

**DJ Gubbay and Company (New Hebrides) Proprietary
Ltd, In re [1975] FJHCWP 1; Civil Case 138 of 1975 (11
July 1975)**

**IN THE HIGH COURT OF
THE WESTERN PACIFIC
(CIVIL JURISDICTION)**

New Hebrides Registry
Civil Case No.138 of 1975

IN THE MATTER of

**D.J. GUBBAY AND COMPANY
(NEW HEBRIDES PROPRIETARY LIMITED)**

AND

IN THE MATTER of

THE NEW HEBRIDES COMPANIES REGULATION (CAP. 9)

JUDGMENT

This is an application by MARAG INTERNATIONAL LIMITED of Auckland, New Zealand, (henceforth referred to in this judgment as the Petitioner) for the appointment by the Court under section 289 of the Companies Regulation (Cap. 9) of a provisional liquidator of D.J. Gubbay and Company (New Hebrides) Proprietary Limited (henceforth referred to as the Company).

The facts are as follows:

On the 27th March 1975 this Court, on the application of the Company, made an order under section 241 (1) of the Companies Regulation that the Company should convene meetings of its creditors for the purpose of considering a scheme of arrangement proposed to be made between the Company and its creditors. Following on the making of this order the Company has issued notices summoning a meeting of its secured creditors on the 11th August 1975 and a meeting of its unsecured creditors on the 12th August 1975, and, as required by section 242(1) of the Companies Regulation, the Company issued with each of these notices a statement explaining the effect of the proposed scheme of arrangement.

It appears that creditors of the Company, including the Petitioner, received copies of these notices and explanatory statements in early June, and on the 7th July 1975 the Petitioner presented to this Court a petition for the winding-up of the Company under sections 233 (a) and 254 of the Companies Regulation on the grounds that the Company was indebted to the Petitioner in the sum of \$A17,333.?? and that the Company was insolvent and unable to pay its debts. The hearing of this petition has been fixed for the 13th August, 1975.

The Petitioner now applies under section 269 of the Companies Regulation for the appointment of a provisional liquidator of the Company.

Mr. Johnstone, Counsel for the Petitioner, submitted that such an appointment would be in the general interest of all the Company's creditors. He said that the proposed scheme of arrangement was deficient in several respects and that it would be extremely difficult for creditors of the Company to vote for or against the scheme in view of these deficiencies in the scheme and the general lack of information available to creditors concerning the Company's affairs. In particular he drew attention to the following points mentioned in the affidavit of Mr. Look, the Manager of the Commercial Bank of Australia Limited in Vila, and an authorised agent for certain purposes of the Petitioner:-

- (1) That the only accounts of the Company available were accounts made up to the 30th June, 1972;
- (2) That the proposed scheme of arrangement contained no exhaustive list of the Company's assets or a list of its creditors;
- (3) That clause 11 of the Company's statement explaining the proposed scheme of arrangement (annexure "B" to Mr. Look's affidavit) was unclear but appeared to

show that valuable assets of the Company had been or might be transferred out of the Company to the detriment of its creditors.

It appears convenient at this stage to set out this clause, which reads as follows:-

"11. Earlier this year the company agreed to transfer to Donald John Gubbay all its shares in three wholly owned subsidiaries of the company in consideration of past services rendered by Donald John Gubbay and of moneys paid by him on behalf of the company. The directors estimate that the shares in one of these companies namely British Solomons Trading Company Limited are worth approximately AS600,000 which will be charged to the extent of A\$150,000 to secure the personal guarantee of Donald John Gubbay abovementioned."

Mr. Johnstone said that he was not suggesting that a provisional liquidator should be appointed with a view at this stage to the winding up of the Company, but that the appointment of a provisional liquidator was desirable to take control of the assets of the Company, in particular the shares referred to in clause 11 of the explanatory statement if these had not already been transferred, and in the exercise of his powers and duties to obtain as much information as possible on the Company's affairs which should be made available to creditors for the purposes of the meetings summoned in August to enable them to come to a decision on the Company's proposed scheme of arrangement.

Mr. Wynter, Counsel for the Company, opposed the application. He conceded that the Company was at present unable to pay its debts as they fell due; that it had ceased to carry on business; that the New Hebrides Trust Company Limited was at present only administering the Company for the purposes of bringing the Company's books up to date and fulfilling the statutory requirements of the Companies Regulation, and that the explanatory statement of the proposed scheme arrangement was deficient in the respects pointed out by Mr. Johnstone. As regards clause 11 of the explanatory statement, Mr. Wynter stated that the shares the transfer of which was therein referred to were shares in Calmarine S.A. (a French company), British Solomon Islands Trading Company Limited and South Pacific Fishing Company Limited and that it was not clear from the researches he had been able to carry out whether or not the transfers proposed had in fact been completed.

Mr. Wynter submitted that the appointment of a provisional liquidator only a month before the meetings of creditors summoned for the 11th and 12th August, was likely only to prejudice acceptance of the proposed scheme of arrangement as in his submission a provisional liquidator, if appointed, would be unable in the time available to put any more information than that which would in any event, it was hoped, be available at the meetings as a result of the work at present being undertaken by the New Hebrides Trust Company Limited; that it should be left to the creditors at the meetings to decide on the information available to them then

whether or not to accept the proposed scheme of arrangement and, in the event of their not doing so, it would then be open to the Petitioner to proceed on the 13th August with its petition to have the Company wound up which, if granted, would place the Petitioner and the other creditors of the Company in no worse position than that were a provisional liquidator to be appointed now. He drew attention insofar as the transfer of shares by the Company to Mr. D. J. Gubbay was concerned to the statutory provisions under the Companies Regulation and in bankruptcy relating to fraudulent preference, including the provisions of section 172 of the English Law of Property Act 1925.

The Attorney-General, appearing on behalf of the Official Receiver, stated that it would not be possible for the newly-appointed Official Receiver to accept appointment as provisional liquidator in this matter and that it was desirable therefore that some other person be appointed should the present application be granted.

I have come to the conclusion that the appointment of a provisional liquidator at this stage is not in the best interests of the Company's creditors. As has been pointed out, there is now only a month to go before the meetings summoned to consider the Company's proposed scheme of arrangement take place. As I understand it, the scheme of arrangement was prepared on information relating to the Company's affairs available at that time and that, as a result of the work at present being undertaken by the New Hebrides Trust Company Limited further information relating in particular to the Company's accounts and indebtedness will be available at the creditors' meetings. Not only would the appointment of a provisional liquidator now give rise to additional expense payable out of assets of the Company which would otherwise be available to the creditors, but it would seem unlikely that a provisional liquidator, if appointed now, would be able in the time available before the dates fixed for the creditors' meetings to obtain much of any additional information for the benefit of creditors to that which will be available at the meetings.

The Petitioner will, I assume, be represented at the meeting of creditors of the Company by counsel or otherwise and will be able to have its views put forward. In the event of the creditors agreeing to the scheme of arrangement, it will still be open to the Petitioner if dissentient, to oppose the sanctioning of the scheme by the Court under section 241(2) of the Companies Regulation. And in the event of the creditors not agreeing to the scheme of agreement it will be open to the Petitioner to make a further application for the appointment of a provisional liquidator or to proceed with its petition for the winding up of the Company in which event the validity of any transfer of the shares in the three companies referred to by Mr. Wynter in connection with clause 11 of the explanatory statement of the Company's scheme of arrangement would have to be considered in the light of section 343 of the Companies Regulation.

It is also to be observed that the presentation by the Petitioner of a petition to wind up the Company will enable applications to be made under section 257 of the Companies Regulation for the stay of proceedings against the Company pending the sanctioning by the Court of the Company's scheme of arrangement under section 241 (2) of the Companies Regulation (see the case of Bowkett v. Fullers United Electric Works Ltd. [\[1923\] 1 KB 160](#)) or pending the winding up of the Company or any further application for the appointment of a provisional liquidator.

In my view the interests of the Company's creditors are sufficiently protected at present by the presentation by the Petitioner of its winding-up petition and would be no further advanced by the appointment at this stage of a provisional liquidator.

Accordingly this application is dismissed with costs.

GIVEN at Vila this 11th day of July One thousand nine hundred and seventy-five.

D.R. DAVIS
Acting Chief Justice