Privy Council Appeals Nos. 47 and 48 of 1985

Perak Pioneer Limited *Appellant*

v.

Petroliam Nasional Berhad *Respondent*

and

Plessey Investments Limited *Appellant*

v.

Petroliam Nasional Berhad *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST MAY 1986

Present at the Hearing:

LORD BRIDGE OF HARWICH
LORD BRIGHTMAN
LORD MACKAY OF CLASHFERN
LORD ACKNER
LORD GOFF OF CHIEVELEY

*[Delivered by **Lord Brightman**]*

These two appeals from the Court of Appeal of Hong Kong, by special leave of Her Majesty in Council, raise the question whether the court will permit an assignee of a debt, upon which a winding-up petition is based, to be substituted as petitioner if the assignment has taken place after the presentation of the petition. The proposition contended for by the appellant companies, that the court will not so permit, is largely founded upon the decision of the English Court of Appeal in the case of *In re Paris Skating Rink Company* (1877) 5 Ch.D 959. This case was decided in 1877, a few years after the first of the English Companies Acts had been enacted. The *Paris Skating Rink* case has not been the subject matter of any reported judicial decision or comment in England during the century or so that has elapsed since it was decided.

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The two appeals raise the same point. It will be convenient to treat Perak Pioneer Limited v. Petroliam Nasional Berhad as the prototype.

The appellant company, ("Perak"), was incorporated under the Hong Kong Companies Ordinance (Cap. 32) in 1974 with the object of carrying on a finance business. In 1982 it was lent a large sum of money in Hong Kong dollars by Bumiputra Malaysia Finance Limited ("the finance company"), a company incorporated in Hong Kong. Perak defaulted on the loan, no payment of principal or interest being made after August 1982. It is right to say that Perak purports to dispute the debt, but no evidence of any sort was adduced on its behalf in these proceedings to establish the ground of the dispute or the *bona fides* thereof. For present purposes the debt must be regarded as undisputed. In October 1983 the finance company formally demanded repayment of Perak's indebtedness, then amounting to some HK$28,000,000.

In the course of its business the finance company had lent considerable sums of money to certain Hong Kong companies. By the end of the year 1983 it was owed upwards of HK$881,000,000. The finance company was a wholly owned subsidiary of a Malaysian bank, Bank Bumiputra Malaysia Berhad ("the bank"). By a Deed of Assignment dated 31st December 1983, the finance company assigned to the bank for some US$887,000,000 the benefit of the debts owed to it by the Hong Kong companies and the securities held by it, as set out in schedules to the Deed. These debts included the indebtedness of Perak. The object of the assignment was to enable the finance company to discharge various loans in Asian currencies which had been made to it by its parent company. The bank appointed the finance company its attorney for the purpose of collecting the debts due from the Hong Kong companies. Perak failed to discharge its debt.

On 24th July 1984 the finance company and the bank presented a joint petition to the High Court to wind up Perak under the provisions of the Companies Ordinance on the ground that it was insolvent and unable to pay its debts. The return date of the petition was 26th September 1984.

In the meantime an arrangement was made, with the concurrence of the Finance Minister of Malaysia, under which a Malaysian company called Petroliam Nasional Berhad ("Petroliam") acquired a majority shareholding in the bank, and also purchased the Hong Kong indebtedness due to the bank under the 1983 Assignment. The latter purchase was effected by a Deed of Assignment of 17th September 1984 whereby the bank assigned the benefit of the Hong Kong debts to Petroliam, in consideration of the payment of a sum in Malaysian currency. Thus the debt due from Perak

to the finance company became by the first assignment vested in the bank some seven months before the winding-up petition was presented, and then became vested by the second assignment in Petroliam some two months after the presentation of the petition.

On 19th September 1984 Perak issued a notice of motion to strike out the petition as an abuse of the process of the court on the footing that the debt upon which the petition was based was *bona fide* disputed on substantial grounds. As a result the petition was adjourned pending a decision on the summons to strike out, which was still unheard when this appeal came before their Lordships.

In January 1985 the finance company, the bank and Petroliam made a joint application to the High Court for an order to join Petroliam as an additional petitioner or alternatively to substitute Petroliam as sole petitioner in the place of the finance company and the bank. The application came before the Honourable Mr. Justice Jones in April 1985. He refused to make the first order sought, but made an order for substitution under rule 33 of the Companies (Winding-up) Rules (Cap. 32). The petition was amended accordingly by striking out the names of the finance company and the bank as petitioners and substituting the name of Petroliam as sole petitioner. Perak appealed. The appeal was dismissed in May, as a result of the majority decision of the Honourable Mr. Justice Cons and the Honourable Mr. Justice Fuad, the Honourable Mr. Justice Kempster dissenting. Perak now appeals to Her Majesty in Council.

The proposition sought to be established by Perak, as grounds for allowing the present appeal, are twofold. First, it is said that the *Paris Skating Rink* case is good law; that in accordance with that case Petroliam, as a post-petition assignee, would have no right to a winding-up order on such petition; therefore Petroliam cannot properly be substituted as petitioner. Secondly, it is said that under section 179 of the Companies Ordinance a petition can only be presented by a person who is a creditor at the date of the petition, which Petroliam was not. There were certain further matters raised before the Hong Kong courts as grounds for refusing substitution, but those grounds were not pursued before their Lordships and need no mention in this judgment.

Before considering the judgments in the High Court and the Court of Appeal, it will be convenient to set out section 179 of the Companies Ordinance (defining the persons who may present a winding-up petition) and also rule 33 of the Companies (Winding-up) Rules (defining the circumstances in which the court has jurisdiction to allow a newcomer to be substituted for the original petitioner); and to examine the

Paris Skating Rink case upon which most of the argument has turned.

Under section 179 of the Companies Ordinance a petition may be presented by "the company, or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories or the trustee in bankruptcy or the personal representative of a contributory, or by all or any of those parties, together or separately" and, in certain circumstances, by the Financial Secretary, the Registrar of Companies or the Official Receiver. It is clear that a person, who is not a creditor of the company at the time when the petition is presented and does not fulfil any other of the qualifications mentioned, has no status to present a petition. The petition in the instant case was presented on 24th July 1984. Petroliam was not a creditor of Perek on that day and could not then have presented a petition for a winding up order. Does it follow that Petroliam cannot be a substituted petitioner?

Substitution is covered by rule 33 of the Companies (Winding-up) Rules. This rule (divided into its component parts for ease of reading and omitting irrelevant words) provides as follows:-

> " When a petitioner is not entitled to present a petition or whether so entitled or not, where he
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> (a) fails to advertise his petition ... or
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> (b) consents to withdraw his petition, or to allow it to be dismissed, or the hearing adjourned, or fails to appear ... or
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> (c) if appearing, does not apply for an order in the terms of the prayer of his petition,
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> the court may, upon such terms as it may think just, substitute as petitioner any creditor or contributory who in the opinion of the court would have a right to present a petition, and who is desirous of prosecuting the petition."

In the *Paris Skating Rink* case Powys, who was a creditor for goods supplied to the company, presented a winding-up petition on 17th April 1877. On 24th April Toynbee, who appears to have been a mortgagee holding his security in trust for another creditor, also presented a petition. On 25th April Powys assigned his debt to Vickers, who was a shareholder in the company. When the petition of Powys came on to be heard on 28th April, leave was given to amend by adding Vickers as a co-petitioner, and the petition was adjourned. On 11th May the two petitions came on together for hearing. They were opposed by a shareholder, Jeffree, and by certain

other shareholders. A winding-up order was made on the joint petition of Powys and Vickers, and Toynbee's petition was dismissed as being unnecessary. The opposing shareholders appealed. A separate appeal was also presented by Mair, another shareholder who came in at a late stage. At the hearing of the appeals, Powys (having assigned his debt) stated that he did not desire a winding-up order. He had no apparent interest in the proceedings. He stated that he withdrew authority for the use of his name. Counsel for Jeffree and the other shareholders who had opposed the petition at the hearing before the Vice-Chancellor submitted, according to the report of the argument, that "the petition was one on which the Court ought not to make any order on the grounds of public policy. It is in fact the petition of a partner who has purchased a debt for the purpose of destroying the partnership".

The first judgment was given by Lord Justice James in the following terms:-

> " I am of opinion that we ought not to allow the order of the Vice-Chancellor to stand, on this plain and simple ground - this is the first instance since the Companies Acts were passed in which such an experiment has been tried, that is to say, of a creditor presenting a petition for winding up with a view of obtaining payment of his debt, and then of a member of the company, for some purpose or other, buying from the debtor the right to proceed with that petition. This has never been done before, and I think it ought to be discouraged, because to my mind it is impossible to foresee the amount of mischief and oppression that might be occasioned if a person were allowed to come in and buy up the right to proceed with a winding-up petition. Upon that simple ground - that such a thing never has been and never ought to be done - I am of opinion that the Vice-Chancellor's order ought to be discharged ..."

Lord Justice Baggallay agreed. Lord Justice Bramwell said that he was of the same opinion, and added:-

> "I should not like it to be supposed that the assignee of a debt due from a company cannot take proceedings for winding up the company; but my objection to this petition is the same as that stated by Lord Justice James, that Vickers was the assignee, not merely of Powys' claim against the company, but also of his right of proceeding with the petition to wind up the company. I doubt whether in a common law action such an assignment might not be good, because the person who had purchased the right would have stood on the same footing, and have been subject to the

> same answer in the action as the original debtor. But however that may be, I think that this case gives rise to different considerations, because the assignor might be subject to an answer which the assignee was not subject to. On the ground that we ought not to permit the assignment of a debt, together with the right to proceed with a petition to wind up which has been brought in respect of such debt, I concur in holding that the order of the Vice-Chancellor must be discharged."

The question is, whether any and if so what principle emerges from that case which is relevant to the present appeals. In the High Court Mr. Justice Jones treated the case as deciding only that "the sale of the right to proceed with a winding-up petition ought not to be allowed", and he clearly did not regard the assignment to Petroliam as a transaction answering that description. In the Court of Appeal Mr. Justice Kempster, in his dissenting judgment, referred to the Application of English Law Ordinance which was passed in 1966 to declare the extent to which English law is in force in the colony. Section 3(1) provides that "The common law and the rules of equity shall be in force in Hong Kong (a) so far as they are applicable to the circumstances of Hong Kong or its inhabitants; (b) subject to such modifications as such circumstances may require; (c) subject to any amendment thereof (whenever made) by" Order in Council, Act or Ordinance. Mr. Justice Kempster said, "We have no basis for concluding that the relevant mischief is any less a matter for concern here in 1985 than it was in England in 1877 so as to allow or require us to find that public policy presently requires a different approach and to declare the common law in a different sense". Mr. Justice Fuad expressed the view that the *Paris Skating Rink* case did no more than establish a rule of practice; that it was not a rule of practice which it was appropriate to follow in Hong Kong; that to apply that authority would place an unwarranted gloss on the plain and ordinary meaning of rule 33; and that there was no equivalent rule in the English Companies legislation in force in 1877 when the *Paris Skating Rink* case was decided. Mr. Justice Cons referred to the difficulty of discerning the principle which underlay the *Paris Skating Rink* case, and took the view that the court was not constrained by the Application of English Law Ordinance to follow the *Paris Skating Rink* case, since it did not lay down any general principle of the common law but was concerned only with a particular aspect of statutory law.

As was observed during argument before their Lordships, the jurisdiction invoked in the *Paris Skating Rink* case was the discretionary jurisdiction

to wind up a company, while the jurisdiction that arises in the present case is a different one, namely the discretionary jurisdiction to permit substitution. But that is not a real point of distinction, because the discretionary jurisdiction to order substitution would clearly not be exercised in favour of a would-be petitioner who would not be able successfully to invoke the jurisdiction to make a winding-up order. The *Paris Skating Rink* case is therefore of direct concern despite the different discretion there in issue.

In the opinion of their Lordships the key to the *Paris Skating Rink* decision is to be found in the words of Lord Justice James, "... a member of the company, for some purpose or other, buying from the debtor the right to proceed with that petition". It is apparent that there was a difference of view among the shareholders as to whether the liquidation of the company sought by Powys and Toynbee should be opposed. Jeffree and his colleagues were shareholders who opposed liquidation. Vickers was the holder of 200 shares who wanted liquidation. Eight days after the battle lines had been drawn by the presentation of a petition by Powys, who was an outside creditor, Vickers bought up the debt. Vickers clearly did this in order to put himself in a stronger position to force a liquidation than if he had been merely a minority shareholder. There can have been no other reason for his buying up the debt. Hence counsel's description of the amended petition as "the petition of a partner who has purchased a debt for the purpose of destroying the partnership".

In the opinion of their Lordships the *Paris Skating Rink* case is merely an example of the court's declining to exercise its discretionary jurisdiction to order the winding up of a company on the petition of a creditor who has acquired that status for some ulterior motive during the pendency of the proceedings. No question of public policy was involved. The case is not an authority that the court is required to exercise its discretion adversely to a petitioning creditor whose status as such was acquired by assignment after the presentation of the petition. A contrary conclusion would impose a wholly unreasonable and oppressive fetter on the court's winding up jurisdiction. Take this example, which is close to the present case. Suppose that for *bona fide* commercial reasons one finance house acquires the undertaking of another finance house. By the nature of its business the transferor finance house is likely to have a number of debts owing to it at the date of the transfer. Suppose that some of these are overdue debts owing by companies against whom the transferor finance house has presented winding-up petitions in the ordinary course of collecting the monies due to it. Their Lordships ask themselves

what possible reason there could be for requiring the court to dismiss all such petitions (in the absence of another creditor seeking substitution) so that costs are thrown away, the transferee finance house has the pointless burden of presenting new petitions based on the same debts, and furthermore may be prejudiced as a result of the postponement of the commencement date of the winding up. Their Lordships are of the opinion that the *Paris Skating Rink* case does not establish any general proposition which is relevant to the present case.

As their Lordships have indicated, there is no trace in the reported English cases of any judicial comment on the *Paris Skating Rink* case. It did however receive brief notice in the current Solicitor's Journal (1877, Volume 22, page 6) where the editor observed "We apprehend that the true law to be deduced from the case is that a petition founded on a debt purchased *pendente lite* for the very purpose of acquiring the right to petition is not sustainable". In the opinion of their Lordships this was an accurate comment.

The appellant's alternative submission is based on the wording of section 179 of the Companies Ordinance. The argument runs thus. As an application to the court for a winding-up order must be by a petition presented by (among others) a creditor, it follows that the petitioner must sustain the status of a creditor at the date when the petition is presented. If Petroliam is substituted for the finance company and the bank, the petition will have to be amended by striking out the latter as petitioners and substituting the former. There will then exist a petition of a person who was not a creditor at the date of the presentation of the petition. This, it is said, contravenes section 179.

The answer to the argument is to be found in the wording of rule 33 of the Companies (Winding-up) Rules which their Lordships have already set out. The court is entitled to substitute any creditor of the company as petitioner in certain defined circumstances. The conditions are these. First, one of certain specified events must have happened, i.e. (A) "when a petitioner is not entitled to present a petition", or (B) whether so entitled or not, he fails to advertise, or consents to withdrawal, or to dismissal, or to an adjournment, or fails to appear or does not apply for an order. If one of these events happens the court may substitute any other creditor provided that such creditor satisfies the required condition, i.e. (C) the creditor is a person "who in the opinion of the court would have a right to present a petition" and "who is desirous of prosecuting the petition". Condition (A) presupposes that a petition has been presented

(otherwise substitution could not arise), and that the petitioner is a person who "is not entitled to present a petition". That condition is expressed in the present tense. The court must therefore look at the position at the date when substitution is sought, and ask the question whether the petitioner for whom another person is proposed to be substituted is a person who is not entitled to present a petition. In the present case that condition was satisfied because, by reason of the second assignment, the finance company and the bank were not at the date when substitution was sought, persons who were entitled to present a petition. One then turns to condition (C) to ascertain whether that condition also was satisfied. To answer that question, the court must ask itself whether Petroliam "would have a right to present a petition", not whether Petroliam "would have had a right to present the petition". At the date when substitution was sought, Petroliam had a right to present a winding up petition. It follows that on the plain wording of rule 33, the court had jurisdiction to order the substitution of Petroliam notwithstanding that Petroliam was not a creditor at the date when the petition was presented.

The second appeal relates to Plessey Investments Limited ("Plessey"). A petition was presented by the finance company and the bank in September 1984 based on debts of some US$81,000,000, HK$36,000,000, and £5,000,000. The benefit of these debts and the securities therefor were also comprised in the assignment of 31st December 1983 to the bank and in the assignment of 17th September 1984 to Petroliam. There was a similar summons for substitution. The summons in this case and in the case of Perak, and later the appeals, were heard together with like results. No distinction is claimed to exist between the Plessey case and the Perak case.

In the result their Lordships will humbly advise Her Majesty that these appeals should be dismissed. In each case the appellant company will pay the respondent's costs of the appeal.