JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 47/2000

SUIT NO. E469 OF 1999

MOTION

BEFORE: **THE HON. MR. JUSTICE FORTE, J.A.**
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE COOKE, J.A.(Ag.)

BETWEEN:	**FEDERATED STRATEGIC INCOME FUND**	
	FEDERATED INTERNATIONAL HIGH INCOME FUND	
	STRATEGIC INCOME FUND	**OBJECTORS/APPELLANTS**
AND	**MECHALA GROUP JAMAICA LIMITED AND OTHERS**	**PETITIONER/RESPONDENT**

Walter Scott and Mrs. Sharon Usim, instructed by Chancellor and Co., for the appellants

Dr. Lloyd Barnett, Derek Jones and Mrs. Sandra Minott-Phillips, instructed by Dmitri Singh of Myers, Fletcher and Gordon for Mechala Group Jamaica Limited

Charles Piper, instructed by Piper and Samuda for the other respondents

October 2, 3 and 4, and December 20, 2000

FORTE, P.

I have read in draft the judgment of Panton, J.A. and agree with the reasons therein stated for arriving at our decision given on the 4th October, 2000. The matter is simple. The required majority sanctioned the Scheme of Arrangement which was thereafter approved by the learned Chief Justice sitting in the High Court. That Scheme of Arrangement provided for the release of the guarantors from liability and consequently the subsequent approval of the Court made that release binding on all the parties including those in the minority i.e. the appellants. To my mind that is an end of the matter.

I accept as my own thinking the analysis and treatment by my brother Panton, J.A. of the cases cited in argument. In addition, the registration of the Scheme with the Registrar of Companies, resulted in many consequential actions flowing therefrom, which now makes it impossible, to accede to the complaint of the appellants without prejudicing the legal rights of the respondents and third parties, who have acted in accordance with the approval and registration of the Scheme.

In the event, the preliminary objection to the appeal proceeding was upheld and costs awarded to the respondents to be taxed if not agreed.

PANTON, J.A.

This is an appeal from a decision of the learned Chief Justice made on February 24, 2000. Before him was a petition by the respondent Mechala Group Jamaica Limited for the approval of a Scheme of Arrangement under section 192 of the Companies Act. Having heard submissions from all interested parties, he ordered as follows:

> "1. This Honourable Court doth hereby sanction the scheme of arrangement as modified at the said meetings which scheme as so modified and sanctioned is set forth in the Schedule to the said petition and in the Schedule hereto
>
> 2. The said scheme of arrangement is hereby declared to be binding upon Mechala Group Jamaica Limited, the classes of creditors hereinbefore described at paragraphs A(1) and (2) on page 2 hereof and its guaranteeing subsidiaries who appeared before the Court and consented to the scheme namely, West Indies Home Contractors Limited, Redimix Concrete Limited, P.A.Benjamin Manufacturing Company Limited, Universal Stores Limited, Serge Island Farms Limited, Serge Island Dairies Limited, Prime Life Assurance Company Limited, Industrial Finance Corporation Limited, British Caribbean Insurance Company Limited, Industrial Commercial Developments Limited, and Industrial Finance Holdings Limited.
>
> 3. The sums payable on behalf of the petitioner and the aforesaid guaranteeing subsidiaries pursuant to the scheme of arrangement shall be paid to the Bank of New York being the trustee pursuant to the indentures referred to in the scheme of arrangement by way of wire transfer or other customary means of transmittal. Upon such payment, the Global Certificates representing the 1999 Notes and the 2002 Notes will be forthwith cancelled and delivered up to the petitioner by the said trustee.
>
> 4. That the above-named petitioner do deliver a true copy of this Order to the Registrar of Companies."

The appellants, being dissatisfied with the above Order, have in their notice of appeal sought from this Court an Order which, instead, would declare that:

> 1. The Scheme of Arrangements is not binding upon the Guaranteeing subsidiaries of Mechala Group Jamaica Limited.
>
> 2. The sums paid under the Scheme to Noteholders do not release the guaranteeing subsidiaries from liability.
>
> 3. The Court does not approve or sanction the Scheme of Arrangements as modified at the meetings and set out in the Schedule attached to the petition; and

4. The costs of the appeal to be the Objectors', such costs to be agreed or taxed.

In order to achieve their aim, the appellants filed the following grounds of appeal:

"1. (a) The learned Chief Justice erred when he failed to consider the objection raised by the objectors that the Scheme of Arrangements released the guarantors from liability without the guarantors putting up anything whether in the form of cash payment to the noteholders or additional guarantors to the noteholders.

(b) Further the learned Chief Justice failed to consider and decide the point as to whether or not the authority re **Garner Motors Ltd** (1937) All ER 671 was applicable to guarantors, based on the erroneous reasoning that since in that case the Scheme of Arrangements was not found not to be invalid although it did not have the effect of releasing the joint debtor, there was no need to determine the issue of the release of the guarantors.

(c) The learned Chief Justice failed to appreciate the fact that it was a condition of the Scheme of Arrangements that the guarantors would be released and that the validity of the Scheme of Arrangements and the releasing of the guarantors are two separate issues.

2. The learned Chief Justice erred in finding that the only way the noteholders will be paid is by the Scheme of Arrangements.

3. The learned Chief Justice's finding that "nothing has been shown to me by the objectors which amounts to a material oversight or miscarriage" is against the weight of the evidence that was before him.

4. The learned Chief Justice erred in approving and sanctioning the modified Scheme of Arrangements."

The respondent Mechala Group Jamaica Limited objected to the appellants being allowed to pursue this appeal. It filed a notice of motion on June 9, 2000, in which it

sought the dismissal of the appeal on " the preliminary point that it is an abuse of the process of the Court as:

> (1) The Companies Act contains no provision for the revocation of the Order made by the Hon. Chief Justice on the 24th day of February, 2000, once it has been registered with the Registrar of Companies and acted upon.
>
> (2) The appellants are guilty of inexcusable delay in lodging their appeal and in failing to apply for a stay of the Order made on the 24th February, 2000 with the result that the respondent and third parties have acted to their detriment on the basis of the said Order while it was not the subject of any appeal or stay.
>
> (3) The appeal has been rendered nugatory."

Prior to the commencement of the hearing of the arguments on the motion, Mr. Piper sought, and was granted, leave for the other respondents to intervene in the appeal. He later expressed support for the motion by adopting the submissions of Dr. Barnett, and indicated that all the respondents for whom he acted have been directly affected by the appealed Order.

The affidavit in support of the motion was filed by Joseph Arthur Matalon, company director and President and Chief Executive Officer of Mechala Group Jamaica Limited. He stated that at the time of the making of the Order by the Chief Justice, the attorneys-at-law for the appellants indicated to the learned Chief Justice that they had no objection to the Order, whereupon it was signed by the Chief Justice. A copy of the Order was delivered to the Registrar of Companies on the same day for registration. According to Mr. Matalon, consequent on the making of the Order, and its registration, the following things have taken place:

> 1. Mechala has paid US$34,855,821.00 to the Bank of New York as trustee under the indentures for the benefit of

the Noteholders who chose to take cash under the Scheme of Arrangements;

2. The Notes issued pursuant to the indentures have been cancelled and delivered up by the Bank of New York to Mechala;

3. Mechala caused shares of Industrial Commercial Developments Limited (ICDL) worth approximately US$12.8 million to be issued to those Noteholders who opted for shares instead of cash;

4. Mechala's parent company, Mediterranean (St.Lucia) Limited, has injected fresh equity into ICDL by subscribing the sum of US$14,883,000.00 for 'B' shares resulting in the former now owning approximately 99% of the issued share capital of ICDL;

5. The Bank of Nova Scotia Jamaica Ltd. has lent US$20 million to Industrial Finance Holdings, and this sum has been used to finance a portion of the Scheme;

6. The Bank of Nova Scotia has acquired several forms of security from some of the respondents in return for the loan mentioned above; and

7. ICDL has embarked on a corporate restructuring programme and has, accordingly, entered into several business arrangements which include binding unconditional agreements for the sale of various parcels of real estate owned by Prime Life.

In ending his affidavit, Mr. Matalon stated that, as a practical matter, it would be extremely difficult or impossible for the acts and arrangements set out in his affidavit to be undone. The legal rights of several of the respondents would, he said, be severely prejudiced if the terms of the scheme were altered.

It is readily agreed, as Dr. Barnett has suggested, that the release of the guarantors was a critical part of the Scheme of Arrangements. The essential basis of the scheme, as he put it, involves:

1. Payment of debt; and

2. Extinguishment of the guarantees.

Mr. Scott has agreed that the main issue on appeal is that relating to the status of the guarantors. It follows therefore that if the appeal would not result in the guarantors being reinstated (against their will, apparently), there would be no point in the further pursuit of the hearing of the appeal.

In his submissions in support of the motion, Dr. Barnett argued as follows:

1. A Scheme of Arrangement under the relevant provisions of the Companies Act has the effect of altering legal rights and obligations of creditors and members once the scheme has been implemented and the rights of parties altered or extinguished;

2. The Scheme must operate in the same manner with respect to the parties in the same class, and the Court cannot make an order by which one set of noteholders in the instant case would be entitled to enforce the guarantee or obtain a higher amount in payment out than the fellow noteholders have obtained.

3. The submission by the Company of the Scheme of Arrangement to the relevant persons, the resolution of the meeting of the creditors or members affected by the scheme, giving it approval, and the sanction of the Court give the Scheme legal effect so it cannot be altered so as to change the substantive provisions of the terms and arrangements of the Scheme.

4. Where a Scheme of Arrangement has been approved sanctioned and registered by the Registrar of Companies it forms part of the public documents of the Company and is notice to all the world of the operation of the Scheme, and therefore the public generally become entitled to rely on the Scheme as so published and to deal with the Company on that basis.

According to Dr. Barnett, any reversal of the Scheme at this stage would do irreparable harm to third parties. An order which reverses or alters the Scheme would

require rectification of the registration and the Court has no power to order such a rectification. The scheme of the legislation, he said, does not anticipate any challenge after approval and registration.

Mr. Scott, in opposing the motion, submitted as follows:

1. There is an unrestricted right of appeal;
2. The primary purpose of the appeal is to ensure that the guarantors are not released from their obligations;
3. If the guarantors are not released, it does not necessarily follow that any of the steps taken by the Company since the order of the Court below would have to be undone.
4. If the guarantors are not released, those third parties who have acquired rights will not have to lose their rights.

An examination of the Companies Act (the "Act") reveals that there is merit in the submissions of Dr. Barnett. The Act makes what may be described as elaborate provisions for "arrangements and reconstructions" of companies. (See **sections 192 to 195.**)

Under section 192(1) where a compromise or arrangement is proposed between a company and its creditors or members, or any class of them, the Supreme Court may on the application of the company, a creditor or member thereof order the summoning of a meeting of the creditors or members or class thereof.

Although it is not specifically stated, this meeting would clearly be for the purpose of discussing the proposed compromise or arrangement. This conclusion is inevitable because section 193(1) states that with the notice convening the meeting should be sent a statement explaining the effect of the compromise or arrangement and in particular stating any material interests of the directors of the company, and the effect

thereon of the compromise or arrangement in so far as it is different from the effect on the like interests of other persons. The intention here is clearly to have full disclosure of interests and to prevent directors having an unfair advantage over creditors and other persons with interest in the company. Further, where the proposed scheme affects the rights of debenture holders of the company, the statement shall give the like explanation as respects the trustees of any deed for securing the issue of the debentures as it is required to give as respects the company's directors. Section 192 (2) provides that if a majority in number representing three-fourths in value of the creditors or members or class of either as the case may be who are present and voting agree to the proposal, then the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors, or members or class thereof as the case may be and also on the company.

The effect of sections 192 and 193 is that after the proposal has been fully circulated to all interested parties and there has been a meeting for discussion, the vote of a specified majority in favour of the scheme will, if sanctioned by the Court, make the scheme binding on all. Section 192 (3) requires that the order of the Court sanctioning the scheme be delivered to the Registrar of Companies for registration. It is of no effect until it has been so delivered. A copy of the Order is also to be annexed to the Memorandum of the Company.

The act of registering the Order, as well as its annexation to the Memorandum cannot, it seems, be regarded as merely formal. They are both of great significance in that together they amount to the giving of notice to the world of the developments in the life of the Company.

In dealing with the objection raised by Dr. Barnett, serious consideration has to be given to the case **Norcan Oils Ltd and Gridoil Freehold Leases Ltd v Henry Fogler** (1965) S.C.R.36 a decision of the Supreme Court of Canada on an appeal from the Supreme Court of Alberta sitting in its Appellate Division. There, pursuant to the Companies Act, an Order was granted approving the amalgamation of two companies. At the hearing of the application for amalgamation, there was only one objector who objected on the basis that the ratio between the participation of the two sets of shareholders in the amalgamated company was unfair to one set of shareholders. On appeal, the Appellate Division of the Supreme Court of Alberta allowed the appeal and set aside the approving Order. At the hearing of the appeal from the Appellate Division's decision, the Supreme Court of Canada by a majority of 3 to 2, held that:

1. The Order of the judge at first instance was valid until set aside;

2. The Registrar of Companies, in acting on the judge's Order, in keeping with the requirements of the statute, had issued a certificate which confirmed that the two companies had been amalgamated;

3. Upon the issuance of the Registrar's certificate, the two companies became one company possessing all the property rights, privileges and franchises and became subject to all liabilities, contracts and debts of each of the two amalgamating companies;

4. The filing of a notice of appeal did not stay the proceedings, nor did it invalidate them;

5. The Companies Act contained no provision for the revocation of the Registrar's certificate; and

6. The setting aside of the approval Order by the Appellate Division did not have and could not have the effect of dissolving the amalgamated company, or of

> restoring the separate corporate existence of the two companies.

Accordingly, the Supreme Court of Canada concluded, the Order of the Appellate Division could have no effect and ought not to have been made. Martland, J., in delivering the judgment of himself, Ritchie and Hall JJ, highlighted the fact that the approving Order was not one which affected only the position of the parties to the proceedings which led up to it. He said that:

> "...it was an order from which, when filed with the Registrar, by the terms of the statute, legal consequences must flow, which inevitably affected the rights of other persons. Under the specific provisions of section 140a, upon receipt of the amalgamation agreement and the order approving it, the Registrar was not only empowered, but legally obligated, to issue a certificate of amalgamation, and, thereafter, the two companies were amalgamated into one amalgamated company, which was authorized to carry on business, including the making of contracts with other persons. Any such person was entitled to rely upon the certificate as sufficient basis for the capacity of the amalgamated company so to do".

In my view, the situation dealt with in the **Norcan Oils** case is not dissimilar to the one on which we are called to adjudicate. This opinion is arrived at after due consideration of the fact that the legislation in both cases is similar in content and scheme.

Section 140a of the Canadian Companies Act reads as follows:

> "(1). Any two or more companies, including holding and subsidiary companies, may amalgamate and continue as one company.
>
> (2). The companies proposing to amalgamate may enter into an amalgamation agreement, which shall prescribe the terms and conditions of the amalgamation and the mode of carrying the amalgamation into effect.

(3) The amalgamation agreement shall further set out:

(a) the name of the amalgamated company,

(b) the place within the province at which the registered office of the amalgamated company is to be situated,

(c) the amount of the authorized capital of the amalgamated company…

(d) the objects for which the amalgamated company is to be established,

(e) the names, occupations and places of residence of the first directors…

(f) …

(g) the manner of converting the authorized and issued capital of each of the companies….

(h) such other details as may be necessary to perfect the amalgamation and to provide for the subsequent management and working of the amalgamated company.

(4) The amalgamated agreement shall be submitted to the shareholders of each of the amalgamating companies at general meetings thereof called for the purpose of considering the agreement, and if three-fourths of the votes cast at each meeting are in favour of the amalgamation agreement,

(a) the secretary of each of the amalgamating companies shall certify that fact under the corporate seal thereof, and

(b) the amalgamation agreement shall be deemed to have been adopted by each of the amalgamating companies.

(5) Where the amalgamation agreement is deemed to have been adopted the amalgamating companies may, if a copy of the agreement has been submitted to the Registrar and

approved in writing by him, apply to the court for an order approving the amalgamation.

(6) Unless the Court otherwise directs, each amalgamating company shall notify each of its dissentient shareholders, in such manner as the court may direct, of the time and place when the application for approving the order will be made.

(7) Unless the court otherwise directs, notice of the time and place of the application for the approving order shall be given to the creditors of an amalgamating company…

(8) Upon the application, the court shall hear and determine the matter and may approve the amalgamation agreement as presented or may approve it subject to compliance with such terms and conditions as it thinks fit, having regard to the rights and interests of all the parties including the dissentient shareholders and creditors.

(9) The amalgamation agreement and the approving order shall be filed with the Registrar, together with proof of compliance with any terms and conditions that may have been imposed by the court in the approving order.

(10) On receipt of the amalgamation agreement, approving order and such other documents as may be required …the Registrar shall issue a certificate of amalgamation under his seal of office and certifying that the amalgamating companies have amalgamated.

(11) On and from the date of the certificate of amalgamation, the amalgamating companies are amalgamated and are continued as one company hereinafter called…

(12) The amalgamated company thereafter possesses all the property, rights, privileges and franchises and is subject to all the liabilities etc. of the amalgamating companies.

It will be observed from the above that the section provides for the amalgamation of companies, and for the submission of the agreement for the approval of the respective shareholders in the amalgamating companies. A favourable vote by three-quarters of those voting at general meetings of the amalgamating companies will result in the

adoption of the amalgamating agreement. This is to be compared with section 192, sub-sections (1), (2), and (3) of the Jamaican Companies Act to which reference was made earlier. It is significant to note that sub-section (4) of section 192 provides for a penalty on a company and every officer thereof who fail to comply with the procedures for registration. Further, section 194 provides for the transfer of property or liabilities from one amalgamating company to another on the order of the Court, as does the Canadian Act.

Mr. Scott relied on the case **Re Garner Motors, Ltd.** (1937) 1 All ER 671, a judgment of Crossman, J. sitting in the English Chancery Division. In that case, two companies had become jointly liable to another company on a contract. One of the two companies entered into a scheme of arrangement with its creditors, which agreement was sanctioned by the Court under the relevant provisions of the Companies Act. The second company claimed that the scheme of arrangement entered into by the first company had the effect of releasing the second company from its liability under the contract. It was **held** that as a discharge of one of several joint debtors by operation of law does not release the other joint debtors, the discharge of the first company effected by the scheme of arrangement did not release the second company from its joint liability in respect of the debt.

In my view, this case does not help Mr. Scott's cause as the two companies were primary debtors, whereas we are here dealing with guarantors. In **Johnson v. Davies** [1998] 2 All ER 650, the English Court of Appeal, Civil Division, considered the effect of a scheme of arrangement on solvent co-debtors. Chadwick, LJ said at 666:

> "I would reject the submission that, as a matter of principle,
> no term in a voluntary arrangement can have the effect of

> releasing a co-debtor or surety. In my view the effect of a voluntary arrangement has to be determined by construing its terms."

The true position is that in construing the Scheme of Arrangement, the guarantors have been relieved of their responsibility. The creditors have done so by endorsing the Arrangement. The relevant provisions of the Companies Act having been complied with, the learned Chief Justice was correct to have sanctioned the Scheme. There is no avenue for the appellants to force a retreat. As said by Lord Hoffmann, delivering the judgment of the Privy Council in **Kempe v Ambassador Insurance** [1998] 1 BCLC 234 at 238g, the Court "cannot alter the substance of the scheme and impose upon the creditors an arrangement to which they did not agree"

For the reasons stated above, I agreed with the decision that there was merit in the preliminary objection. The impossibility of restoring the guarantors to the position they formerly held made the appeal nugatory. Accordingly, the motion is granted; the sanctioning of the Scheme of Arrangement remains in effect. Costs of the Motion are to be the respondents', such costs to be agreed or taxed.

COOKE, J.A.

I agree.