Privy Council Appeal No. 42 of 1998

Kenneth Kellar *Appellant*

v.

Stanley Williams *Respondent*

FROM

THE COURT OF APPEAL OF THE TURKS AND CAICOS ISLANDS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 7th February 2000

Present at the hearing:-

Lord Browne-Wilkinson
Lord Mackay of Clashfern
Lord Goff of Chieveley
Lord Hutton
Lord Millett

*[Delivered by **Lord Mackay of Clashfern**]*

This is an appeal brought as of right from a decision of the Court of Appeal of the Turks and Caicos Islands (President V.C. Melville, U.V. Campbell and J.S. Kerr JJ.) dated 12th July 1996 which upheld a decision of the Chief Justice of the Turks and Caicos Islands sitting in the Supreme Court dated 19th April 1995.

The purpose of the hearing before the Supreme Court was to provide directions to the Official Liquidator of Sunrise Agency Limited ("Sunrise") as to the treatment to be accorded to funds paid to Sunrise totalling US$476,500. The effect of the decisions of both the Supreme Court and the Court of Appeal has been to reject the appellant's claim that these monies represented loans repayable to him and others and to accept the respondent's claim that these monies were paid to Sunrise as capital contributions and, after payment of debts, are divisible among shareholders in

proportion to the nominal amount of shares issued by Sunrise.

Sunrise Agency Limited is a company incorporated in the Turks and Caicos Islands on 2nd April 1990 in which the appellant held 49% of the shares and the respondent 51%, which was wound up by the Court by an order dated 10th June 1993. On 18th January 1994 the respondent filed an application for directions in the liquidation in the Supreme Court. The application for directions sought an order that the court direct an Official Liquidator as to the treatment to be accorded to funds paid to Sunrise by or on behalf of the appellant; that is whether the funds paid are to be treated as capital contributions (as shown in the company's records) or as shareholders' loans as claimed by the appellant and the validity in law and equity and in the context of this winding up of purported assignments by and on behalf of the appellant of the alleged loans to the company. The application also sought an order that for the purpose of determining the direction to be given the court conduct a hearing as between the shareholders, the respondent and appellant and Sunrise as parties. Following on that application the court on 16th February 1994 ordered a hearing to provide directions to the Official Liquidator regarding the treatment to be accorded the funds referred to in the application; that the Official Liquidator should provide to the court a report setting out his findings to date and made it unnecessary for the Official Liquidator to be present or represented at the hearing. The hearing pursuant to that order took place before the Chief Justice over a period of ten days. The precise figures involved were not established in detail but the matter was dealt with, on the assumption that once the issue was decided, the figures could be finalised. As has already been noted the Chief Justice decided in favour of the respondent and his judgment was adhered to on appeal by the Court of Appeal.

In his written case on this appeal the appellant stated:-

> "The issue is whether the company law of the TCI admits of the making of a 'capital contribution' to a company. This concept (referred to by Courts below variously as 'capital contribution', 'equitable contribution', 'equitable capital', 'contributed surplus' and 'contributed capital') may be defined for the purposes of the action as a payment made to enhance the capital of a company, being neither a subscription

> for shares in the company nor a gift to the company. The making of such 'contribution', however, apparently creates no obligation on the company to repay the money nor can the payer recover it from the company whether as a debt or in any other way."

The appellant contended that this concept does not and cannot exist in the company law of the Turks and Caicos Islands. Money paid to or on behalf of a company other than by way of payment for shares or by way of gift, is repayable to the payer, no matter what legal analysis is applied to the payment. The appellant's case was stated to be that limited liability companies in the Turks and Caicos Islands as in England are entirely the creature of statute and that the capital structure of such companies can only exist within the statutory framework. In the oral argument on the appeal this issue was barely touched upon, the principal argument for the appellant at the hearing being that the primary facts found by the Chief Justice and the Court of Appeal should have led these courts to the conclusion that the monies provided by the appellant to Sunrise were repayable to him on demand insofar as they were not necessary for preserving the solvency of Sunrise and enabling it to meet its debts to its creditors. It was submitted that the courts below had found that the money was not made available to Sunrise as a gift and therefore it followed that it was repayable on demand subject to the condition just mentioned.

At the hearing the respondent contended that both courts below had properly considered the evidence before them and had reached the conclusion that the funds in question were made available to Sunrise by the appellant as a contribution to the capital of Sunrise which would become repayable only on a distribution of the capital of the company and therefore divisible among shareholders after payment of debts in proportion to the nominal amount of their shares.

To deal with the issue as presented in the oral hearing it is therefore necessary to narrate in some detail the findings made by the courts below. The appellant was and is the holder of 100% of the shares of Carib West Limited which is a company importing liquor to the Turks and Caicos Islands. Sunrise was formed in order to provide a shipping agency that could more economically obtain shipping and

trucking services for Carib West than had been possible hitherto. The respondent was the manager of Carib West and the appellant and the respondent agreed that Sunrise should be set up at a meeting in the office of the respondent's attorney. It was agreed that the appellant would be providing the funds for Sunrise and that the respondent was to be the major shareholder. The reason for this was that having a "belonger" that is to say a local citizen as the majority shareholder was advisable if Sunrise wished to obtain a local business licence without much ado. The agreement as narrated having been reached Sunrise was formed without delay. The Chief Justice found that at that meeting there was no clear indication whether or not it was the appellant's intention that the monies he would supply to the new company would be by way of a loan or capital contribution. Apparently when asked if the directors were to be paid the appellant replied emphatically in the negative and added "I am putting up all the money". Thereafter the respondent was obliged to sign two powers of attorney, one for Lois Schmidt, the appellant's personal secretary in Washington State, USA and the other for his son Michael Kellar who ran the appellant's operations in Florida. This in effect negated any control that the respondent may have hoped to exercise over Sunrise. The appellant's daughter was stationed in Providenciales where Sunrise operated and saw to it that the net income of Sunrise was sent to the appellant's bank in Blaine, Washington State. Lois Schmidt at the bank then sent money to Florida where the appellant and Michael and his fiancée had full control of it, using it mainly for the benefit of the appellant's concerns, his warehouse, Kellar's Trucking Company and Carib West. The Chief Justice summed up the situation by saying that:-

> "…what was actually taking place was that Sunrise Agency was sending its net profits to Kellar, Kellar in turn was sending money to Florida where the recipients were Keller's warehouse, Kellar's Trucking and Teether's Brothers (sic) all to which Michael Kellar had close links, and mostly for the benefit of Kellar's Carib West in Providenciales. No one can deny that Kellar was making absolutely certain that the money was moving from one Kellar concern to another, never to the office of Sunrise Agency."

The initial payment to Sunrise of US$159,000 which appears in the account prepared by Janet Prescher who was

hired by the appellant to work in Sunrise came from a company named Country and Newtown Properties Limited wholly owned by the appellant. There was no evidence of any loan agreement between Country and Newtown and Sunrise. The certified public accountant who worked with the appellant in Washington testified that he treated the payment as both taxable income and as a loan.

The remaining money provided by the appellant to Sunrise appears to have been so provided in the way described by the appellant in his testimony quoted by the Chief Justice:-

> "Teeters Brothers (This is a company run by his son's Fiancée) would require the money in advance. I set it up with my secretary that if the money were needed for these ships to sail she would have it, she has the Power of Attorney to withdraw funds from my personal accounts."

In addition to money provided in this way to settle amounts due by Sunrise money was remitted from time to time from Sunrise to the appellant's bank in Washington and these two sources of money were used to settle liabilities incurred by Sunrise for the services provided to Carib West. Janet Prescher showed the moneys provided by the appellant in her accounts as capital contributions going to make up the total owner's equity. The Chief Justice held that these accounts were sent to the appellant that he had admitted seeing them and yet no effort was made at that time to question the description. Janet Prescher testified that she had seen the appellant on several occasions after receipt of the accounts which she had prepared but that he had made no mention of the entry. The Chief Justice draws the inference that had the appellant intended these payments to be in the form of a loan he would have drawn the necessity for a correction of her error to Janet Prescher's attention. The appellant also testified that he had been involved in many ventures throughout the years and that if he put funds into a company of which he was not the sole shareholder he would take a note on the company or if it was a company such as a bank he would take stock. This evidence was supported by Cushman who had been the appellant's Vice-President Finance for all of his operations. Cushman also corroborated the appellant's statement that when the appellant lends money he requires

documentation stating interest rates, terms of repayment and a promissory note. The appellant's explanation for not getting a note from Sunrise was that when he went into the agreement he thought it would stand on its own feet so he did not go into it further.

Cushman further stated to the court that the money provided to Sunrise was by means of an investment not a loan and although Cushman's motive for testifying had been questioned the Chief Justice was inclined definitely to believe his testimony that the appellant told him to treat these monies as investment. The Chief Justice also stated there was in his opinion enough credible evidence before the court to satisfy him that the monies paid to Sunrise by the appellant were not by way of a loan. The Court of Appeal agreed with the Chief Justice in his ruling that the sums advanced were equity or capital contributions and indicated the principal parts of the evidence on which in their view supported this decision by the Chief Justice.

In the light of these findings of fact by both courts below their Lordships consider the principal argument advanced by the appellant at the oral hearing cannot be accepted.

As their Lordships have already mentioned the first payment which is the subject of dispute was made by Country and Newtown but this company is wholly owned by the appellant and it is clear that he repeatedly claimed that he had provided all the funds for Sunrise. The Court of Appeal stated:-

> "The payment by Newtown is not a payment by Newtown to Sunrise to create a debt, but rather at the dictate of and behalf of Kellar who uses his wholly owned companies to move monies from one company to another as he deems fit."

Their Lordships interpret that as a holding that the payment made by Newtown was in fact a payment made on behalf of and on the instructions of the appellant as the beneficial owner of Newtown. On this basis the order made by the Chief Justice and affirmed by the Court of Appeal determined the character of the payments as between Sunrise, the appellant and the respondent. Although Newtown was not a party to these proceedings the payment made by that company requires separate consideration only

if it was not made on behalf of the appellant, contrary to his claim in evidence.

Once the findings of fact to which their Lordships have referred are accepted and where there are concurrent findings of fact of this type this Board would unless there were exceptional circumstances not present in this case be bound by them, the appellant's argument at the oral hearing must fail.

The contention of the appellant in his written case, which as their Lordships have noted was not pressed at the oral hearing, cannot be given effect. If the shareholders of a company agree to increase its capital without a formal allocation of shares that capital will become like share premium part of the owner's equity and there is nothing in the company law of the Turks and Caicos Islands or in the company law of England on which that law is based to render their agreement ineffective. Accordingly their Lordships will humbly advise Her Majesty that this appeal should be dismissed and that the appellant should pay the respondent's costs before the Board.

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