewart obtained these injunctions they became "quasi-trust funds" and this fact, in itself, would enable this Court to order that both the liquidator and Mrs. Stewart should be awarded costs out of the monies frozen by the injunctions.

Mr. Boxall further argued that impliedly the "innocence" of Mrs. Stewart had been acknowledged by orders for costs made both in this jurisdiction and in the High Court.

On the 10th October, 1983 the liquidator brought an action against Mr. Stewart (first defendant) and Mrs. Stewart (second defendant) and seven parties cited - mainly the finance houses. The Order of Justice only asked for costs to be awarded against the first defendant.

When the second defendant (Mrs. Stewart) filed her Answer she incorporated in it an Order of the High Court (Chancery Division). That Order showed that there had been a trial between the company (in liquidation) and Mr. and Mrs. Stewart. The Court declared "that the first defendant (Mr. Stewart) had acted in breach of trust and was guilty of misfeasance as a Director of the plaintiff in misappropriating the plaintiff's assets". The first defendant was ordered to pay the plaintiff's costs.

On the same day there followed a consent order in the same Court. Mrs. Stewart agreed to pay £90,000 to the liquidator (being monies from the assets declared to be his that she had used to purchase a property in England). Specifically it was ordered that there be no order as to costs as between the liquidator and Mrs. Stewart.

The English Judgment was duly registered in Jersey by Act dated the 7th March, 1986 under the provisions of the Judgments (Reciprocal Enforcement)(Jersey) Law, 1960. The costs of £50 were ordered to be paid by Mr. Stewart.

On the 30th June, 1989 the liquidator obtained an order from this Court which stated "that all the title and interest which Mr. Stewart may have in the assets should immediately be vested in the representor ...".

The liquidator began proceedings against Mrs. Stewart on the 23rd January, 1989. For the first time he requested that Mrs. Stewart be ordered to pay the costs "of and incidental to the representation".

Mrs. Stewart did not hesitate to defend: her defence was threefold.

1. She pleaded that the £600,000 was lawfully in the possession and ownership of Mr. Stewart and "will or may give rise to the existence of a loan from Mr. Stewart to the company".

2. Denied that the liquidator had any right to trace the assets and, more importantly,

3. Argued that ownership of the assets fell to be determined by the Matrimonial Causes Division which had heard the case on the 11th December, 1987 (and was to deliver its judgment on the 28th March, 1991).

As matters transpired, the case, although fully pleaded, did not come to be adjudicated upon because, at the eleventh hour, and as we have said, a compromise was reached save as to costs.

Mr. Boxall took us through three cases which showed that at the time the liquidator began his actions in 1983 there was no allegation of misfeasance upon which he could rely. Indeed as Lawton LJ said in Multinational (as v. Multinational Gas Services (1983) 2All ER 563 at page 571:-

> "The submission in relation to the defendants was as follows. No allegation had been made that the plaintiff's directors had acted ultra vires or in bad faith. What was alleged was that when making the decisions which were alleged to have caused the plaintiff loss and giving instructions to Services to put them into effect they had acted in accordance with the directions and behest of the three oil companies. These oil companies were the only shareholders. All the acts complained of became the plaintiff's acts. The plaintiff, although it had a separate existence from its oil company shareholders, existed for the benefit of those shareholders, who, provided they acted intra vires and in good faith, could manage the plaintiff's affairs as they wished. If they wanted to take business risks through the plaintiff which no prudent businessman would take they could lawfully do so. Just as an individual can act like a fool provided he keeps within the law so could the plaintiff, but in its case it was for the shareholders to decide whether the plaintiff should act foolishly. As shareholders they owed no duty to those with whom the plaintiff did business. It was for such persons to assess the hazards of doing business with them. It follows, so it was submitted, that the plaintiff, as a matter of law, cannot now complain about what they did at their shareholders' behest.

This submission was based on the assumption, for which there was evidence, that Liberian company law was the same as English company law and on a long line of cases starting with Salomon v A Salomon & Co. Ltd. [1897] AC 22, [1895-9] All ER Rep 33 and ending with the decision of this court in Re Horsley & Weight Ltd [1982] 3 All ER 1045, [1982] Ch 442. In my judgment these cases establish the following relevant principles of law. First, that the plaintiff was at law a different legal person from the subscribing oil company shareholders and was not their agent (see Salomon v A Salomon & Co Ltd [1897] AC 22 at 51, [1895-9] All ER Rep. 33 at 48 per Lord Macnaghten). Second, that the oil companies as shareholders were not liable to anyone except to the extent and the manner provided by the Companies Act 1948 (see Salomon v A Salomon & Co Ltd). Third, that when the oil companies acting together required the plaintiff's directors to make decisions or approve what had already been done, what they did or approved became the plaintiff's acts and were binding on it (see by way of examples A-G for Canada v Standard Trust Co of New York [1911] AC 498, Re Express Engineering Works Ltd [1920] 1 Ch 466 and Re Horsley & Weight Ltd). When approving whatever their nominee directors had done, the oil companies were not, as the plaintiff submitted, relinquishing any causes of action which the plaintiff may have had against its directors. When the oil companies, as shareholders, approved what the plaintiff's directors had done there was no cause of action because at that time there there was no damage. What the oil companies were doing was adopting the directors' acts and as shareholders, in agreement with each other, making those acts the plaintiff's act.

It follows, so it seems to me, that the plaintiff cannot now complain about what in law were its own acts."

Mr. Boxall referred us to West Mercia Safetywear Ltd. (In liq.) v. Dodd & Another (1988) BCLC 250 at page 252 where Dillon DJ said :-

"We have been referred to quite a number of authorities on this topic. For my part I find helpful, and would approve, the statement of Street CJ in Kinsela v Russell Kinsela Pty Ltd (in liq)(1986) 4 NSWLR 722 at 730, where he said:

> 'In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholders' assets that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency, or the imposition of some alternative administration.'

> In the present case, therefore, in my judgment Mr. Dodd was guilty of breach of duty when, for his own purposes, he caused the £4,000 to be transferred in disregard of the interests of the general creditors of this insolvent company. Therefore the declaration sought in the notice of motion ought to be made as against Mr. Dodd."

Although the law had slightly shifted over these five years, Mr. Boxall argues that at the time that Mr. Stewart came to Jersey there were no creditors and the two directors and shareholders were unanimous in the decision that Mr. Stewart took. That is an interesting argument but we cannot see how it an help Mr. Boxall at this late stage. Nor does it assist him, in our view, to make the point (which we accept) that the actions of Mr. Stewart at the time were apparently ~~ultra~~ intra vires the company's memorandum and in particular within objects (I),(J) and (N).

Indeed, the action commenced by Le Marquand & Backhurst (Le Marquand & Backhurst v. Chiltmead Limited (by its Liquidator, Halls) 1987 - 88 JLR 86 disclosed the creditors of the company. It showed that the company had liabilities of £423,492. None of these liabilities were in existence when Mr. Stewart came to Jersey.

All this we understand. We have also listened with some sympathy to Mr. Boxall's further arguments. We do not, however, agree that Mrs. Stewart derived no benefit from the acts of misfeasance of her former husband. She did, after all, submit to judgment on the 19th November, 1985, in the sum of £90,000 which sum she undertook to repay to the liquidator on or before the 19th November, 1987.

We cannot see that there is any particular merit in the very cogent and able argument of Mr. Boxall that Mrs. Stewart's behaviour justifies her not being penalised for costs. We agree that she has treated the court with respect; we agree that she has not herself been adjudged to have been guilty of misfeasance. She may have saved the liquidator, by reason of her last minute compromise, from the expense of tracing the funds but that only means that she threw in the towel when the argument became impossible to sustain. She felt that the funds were in some way matrimonial assets. That hope was dashed irretrievably when the Matrimonial Causes Division held (albeit obiter) in March 1991 that the assets belonged to the

company. That may be a tragic miscalculation on her part. But it was a reasoned decision to hold on. Mrs. Stewart lived in hope. When her hopes were dashed she compromised the action. In our view (and we are unanimous in that view) costs must follow the event. We can see no justification in regarding the company's assets as a form of trust fund out of which the litigants can take their costs. The company's assets are there for the benefit of the creditors. The liquidator has a duty to distribute those assets. It would, in our view, be unequitable in these circumstances further to deplete such fund as there may be in order to allow Mrs. Stewart (and, for that reason, the liquidator as well) to take costs from the fund.

We can see nothing in the stand taken by the liquidator which would deprive him of his costs. That we sympathise with Mrs. Stewart is not, in our view, sufficient cause for us to deprive him of those costs.

We have no hesitation in awarding the liquidator his costs of and incidental to his representation of the 18th February, 1991. Mrs. Stewart shall also pay the taxed costs of this day's hearing.

Authorities

Multinational Gas -v- Multinational Gas Services (1983) 2 All ER 563.

Kinsela -v- Russell Kinsela Pty Ltd (1986) 4 NSWLR 722.

West Mercia Safetywear Ltd -v- Dodd (1988) BCLC 250.

Ludlow -v- Jones (1985-86) JLR 40.

4 Halsbury 37 paras. 712-725.