

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Commercial Division

2021/COM/com/000055

IN THE MATTER OF The International Business Companies Act (Ch. 309)

AND

IN THE MATTER OF JET TEST INTERNATIONAL LIMITED

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2021/CLE/gen/01272

**IN THE MATTER OF Section 21 of the Supreme Court Act Statue Laws of The
Bahamas**

AND

**IN THE MATTER OF the Memorandum of Association and Articles of
Association of JET TEST INTERNATIONAL LIMITED (A company incorporated
and registered under the INTERNATIONAL BUSINESS COMPANIES ACT
CHAPTER 309).”**

BETWEEN

**WINDWARD ASSET MANAGEMENT INTERNATIONAL LIMITED,
(A Shareholder and Director of Jet Test International Limited)**

Plaintiff/Applicant

AND

**SEABIRD INTERNATIONAL HOLDINGS LIMITED,
(A Shareholder and Director of Jet Test International Limited)**

1st Defendant

AND

**FREEBIRD INTERNATIONAL LIMITED,
(A Shareholder and Director of Jet Test International Limited)**

2nd Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: Sean Moree and Erin Hill for Freebird International Limited and
Seabird International Limited
Dennis Williams and Clinton Clarke for Windward Asset
Management International, Limited

27 October 2021 and 29 October 2021

RULING

WINDER, J

On 29 October 2021, after hearing applications in these separate but related actions, I appointed Alison Treco and Maria Ferere as joint provisional liquidators of Jet Test International Limited (the Company), a Bahamian International Business Company. I promised to put the reasons for my decision in writing; I do so now.

1. The Company was incorporated on 15 April, 2013 under the International Business Companies Act, 2000 (the IBC Act) with registration number 16,7421B. The registered office of the Company is Windermere Corporate Management Limited, Nassau, The Bahamas.

2. The Company is an international company that offers aviation related services, such as providing qualified pilots and supporting logistics in conducting domestic and international aircraft ferry-flight operations to clients on a one-off, free market basis around the globe.

3. These two cases concern the control and future management of the Company. The contending parties are the three members/shareholders of the Company. They are Freebird International Limited (Freebird), Seabird International Limited (Seabird) and Windward Asset Management International Limited (Windward). The ultimate beneficial owners of Freebird, Seabird and Windward (and by extension the Company) are Robert Allen (Allen), Steven Giordano (Giordano) and Gloyd Robinson (Robinson) respectively. Freebird, Seabird and Windward are also the three directors of the Company.

4. It is an undisputed fact that over the last several years the business relationship between the Company's ultimate beneficial owners has deteriorated. Allen and Giordano attributes the deterioration of the business relationship to the on-going substance abuse by Robinson. They say that this has impaired his ability to continue to perform the work performed by the Company.

5. On 3 September, 2021, Allen and Giordano filed a Verified Complaint in the Courts of Nevada alleging intentional interference with contractual relations, breach of fiduciary duty, unjust enrichment and declaratory relief. On 8 September, 2021, Allen and Giordano petitioned the Court for an order appointing a receiver over the Company, for a preliminary injunction enjoining the Company's shareholders, officers, directors, contractors and/or agents, in particular Robinson from interfering with the receiver and for a temporary restraining order. On 16 September, 2021, the Court entered its Order Granting Applications for the Temporary Restraining Order and on 25 September, 2021, the Court entered its Order: (1) Appointing a receiver; (2) Entering Preliminary Injunction; and (3) Temporary Restraining Order.

6. Freebird and Seabird have petitioned for the winding up of the Company. The Petition, filed on 27 October 2021, cites the following grounds at paragraphs 87-91:

87. As outlined above, GR has effectively taken over complete control of the Company's website, e-mails, finances, credit card, bank accounts, and all related business activities without authority from the Company to do so.

88. GR, who merely holds a minority interest in Jet Test via his interest in Winward, does not have the requisite control, voting share, or authorization to take the actions described herein.

89. GR's conduct is damaging the Company's financial wellbeing as well as the Company's reputation and goodwill.

90. In spite of significant legal efforts to restore the status quo and to permit the continued operation of Jet Test, RA and SG have not been able to overcome the challenges posed by the GR's continued conduct.

91. The Petitioners hereby apply to this Honourable Court to wind up the Company on the basis that it is just and equitable to do so.

7. The grounds are supported by the facts stated in the Petition (verified by the sworn testimony of Giordano). The Petition cites numerous instances where Robinson, a minority shareholder, is alleged to have seized control of the Company and its assets to the exclusion of the majority.

8. The present application on the part of Freebird and Seabird, made by Summons dated 27 October 2021, prays for the appointment of Alison Treco and Maria Ferere

as joint provisional liquidators pending the hearing of the Petition to wind up the Company.

9. Windward filed an Originating Summons against Freebird and Seabird seeking the following relief:

1. An Order that a Receiver be appointed over Jet Test International Limited (JTIL) in accordance with Section 21 of the Supreme Court Act and under the Inherent Jurisdiction of The Court and or in terms of the INTERNATIONAL BUSINESS COMPANIES ACT, the COMPANIES ACT to take control of, to pay debts of JTIL, to account for, to investigate and to value the assets of JTIL, and to manage and or carry out any legal act needed to be done to control the assets of Jet Test International Limited (“JTIL”) during the period that JTIL is under Receivership taking into account matters raised in Case No.: A-21-840547-B in EIGHTH JUDICIAL DISTRICT COURT CLARK COUNTY, NEVADA (JET TEST INTERNATIONAL LIMITED, an international company under the Commonwealth of the Bahamas, ROBERT ALLEN, an Arizona resident, and STEVEN GIORDANO, a New Jersey resident, Plaintiffs V GLOYD ROBINSON, a Nevada resident, Defendant) .

2. An Order that the Receiver appointed produce a report within ninety (90) days within the terms of paragraph one (1) above.

3. An Order that the Receiver appointed have access to ALL company information to enable them to produce a report as outlined above in three (3).

4. An Order that subject to the findings in three (3) above and taking all matters raised herein into consideration that:

- I. a share transfer in JTIL is to take place within ninety (90) days of the said report OR
- II. JTIL is to be dissolved and all assets and or liabilities appropriately distributed.

5. Such ORDER, Declarations or RELIEF that the Honourable Court deems just and equitable.

10. The Company is not a party to Windward’s receivership application. The application is supported by the Affidavit of Robinson. Windward’s case is summed up in the *“Limited Opposition to Joinder and Counter-motion”*, filed in the Nevada proceedings, where it states:

The parties no longer trust each other, are now at each other’s throats and cannot even calmly or peacefully communicate with each other. The reason has nothing to do with Plaintiff’s salacious, false and exaggerated claims against the Defendant Robinson, which occurred years ago. Instead, it has to do with Robinson discovering what Plaintiffs were up to. Plaintiffs were

conducting flights for Business customers where payment was directly received by them and/or their competing legal entity [Nomad Aviation], with the expenses all being charged to and paid by the Business.

11. Windward's present application is made by Summons seeking the immediate appointment of Receiver. Although not stated, it must be an application for the interim appointment of a receiver.

12. The parties have agreed that there is an urgent need for the company's management to be placed in the hands of independent persons. A receiver had been appointed by the courts of Nevada, by consent of the parties, but they accept that this appointment has not proven effective to resolve the impasse between the parties. They disagree as to whether this independent person ought to be a receiver or a provisional liquidator. The party with 1/3 interest in the beneficial ownership of the Company says his interest would be better served with receiver whilst the parties with the 2/3 interest have moved for the winding up of the Company and for a provisional liquidator to be appointed.

13. Section 21(1) of the Supreme Court Act provides:

(1) The Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the Court to be just and convenient to do so.

Section 164 of the International Business Companies Act provides:

164. The provisions of the Companies Act regarding receivers and managers govern mutatis mutandis the appointment, duties, powers and liabilities of receivers and managers of the assets of any company incorporated under this Act.

Section 139 of the Companies Act provides as follows:

139.(1) Where any person –

- (a) obtains an order for the appointment of a receiver of any of the property of a company;
- (b) who as a debenture holder becomes entitled to realise his security interest and appoints a receiver of any assets of a company pursuant to the instrument creating the debenture; or
- (c) appoints a receiver, pursuant to any Act, instrument or rule of law, of any of the property of a company or enters possession of any property of a company under the powers contained in any charge, he

shall give, within ten days from the date of the order, appointment or entry into possession, notice thereof to the Registrar, who shall cause the same to be filed in the company's file at the Registry.

14. The Originating Summons of Windward, seeking for the appointment of a Receiver over the Company, faces severe procedural challenges. Firstly, the Company, as a separate legal entity, ought to be a party to the action which seeks to appoint a receiver over its asset. Secondly, there is no affidavit of the proposed Receiver, providing for his qualifications and consent to act. Thirdly, there are considerable factual disputes between these parties, making the proposition of a resolution of this dispute, by Originating Summons, unsuitable.

15. In any event, notwithstanding the procedural challenges, I am not satisfied that it is just and convenient in the circumstances to appoint a Receiver. The parties have already tried and failed in the appointment of a Receiver over the assets of the Company in the Nevada proceedings, notwithstanding the consent of all the parties. No application for recognition of that appointment has been made in this jurisdiction.

16. Further, I am not satisfied as to what is the expected end result of the appointment of a Receiver, as sought by Windward. This is not the case of an insolvent company, as it appears accepted that the Company is solvent. In the circumstances, this is not the usual case of a Receiver appointed for the purposes of realizing the assets to settle the debt of a security holder and then return the Company to its old or new management. The need for the Receiver is said to be the result of the irretrievable break down of the relationship between the partners/members, making it difficult to understand the process by which the Receiver will exit the Company.

17. According to the Originating Summons, there is a prayer for the receiver to value the company and to prepare a report within 90 days, which could result in a share transfer or the dissolution of the Company. This seems to craft a relief for the shareholder remedy of oppression/unfair prejudice without any reference to any statutory power to enable the same and without naming the Company as a party. More importantly, there is a recognition in this prayer that the end result of this process is likely the dissolution of the Company. Receivership, however, is not the appropriate

mechanism for the dissolution of a company, which is reserved for the winding up process.

18. In all the circumstances I was not satisfied that the appointment of a receiver was a just and convenient exercise of my discretion. I was satisfied that it was more appropriate to appoint a provisional liquidator, pending the determination of the Petition for the winding up of the company.

19. Section 186 of the Companies Winding Up Amendment Act (CWUA) provides:

186. Circumstances in which a company may be wound up by the court. A company may be wound up by the court if-

(a)...

(b)...

(c) the company is insolvent;

(d)...

(e) *the court is of the opinion that it just and equitable that the company should be wound up; ...*

Unlike the insolvency ground, there is no definition in the CWUA of what ought to constitute circumstances for the court to be satisfied that it is just and equitable that the company should be wound up. The absence of a definition is not surprising as the leading case in this area of insolvency law appears to suggest that the categories of cases which fall to be classified under this head is never closed. The oft cited opinion of **Lord Wilberforce** in the English House of Lords Decision in ***Ebrahimi v Westbourne Galleries [1973] AC 360*** is found at page 379 of the judgment:

"It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence - this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company - so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere."

(Emphasis added)

The scenario in this case, of a partnership which has soured, is certainly the classic case for the winding up under the just and equitable ground.

20. Section 199(1) and (2) provides for the appointment of a provisional liquidator as follows:

199. Provisional liquidator: appointment, powers and termination.

(1) Subject to this section and any Rules made under section 252, the court may, at any time after the presentation of a winding up petition but before the making of a winding up order, appoint a liquidator provisionally.

(2) An application for the appointment of a provisional liquidator may be made under subsection (1) by a creditor or contributory of the company or any relevant regulator on the grounds that

- (a) there is a 'prima facie case for making a winding up order; and
- (b) the appointment of a provisional liquidator is necessary-
 - (i) to prevent the dissipation or misuse of the company's assets,
 - (ii) to prevent the oppression of minority shareholders,
 - (iii) to prevent mismanagement or misconduct on the part of the company's directors, or
 - (iv) in the public interest. ..

21. The legal requirements necessary for the exercise of the courts discretion to appoint provisional liquidators are therefore: (1) the existence of a prima facie case for the making of a winding up order; and, (2) the existence of one or more of the necessities cited in section 199(2)(b)(i) to (iv). The Petitioners say that the appointment is necessary to prevent the dissipation of the company's assets (199(2)(b)(i)) and to prevent mismanagement or misconduct on the part of the company's directors.

22. Having considered the application for the appointment of provisional liquidators and the evidence of all the parties, I was satisfied that the appointment ought to be made as:

- (a) there is a prima facie case for making a winding up order on the just and equitable ground, and
- (b) the appointment of a provisional liquidator is necessary to prevent the dissipation or misuse of the company's assets and to prevent mismanagement or misconduct on the part of the company's directors.

23. I should point out for the benefit of Windward, as the minority shareholder, that section 199(2)(b)(ii) provides that one of the matters which the appointment of a provisional liquidator could address is that of oppression of a minority shareholder, a matter which it alleges in the Robinson affidavit, albeit not in any substantive process.

24. Having appointed provisional liquidators, I fixed the hearing of the Petition for 28 February 2022.

Dated this 5th day of November 2021

A handwritten signature in black ink, appearing to read 'I-R. Winder', written over a faint horizontal line.

Ian R. Winder

Justice