COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Equity Side

1996/CLE/gen/FP83

IN THE MATTER OF VENICE-IN-THE-BAHAMAS LIMITED
(IN LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACT, 1992

JUAN A. LOPEZ
Official Liquidator

Applicant

AND

DAVID E. JENNETTE, JR.

Respondent

BEFORE: The Honourable Mrs Justice Estelle Gray Evans

APPEARANCES: Mr James Knowles, Mr Emerick Knowles,
Mr Christopher Gouthro, and Miss Yolanda Been
for the applicant

Mrs Caryl Lashley and Mrs Sherrilyn Bastian
for the respondent

2008: 8 April; 11 December;
2009: 27 April
2010: 23 April

DECISION

Gray Evans, J.

1. Winding up proceedings with respect to Venice-in-The Bahamas Limited commenced in 1987 and by order of the Supreme Court filed on 5 November 1987 in this action (formerly No. 1062 of 1987) it was ordered that that company be wound up and the late Mr Derence Kent be appointed as the Official Liquidator of Venice-in-The Bahamas Limited (In Liquidation) ("the company")

2. By order filed herein on 8 February 1991 Mr David E. Jennette, Jr. ("the respondent") was appointed as Official Liquidator in place of the late Mr Kent who died in June 1990 and by order of Longley, J. made 8 May 1997 and filed 14 May 1997, Mr Jennette was, by consent, removed from office as Official Liquidator and Messrs, David Hamilton and Juan Lopez were appointed as Official Liquidators in his stead.

3. By that same order, Mr Jennette was ordered to "immediately deliver up and/or cause to be delivered up to Messrs. David Hamilton and John Lopez all records, files, documents, tapes and any other information whatsoever in his possession or the possession of his servants or agents touching or relating to these proceedings."

4. Mr David Hamilton resigned in 2003 leaving Mr Juan Lopez as sole Official Liquidator.

5. Mr Lopez, ("the applicant") says the respondent has not fully complied with the aforesaid order of Longley, J. and by summons filed 8 June 2007 he seeks the following relief:

    1. That Mr. Jennette within seven days deliver or cause to be delivered to the Official Liquidator all documents in his and/or its custody, possession or power including documents stored electronically relating to the estate, affairs or effects of the Company, which may have come into his custody, possession or power during the period Mr. Jennette acted as Official Liquidator of the Company from 8th February 1991 to 14th May 1997.

    2. That Mr. Jennette give an account on the basis of willful default of all sums received or disbursed by him belonging to the Company during the time that Mr. Jennette acted as Official Liquidator of the Company.

    3. That the Court, if necessary, give directions for the taking of the account.

    4. That Mr. Jennette pay to the Official Liquidator all sums found due on the taking of the account together with interest for such period as the Court may seem just.

    5. That the Court examine the conduct of Mr. Jennette as Liquidator and order that he repay to the Company any monies misapplied or retained by him and any monies he is unable to account for and for any monies paid away by him in breach of trust or by misfeasance.

6. That a date be set for the examination of Mr. Jennette by the Court, which examination should take place before a Judge of the Court pursuant to Sections 220 and 221 of the Companies Act, Chapter 308.

7. That the costs of this application, the account and the examination be paid from the assets of the Company with liberty to the Official Liquidator to recover such costs from Mr. Jennette on an indemnity basis.

6. The summons was initially set for hearing on 8 April 2008 at which time each of the parties had filed two affidavits. The applicant, Mr Juan Lopez's affidavits were filed on 8 June 2007 and 31 January 2008 respectively and the respondent, Mr David Jennette, Jr's affidavits were filed on 5 October 2007 and 1 April 2008 respectively.

7. On 8 April 2008 counsel for the applicant presented his case. He provided no written submissions but relied on the aforesaid affidavits by the applicant, which he said provided prima facie evidence of wrongdoing on the part of the respondent and showed that the respondent had failed to comply fully with the May 1997 order.

8. In that regard, counsel pointed to several items exhibited to Mr Jennette's said affidavits, which he says had not previously been provided to the Official Liquidator and which, in his submission, must still be in the possession of the respondent to enable him to make the said affidavits. In fact, counsel for the applicant submitted at the time that although the Official Liquidator should have been pursuing contempt charges against the respondent, he was merely *"seeking an order to enforce an order."*

9. Counsel for the respondent, in her written submissions in opposition to the applicant's summons, raised as a preliminary issue, whether the applicant was barred by virtue of the provisions of the Limitation Act from proceeding with his summons and the matter was adjourned to 26 May 2008 to enable counsel for the applicant to provide the Court with written submissions in response to that issue and for counsel for the respondent to respond to the applicant's June 2007 summons. The matter was further adjourned at the request of counsel to 11 December 2008.

10. In the meantime, the applicant, on 15 September 2008, filed an additional affidavit in response to which the respondent on 26 November 2008 filed a summons seeking to have certain paragraphs of that affidavit struck out "as being scandalous and/or irrelevant and/or oppressive and/or an abuse of the process of the Court" on the ground that it referred to and exhibited "without prejudice" correspondence.

11. At the hearing on 11 December 2008 the parties agreed that the Court should hear counsel for the respondent only on the preliminary issues regarding the Limitation Act and the admissibility of the 15 September 2008 affidavit and that the substantive application would be further adjourned until those issues had been resolved.

12. However, by the end of the hearing on 11 December, counsel for the respondent had in fact made her submissions not only with respect to the preliminary issues,

but, as pointed out by counsel for the applicant, she had also dealt with all of her objections to the application necessitating a further adjournment, this time to 27 April 2009, so that counsel for the applicant could respond.

13. During the adjournment, the applicant on 15 April 2009 filed a further affidavit and the respondent on 20 April 2009 filed a further summons, this time seeking to have the 15 April affidavit struck out as being scandalous and/or irrelevant and/or oppressive and/or an abuse of the process of the Court on the ground that the applicant, having closed his case, a year earlier, in April 2008, ought not to be permitted to file further affidavit evidence.

14. So, in addition to the substantive applications and the aforesaid preliminary issues, the issue of the admissibility of the 15 April 2009 affidavit also arose for determination during the hearing on 27 April 2009.

15. Consequently, by the 27 April 2009 counsel on both sides had laid over multiple sets of written submissions and several authorities dealing with the aforesaid issues, so that at the conclusion of the hearing on 27 April 2009 counsel had in fact addressed all of the issues which had arisen for determination since the filing of the June 2007 summons.

The 15 September 2008 Affidavit

16. Counsel for the respondent objects to the use by the applicant of the affidavit filed 15 September 2008 because, she says, it contravenes Order 41 rule 6 of the Rules of the Supreme Court as well as section 16 of the Evidence Act, chapter 65, Statute Laws of The Bahamas.

17. Order 41 Rule 6 of the Rules of the Supreme Court empowers the Court to strike out of any affidavit any matter which is "scandalous, irrelevant or otherwise oppressive" and section 16 of the Evidence Act provides that "no evidence shall be given in any civil proceeding of any admission which was made upon an express condition that it should be without prejudice to the rights of the party making it, or in circumstances from which the court can infer that the parties agreed together that evidence should not be given." (emphasis added).

18. Mrs Bastian contends that paragraphs 4, 5, 7, 8, 9, 10 and 11 of the said affidavit are inadmissible as these paragraphs refer and/or relate to privileged information of the negotiations, proposals and discussions between the Official Liquidators and Mr Jennette and contain privileged, documents which form part of those negotiations. She contends further that paragraphs 14 and 17 are irrelevant as they "try to infer an admission or acknowledgement by Mr Jennette of some wrongdoing and are therefore oppressive.

19. In her submission, at the time the letters referred to in the said affidavit were made there was a dispute between the Liquidator and Mr Jennette as to whether or not Mr Jennette had provided the Liquidator with all documentation which he had in his possession at the time he was Liquidator of the company. It is clear, she argues, that those letters were written for the purpose of settling the dispute and although they were not marked with the words "without prejudice" they are privileged and not admissible in evidence.

20. Counsel pointed out that the Liquidator admits that the parties did not enter into a binding agreement therefore, in her submission, it is not permissible for him to refer to the negotiations and/or exhibit the correspondence that passed between

them, particularly as Mr Jennette had not waived his right of privilege nor had he consented or agreed to the correspondence and reference to the negotiations being released from privilege. In her further submission, those negotiations cannot be used to establish an admission or a partial admission by Mr Jennette. In support of that proposition, counsel relied on the case of *Rush & Tomkins Ltd. v. Greater London Council and another1*.

21. Counsel for the applicant, however, pointed out that Mr Hamilton in his affidavit filed 9 December 2008 in response to the respondent's application to strike out, has disputed Mr Jennette's claim and has averred that the negotiations were "with prejudice" and that at no time was a suggestion made by himself or Mr Jennette that the negotiations were "without prejudice."

22. In counsel's further submission, Mr Hamilton as liquidator of the company, was simply attempting to enforce the order of the Court and the obligations of Mr Jennette to turn over documents and to give an account, not negotiating a settlement of a dispute. Therefore, in his submission, the exclusion of admissions made in "without prejudice" communications is not applicable in this case.

23. Counsel pointed out further that on a close examination of the letters of 5 and 6 August 2003 and 26 February 2004, it could be noted that the negotiations only involved the issue of the sums due to the company and the estate and how that claim could be resolved and contrary to the argument of counsel for the respondent, there is no reference in those letters to the obligations by Mr Jennette to turn over documents to the liquidators.

24. In any event, counsel for the applicant submitted, open letters containing an offer to settle can be used in evidence if relevant to the issues in the action and for that proposition he relies on the cases of *Dixons Stores Group Ltd v Thames Television plc2*; *Standrin and another v Yenton Minster Homes Ltd and others3*; and *Buckinghamshire County Council v Moran4.*

25. Furthermore, counsel for the applicant submitted, the letters that were exchanged between Mr Hamilton and Mr Jennette and the subsequent letters between the attorneys for the parties are admissible to show what action was taken to enforce the 1997 order and why there was delay in making the current application. For that contention, counsel referred to the case of *Walker v Wilsher5* where the Court said: *"no doubt that there are cases where letters written without prejudice may be taken into consideration, as was done the other day in a case in which a question of laches was raised."*

26. It is evident, he submits, from the correspondence attached to that affidavit that the Official Liquidator was trying to resolve the matters with Mr Jennette and that Mr Jennette's attorneys were also trying to get him to resolve the matters, obviously without success.

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1 [1988] 3 All ER 737
2 [1993] 1 All ER 349
3 The Times, 22 July 1991
4 [1990] 1 Ch. 623 CA
5 [1889] 23 QB 335

27. In *Rush & Tompkins Ltd v Greater London Council*[6], the House of Lords ruled that genuine negotiations for the purpose of settlement are protected from disclosure whether or not they are marked 'without prejudice'.

28. It is not contended on behalf of the respondent that any of the offending correspondence has been marked "without prejudice". However, counsel for the respondent relying on the case of *Rush & Tompkins*, submitted that they are nevertheless protected by privilege. In that case Lord Griffiths stated the principle as follows:

> "The 'without prejudice' rule applies to exclude all negotiations genuinely aimed at settlement, whether oral or in writing, from being given in evidence. A competent solicitor will always head any negotiating correspondence 'without prejudice' to make clear beyond doubt that in the event of the negotiations being unsuccessful, they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase 'without prejudice', and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission."

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29. According to the authorities, in order for correspondence to attract privilege, particularly where such correspondence is not marked "without prejudice" two common features must be present. Firstly, there must be a dispute between the parties which led them to negotiate with each other; and secondly, the communication between them must contain suggested terms that would finally lead to the settlement of the dispute.

30. Each of the alleged offending paragraphs in the affidavit, except for paragraphs 14 and 17, contain the word "settlement" or the phrase "proposed settlement" and counsel for the respondent points out that at paragraph 4, the applicant avers that his primary purpose for making the affidavit is:

> "...to disclose to this Honourable Court certain correspondence exchanged between the Liquidators and Mr Jennette concerning possible settlement of this matter and further attempts to meet with Mr Jennette in order for him to produce all of the financial information. These attempts were made in order to give Mr Jennette the opportunity to produce all of the financial information and to avoid incurring costs."

31. The applicant also avers that the settlement proposal was withdrawn by letter dated 6 August 2003, so obviously no settlement was arrived at between the parties.

32. The letters, although not marked "without prejudice" were obviously made in connection with settlement talks and even though it is doubtful that a liquidator

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6 [1989] AC 1280

should be entitled to protection with respect to the trust property against another liquidator, I will give Mr Jennette the benefit of the doubt and hold that the negotiations and correspondence referred to at paragraphs 4,5,7,8,9,10, and 11 are therefore protected and may not be relied on by the applicant and I order those paragraphs struck from the 15 September 2008 affidavit.

33. However, as regards paragraphs 14 and 17 I do not hold the same view. Counsel contends that paragraphs 14 and 17 are irrelevant as they "try to infer an admission or acknowledgement by Mr Jennette of some wrongdoing and are therefore oppressive." I disagree.

34. Having reviewed the paragraphs, it seems obvious to me that, notwithstanding the failed settlement talks in 2003, attempts were made through the parties' respective attorneys to arrange a meeting with them since requests of Mr Jennette for information and documents seems to have gone unheeded. In a letter dated 13 December 2005 from Messrs. DuPuch & Turnquest, Mr Gape wrote: "Accordingly, we should be grateful if you would extend the period to provide the accounts and materials required and in this regard would suggest a meeting between the parties at say, the first week of the New Year so we can definitively identify the issues." That letter was not marked "without prejudice" nor was a subsequent letter dated 24 March 2006 in which the respondent's attorney wrote to the applicant's attorney suggesting a date for the proposed meeting, although written after a draft of the June 2007 affidavit and summons were apparently forwarded to the respondent's attorneys alerting them of the applicant's intention to commence these proceedings.

35. The respondent's application to strike out paragraphs 14 and 17 of the affidavit filed on 15 September 2008 is therefore refused.

15 April 2009 Affidavit

36. Counsel for the respondent objected to the use of the 15 April 2009 affidavit, firstly on the ground that it was filed, without leave, after the applicant had "closed its case" on the substantive application. In her submission, the affidavit is an attempt by the applicant to correct the defects in his case which she pointed out at the December hearing and if he was allowed to use the affidavit, he will, in effect, be getting "two bites of the cherry."

37. Secondly, counsel for the respondent objects to the applicant being allowed to use the affidavit on the ground that it is scandalous, irrelevant and/or oppressive, because, in her submission, the preliminary objection raised by the respondent was a point of law, which did not require the applicant to adduce further evidence.

38. On the other hand, counsel for the applicant submits that there is nothing in the 15 April affidavit which is scandalous, irrelevant or oppressive and that in any event the Court has a discretion to permit a party to lead whatever evidence that may be appropriate in support of an application no matter how late such affidavit is filed provided the other party is not prejudiced by such evidence and it would not delay a timely determination of the application. In support of those submissions, counsel relied on Order 38 rules 2 and 3 of the Rules of the Supreme Court and the case of *Chifferiel v Watson*[7].

7 [1888] 36 W.R. at page 806.

39. He pointed out that the affidavit was merely an effort by Mr Lopez to provide the inventory which Mr Jennette had complained had not been provided and in his submission, if Mr Jennette was of the view that the inventory was inaccurate then that was a matter for him to raise but not a reason for not allowing the evidence to be used.

40. It is not disputed that no application was made on behalf of the applicant for the filing of additional evidence prior to the applicant filing the 15 April 2009 affidavit. Nor is it disputed that the receipt of additional evidence is a matter of discretion. It is, in my view, however, disingenuous of Mr Jennette to complain that the Official Liquidator had provided him with no inventory of what was delivered by Mr. Jennette and/or his attorney pursuant to the 1997 order or indicated what he believed Mr Jennette still had in his possession and when such inventories and/or lists are provided, he complains that it is too late. Consequently, in exercise of my discretion I refuse to strike out the affidavit.

The June 2007 Summons

41. The respondent opposes the Official Liquidator's application on several grounds, namely: (i) the relief sought by paragraph 1 of the summons was granted by the 1997 order; (ii) the liquidator's claim is statute barred because of section 5 of the Limitation Act; (iii) the applicant's failure to state in the summons the sections of the Companies Act or other legislation on which the applicant relies for his application; and (iv) the applicant's failure to provide particulars with respect to its claim for an accounting on the basis of willful default and its allegation of breach of trust or misfeasance as required by Order 18 rule 12 of the Rules of the Supreme Court.

Production of documents, etc.

42. Mrs Bastian for the respondent submits that the relief sought in paragraph 1 of the summons was granted by Longley, J in 1997 and therefore this Court no longer has jurisdiction to entertain an application therefor, particularly, she says, as the respondent has repeatedly said that he has complied with the order and has no further documentation on behalf of or in connection with the company. In her submission, if the applicant is alleging non-compliance with Longley, J's order, he ought to have brought another application.

43. Mr Knowles for the applicant contends that the applicant is not seeking a new order but merely seeking to enforce the order made by Longley, J. He points out that as the order required the documents to be produced "immediately", rather than within a specific time, the Court would have to infer a time limit within which the order is to be complied. Therefore, he says, the applicant is asking that a time limit of seven days be imposed so that the Official Liquidator, in the event the respondent fails to comply within that time, can enforce the order by committal.

44. As for Mr Jennette's claim that he no longer has any documents relating to the company, counsel for the Official Liquidator referred the Court to Mr Lopez's 31 January 2008 affidavit in which he avers that there are documents exhibited to Mr Jennette's affidavits which he had not seen before, which suggests that Mr Jennette still has documents which ought to be delivered to the Official

Liquidator. Further, counsel points out, although Mr Jennette gives detailed descriptions of what he claims to have done as liquidator, he does not explain or provide an accounting of sums colleted and payments made while he so acted.

45. In any event, counsel submits, this is a continuing liquidation and since the 1997 order did not dispose of the matter finally, and Mr Jennette has not been released as Liquidator, the current Official Liquidator has a right to apply to the Court at any time for the Court's assistance in carrying out his duties.

46. Although counsel for the applicant says that the present application is an attempt to enforce the 1997 order, or, as he said on another occasion, a "tightening up" of Longley, J's order, it appears to me that the relief sought in paragraph 1 of the June 2007 summons is an attempt to vary that order by specifying the time within which the respondent is to comply therewith, notwithstanding Longley, J having ordered the act to be done "immediately". I understood counsel for the applicant to say that the reason for asking for a time limit to be included in the order now is to "pave the way" for the applicant to be able to commence committal proceedings in the event the respondent fails to comply therewith.

47. As indicated, the respondent objects to the application being heard firstly, on the ground that it is a duplication of the order already granted and therefore this Court no longer has jurisdiction to entertain the same.

48. Order 42 of the Rules of the Supreme Court provides that: *"a judgment or order which requires a person to do an act must specify the time after service of the judgment or order or some other time within which the act is to be done."*

49. And Order 45 rule 6 of the Rules of the Supreme Court empowers the Court, where a judgment or order requiring an act to be done already specifies the time within which the act is to be done, to specify another time and where it does not already specify such a time to do it subsequently.

50. Consequently, I do not accept the submission of counsel for the respondent that this Court does not have jurisdiction to entertain the applicant's application for what, in my view, is a variation of the 1997 order to include a specific time and I hold, pursuant to Order 45 rule 6 aforesaid that this Court does in fact have jurisdiction to entertain the application to fix a date for the respondent to comply with the order for production of documents, etc., as ordered by Longley, J in 1997.

51. Secondly, counsel for the respondent submits that even if this Court has jurisdiction to grant the order sought in paragraph 1 of the 2007 summons, the applicant is barred, by virtue of the provisions of section 5 of the Limitation Act, 1995, from proceeding with the summons with respect to that relief as well as the remaining relief sought therein.

The Limitation issue

52. Counsel for the respondent points out that the allegations on which the applicant's summons is based occurred during the period 1991 to 1997 when the respondent served as Official Liquidator. She points out further that the applicant's first demand of the respondent for documentation was made by letter dated 20 May 1997. Therefore, in her submission, the applicant's cause of action against the respondent would have accrued in May 1997, at which date the time for the applicant to file his summons began to run and the summons having been

filed more than ten years since that date, without any evidence that the cause of action arose later than 20 May 1997, the applicant is now barred by virtue of section 5 of the Limitation Act from proceeding with the summons.

53. Further, counsel for Mr Jennette pointed out that except for the request that a date be set for the examination of Mr Jennette by a judge pursuant to sections 220 and 221 of the Companies Act, chapter 308, the June 2007 is silent as to the statutory provisions, if any, on which the applicant relies when seeking the following relief:

> **1.** That Mr. Jennette give an account on the basis of willful default of all sums received or disbursed by him belonging to the Company during the time that Mr. Jennette acted as Official Liquidator of the Company.
>
> **2.** That the Court examine the conduct of Mr. Jennette as Liquidator and order that he repay to the Company any monies misapplied or retained by him and any monies he is unable to account for and for any monies paid away by him in breach of trust or by misfeasance.

54. She surmised, and this was later confirmed by counsel for the applicant, that section 263 of the Companies Act is the relevant statutory provision and submits that those claims are also statute barred pursuant to section 5(1)(c) of the Limitation Act. For this proposition, she relies on the case of *Southern Mineral Oil Ltd. (No. 2) v. Conney*[8] a case in which relief was sought by notice of motion dated 18 August 1994 against the respondents for declarations pursuant to sections 297 and 298 of the Companies Act, 1963 (the latter section is similar to section 263 of our Companies Act, 1992) and for an order for the examination of the conduct of the respondents pursuant to section 298(2) of the Companies Act, 1963, and further for an order compelling the respondents to contribute to the assets of the companies, such sum as the Court might think just. It was common between the parties that the events in relation to which the entitlement to relief was sought occurred in 1988, being the year in which each of the companies in the title to these proceedings was wound up. On an application by the liquidator to substitute himself as applicant in place of the companies commencing the action, the question arose as to what, if any, limitation period applied to the claim. The court found that the causes of action in relation to which the relief sought accrued in 1988, that such relief was for "the recovery of any sum recoverable by virtue of any enactment" and therefore the relevant limitation period was six years.

55. The court also pointed out that a similar question arose in the case of *Farmizer (Products) Limited, Moore & Anor v. Gadd & Anor*[9], and the Court of Appeal in England and Wales when considering Section 214 of the English Insolvency Act, 1986, which is similar to our section 263 aforesaid, decided that a claim under that section was "an action for the recovery of any sum recoverable by virtue of an enactment" and therefore the limitation period of six years applied.

56. Similarly, counsel for the respondent submits that as counsel for the applicant in his submissions indicated that the application was being made pursuant to section 263 of the Companies Act, the application was, as I understood her

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8 [1999] 1 IR 23
9 1997 BCLR 589

submission, either for the recovery of sums recoverable by virtue of any written law, in this case, the Companies Act, or on the basis of misfeasance or breach of trust, and therefore either section 5(1)(c) of the Limitation A ct, in the case of the former, or section 5(1)(a) of the Limitation Act, in the case of the latter, would apply, but in either case, the relevant limitation period is six years, which has expired.

57. Section 263 of the Companies Act provides as follows:

> 263. Where, in the course of the winding up of any company under this Act, it appears that any past or present director, manager, official or other liquidator, or any officer of such company-
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> > (a) has misapplied or retained in his own hands or become liable or accountable for any monies of the company; or
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> > (b) is guilty of any misfeasance or breach of trust in relation to the company,
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> the court may, on the application of any liquidator, or of any creditor or contributory of the company, notwithstanding that the offence is one for which the offender is criminally responsible, examine the conduct of such director, manager, or other officer and may compel him to repay any monies so misapplied or retained, or for which he has become liable or accountable together with interest at such rate as the court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance or breach of trust as the court thinks just.

58. Mrs Bastian submitted further that since there can be no waiver of Mr Jennette's right not to be sued outside the limitation period (*Naomi Butler v Barclays Bank PLC and Care Maintenance Ltd Bahamas*[10]), the Official Liquidator's application should, therefore, be dismissed.

59. Counsel for the Official Liquidator/applicant submits that the Official Liquidator's application is for the enforcement of the Order of Longley, J made in May 1997 as well as the performance of the duties and obligations owed by Mr Jennette to the Court while acting as an officer of the Court when he was Official Liquidator of the company and as such it is not a "cause of action" as contemplated by section 5 of the Limitation Act and further that the Limitation Act does not apply to execution under a judgment.

60. For that latter proposition, counsel referred to the case of *Bahamas Commonwealth Bank Ltd v Lewis*11 in which Barnett, J (Ag), adopting the reasoning of the English Court of Appeal in the cases of *W.T. Lambs & Sons Rider12 and Lougher v Donovan13,* found that the right to sue on a judgment is a

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10 S.C. Action No. 53 of 1999
11 [1996] BHS. J. No. 96

matter quite distinct from the right to issue execution under it and the provision in the Limitation Act applies to actions on a judgment but does not apply to execution under a judgment.

61. Notwithstanding his submission that the applicant relied on section 263 to ground his claim, counsel for the applicant, nevertheless, submits that neither section 5(1)(a) nor section 5(1)(c) of the Limitation Act applies as the present application by the Official Liquidator is not, in his submission, an action in contract or tort nor is it an action to recover any sums by virtue of any written law. In his submission, the application is by way of summons in winding-up proceedings where the Official Liquidator is seeking to enforce the performance of the duties and obligations owed by the respondent to the Court as an officer of the Court, as well as the duties and obligations imposed upon him by the Companies Act, in his capacity as Official Liquidator, to give an account of moneys that he received or should have received while he acted as liquidator.

62. Counsel on behalf of the applicant submits further that both *Southern Mineral Oil Limited* and *Farmizer (supra)* on which the respondent relied are distinguishable from the present case. In his submission, the "true rule" is that section 5(1)(c) of the Limitation Act does not bar an applicant unless it is a claim made pursuant to any written law not where the claim is, as in this case, made in respect of a breach of fiduciary duty. In such a case, he submits, the Court must look at the underlying claim for the misfeasance or breach of fiduciary duty and apply the limitation period applicable to that particular claim. *Eurocircuit Europe Limited (in Liquidation)14.*

63. In that regard, counsel for the applicant submits that the Official Liquidator is claiming that Mr Jennette as Trustee owed fiduciary duties to the company and the claim is therefore in respect of "fraudulent breach of trust" or "to recover trust property or the proceeds thereof" and in his submission, the authorities are clear that when a trustee receives money in his capacity as trustee and converts it to his own use, he is not protected by the Limitation Act. In support of that proposition he relies on section 33 of the Limitation Act as well as the cases of *Armitage v Nurse and others* and The *Attorney General v Cocke and Another*[15] and *North American Land and Timber Company v Watkins16.*

64. Section 33 of the Limitation Act provides, inter alia, that:

> **33.** (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action-
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> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
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> (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or

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12 (1948) 2 K.B. 331
13 (1948) 2 All ER 11
14 [2007] EWHC 1433 Ch; (2007) 2 BCLC 598
15 [1988] Ch 414
16 [1904] 1 Ch 242

previously received by the trustee and converted to the trustee's use.

65. Counsel for the respondent points out that *Armitage* was a case about breach of trust where there was an allegation of fraud and in which the relevant section of the English Limitation Act 1980, section 21, is identical to section 33 of our Limitation Act, which she submits does not apply to these proceedings as that section relates to actions commenced by a beneficiary under a trust, which the current application is not. In any event counsel on behalf of the respondent points out, unlike in the case of *Armitage,* the applicant's summons in this case, does not allege fraud on the part of the respondent and the issue of fraud cannot be raised on counsel's submissions, but must be specifically pleaded. The result, she submits, is that in the absence of deliberate concealment, which is not alleged in this case, the limitation period is six years as it is liability for dishonest breach of trust which endures without limitation of time, whereas liability for an honest breach of trust is statute barred after six years.

66. Finally, counsel for the applicant submits, the Court should not enter into an inquiry as to whether or not a claim might be statute barred on the hearing of a procedural motion and for that submission he cited the case of *Hynes v Western Health Board and another*17.

67. In *Hynes,* the issue of limitation arose on an application to join a party and the Court opined that:

> "*O'Reilly v Granville* is authority for the proposition that the court should not enter into an inquiry as to whether a claim may or may not be statute barred on the hearing of a procedural motion seeking to join a defendant (or as here, where a defendant having been joined seeks by a similar procedural motion to have the earlier order set aside). On that aspect of the matter the only question which the court should ask itself on such an application is as to whether the claim as against the defendant concerned is clearly statute barred. If there is doubt whatsoever about that fact, then the defendant should be joined, if it is otherwise appropriate to do so, and the issue of the claim being or not being statute barred should be dealt with in the ordinary way as appropriate to the circumstances of the case, including, if so appropriate, by means of a preliminary issue."

68. In my view, *Hynes* does not assist the applicant as the issue of the limitation period was not raised on a procedural motion, but rather as a preliminary issue on the substantive claim which the applicant makes against the respondent and which *Hynes* recognized could be done.

69. Section 5 of the Limitation Act 1995 prohibits the commencement of an action founded on simple contract (including quasi contract) or on tort18 or to recover any sum recoverable by virtue of any written law19 or upon any judgment20 after

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17 [2006] IEHC 55
18 Section 5(1)(a)
19 Section 5(1)(c)
20 Section 5(3)

the expiry of six years from the date on which the cause of action accrued or from which the judgment became enforceable, as the case may be.

70. As I understood counsel for the respondent's submission, since the Official Liquidator, as indicated by his counsel, is relying on section 263 of the Companies Act, which is identical to section 212 of the English Solvency Act, as authority for his application, the application ought to have been brought within six years from May 1997, and having failed to do so he is barred by section 5 of the Limitation Act from doing so now. In her submission, whether the applicant's claim is on the basis of the tort of misfeasance or for moneys recoverable under the Companies Act or both, section 5 (1)(a) and/or section 5(1)(c) of the Limitation Act, apply.

71. Although counsel for the applicant says his application is merely a summons in winding up proceedings and not an action contemplated by section 5 of the Limitation Act, in view of the fact that section 2 of the Limitation Act defines 'action' as including "any proceedings in a court of law", it would seem that whether the applicant brings his application by way of summons, as he did, or whether he commences, a new action, as counsel for the respondent suggests he should have done, it would be considered an "action" under the Limitation Act.

72. As for the submission of counsel for the applicant that the case of *Southern Mineral Oil Ltd (No. 2) v. Conney21* and *Farmizer* are distinguishable, as a former liquidator is not protected by the provisions of the Limitation Act, I accept the submissions of counsel for the respondent that it is actually the cases relied on by counsel for the applicant that appear to be either irrelevant or distinguishable from the present case.

73. Firstly, as pointed out by Mrs Bastian, the applicant in *Armitage* was a beneficiary and not a liquidator. Secondly, the case of *North American Land and Timber Co. v. Watkins*22, involved a principal and agent where moneys were actually sent by the principal to and received by the agent, as an expressed trustee, who misappropriated the same. Whereas, as pointed out by counsel for the respondent in this case, the Official Liquidator in his affidavit sworn in support of the 8 June 2007 summons, does not allege that the respondent misapplied or retained any funds; he merely estimates how much he thought Mr Jennette ought to have collected during his term in office as Official Liquidator.

74. Indeed in his said affidavit, Mr Lopez deposes, *inter alia*, as follows:

> ""7. In order to estimate the amount of monies that Mr Jennette collected from the sale of the Company's properties during his term as Official Liquidator of the Company, a search in the Registry was conducted by Computitle at my request in an effort to determine the documents that have been recorded containing the name of David Jennette and Venice-in-The Bahamas Limited during Mr Jennette's term as Official Liquidator of the Company...
>
> "8. Various property control and correspondence files were reviewed in order to identify other monies collected from property sales, releases of service charges and service charges. There is now produced and shown

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21 [1999] 1 IR 237
22 [1940] 1 Ch 242

to me marked "JML5" a bundle containing copies of documents which indicate the possible collections.

"9. After reviewing the information referred to in paragraphs 3, 7 and 8 of this affidavit and other information located in property control and correspondence files as well as estimating the annual receipt of service fees which Mr Jennette may have collected during his term as Official Liquidator of the Company, it is estimated at B$476,356 which amount does not include accrued interest...This amount is only an estimate and to determine the correct amount an accounting with supporting documentation is required of Mr Jennette of all funds received by him or the Company during his tenure as Official Liquidator of the Company."

75. As for counsel for the applicant's reliance on section 33 of The Bahamas Limitation Act (see paragraph 64 above) to support the applicant's application, I agree with counsel for the respondent that section 33 does not assist the applicant as that section refers to applications by beneficiaries under a trust; and that in any event, there is no allegation of fraudulent breach of trust in the applicant's summons or his affidavit in support.

76. Counsel for the applicant says his application is brought pursuant to section 263. Accordingly, I am of the view that the causes of action in relation to which relief is sought under section 263 of the Companies Act accrued in 1997, that the relief sought is for "the recovery of any sum recoverable by virtue of any enactment" (Section 5(1)(c) of the Limitation Act, 1995) and that the period of limitation is six years.

77. As for the applicant's claim that the respondent's conduct as liquidator be examined, and that he be made to repay "any monies misapplied or retained by him and any monies he is unable to account for and for any monies paid away by him in breach of trust or by misfeasance", in my view, even if such a claim were properly pleaded, it too would be caught by section 5(1)(a) of the Limitation Act.

78. In *Eurocircuit Europe Limited (in Liquidation) the* Court said that one must look at the underlying claim for the misfeasance or breach of fiduciary duty and apply the limitation period applicable to that particular claim23. In the instant case, in my view, the underlying claim is the misconduct of Mr Jennette during his term in office as liquidator of the company and in this regard I accept the submission of counsel for the respondent that the cause of action in relation thereto would have been six years from 1997 and is therefore now barred by virtue of section 5(1)(a) of the Limitation Act.

79. Consequently, I hold that the applicant's claims for relief sought by paragraphs 2 through 5 of the summons filed 8 June 2007, having been made more than six years after the cause of action accrued, and being, in my view, new claims against the respondent, are barred by section 5 of the Limitation Act.

80. As for the claim at paragraph 1 of the 8 June 2007 summons, I note from the 5 October 2007 affidavit of Mr Jennette that notwithstanding his averment that he, Mr Gape of Dupuch & Turnquest and Messrs. Deloitte & Touche "gave up all documentation, files, records, account receivables and other information relating

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23 [2007] EWHC 1433 Ch; (2007) 2 BCLC 598

to the company" in their possession to Mr Juan Lopez" and that he does not have "any additional records, files, documents, tapes, information or records relating to the company in his custody or possession." However, I also note, as did the applicant and his counsel, that exhibited to Mr Jennette's 5 October 2007 affidavit as well as his 1 April 2008 affidavit are copies of various documents and letters relating to the business of the company, which the applicant says were never delivered to him.

81. The obvious question then is, if all documentation, files and records relating to the company had been delivered to the Official Liquidator, where did Mr Jennette get the copies which he exhibited to his said affidavits?

82. I am not persuaded therefore that Mr Jennette has in fact complied with the 14 May 1997 order and I agree with counsel for the applicant that the relief sought at paragraph 1 of the 8 June 2007 summons is not a new claim or a new cause of action so it is not barred by the Limitation Act.

83. Consequently, pursuant to Order 45 rule 6 aforesaid which empowers the Court, where an order requiring an act to be done already specifies a time within which the act is to be done, to specify another time or where it does not already specify such a time to do it subsequently, I would grant the relief sought at paragraph 1 of the 8 June 2007 summons.

84. It is therefore ordered that Mr David Jennette, Jr. do, within seven days of service upon him of this Ruling/Order, deliver or cause to be delivered to the Official Liquidator all documents in his custody, possession or stored electronically relating to the estate, affairs or effects of the Company, which may have come into his custody, possession or power during the period he acted as Official Liquidator of the Company from 8th February 1991 to 14th May 1997, including, but not limited to, documents listed and/or referred to in his affidavits filed on 5 October 2007 and 1 April 2008 as well as those listed and/or referred to at paragraphs 8 and 9 of the aforesaid affidavit of Juan Lopez filed 15 April 2009.

85. I will hear the parties as to costs.

DELIVERED this 23rd day of April 2010

Estelle G. Gray Evans
Justice