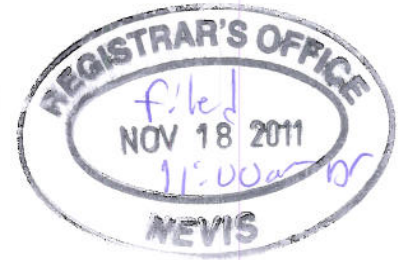


IN THE EASTERN CARIBBEAN SUPREME COURT  
IN THE HIGH COURT OF JUSTICE  
ST. CHRISTOPHER AND NEVIS  
NEVIS CIRCUIT  
CLAIM NO. NEVHCV2011/0067



Between

WANG RUIYN

Petitioner

And

GEM GLOBAL YIELD FUND LIMITED

Respondent

**Appearances:**

Mr. Mark Brantley for the Petitioner, Ms. Midge Morton with him

Mr. Damien Kelsick for the Respondent

2011 October 31, November 18

**JUDGMENT**

[1] **REDHEAD J. (ag)** This is an application by Wang Ruiyan for a winding up Petition of Gem Global Yield Fund an offshore company registered in Nevis incorporated under the provisions of Business Corporation of Ordinance 1984.

[2] In two affidavits sworn by Tan Kuang Hwee, an Attorney-At-Law filed on 16<sup>th</sup> May 2011. He swore in paragraph 5 of affidavit filed on 16 May 2011 that the creditor seeks to

wind up the company because it is unable to pay its debt and that it is otherwise just and equitable to do so.

- [3] Mr. Hwee in that said affidavit swore that the creditor was awarded the sum of HK\$128,351,291.56 together with [interest] HK\$59,251,174.91 as of March 22, 2011 and accruing therefore at the rate of 8% or at daily rate of HK\$28,131.78 representing interest thereon at judgment rate from the date of the writ.... On the 24<sup>th</sup> day of March 2011, the creditor sued the company on the judgment debt in the High Court of Nevis. The creditor obtained a Judgment in Default on 5<sup>th</sup> day of May 2011. To date the company has failed and/or refused to pay the outstanding judgment debt to the creditor.
- [4] The Petitioner has demanded payment of the judgment sum from the company but has not to date received payment of the judgment sum or any amount.
- [5] The company appealed to the Court of Appeal in Hong Kong against the quantum of the Hong Kong judgment. The appeal was heard on 3<sup>rd</sup> June 2011 and the court of Appeal on 25<sup>th</sup> June 2011 dismissed the appeal with costs against the company.
- [6] On 16<sup>th</sup> May 2011 the Petitioner commenced winding up proceedings in the High Court of Justice Nevis Circuit on grounds that the judgment debtor was unable to pay its debts owed to the judgment creditor and or otherwise it was just and equitable for the company to be wound up.
- [7] On 17<sup>th</sup> May 2011 the petitioner filed on ex-parte application for the appointment of provisional liquidators to take charge of the company pending the winding up proceedings. The application was granted on 20<sup>th</sup> May, 2011.
- [8] On an inter partes hearing the appointment of the provisional liquidators was reversed.

[9] Mr. Brantley in his submission argued that the jurisdiction of the Nevis High Court to order the winding up of a company incorporated under the provision of the Nevis Business Corporation ordinance 1984 as amended (NBCO) is the central question to be determined in these proceedings. Mr. Brantley argued that it is common ground that there are no provisions contained in NBCO permitting a creditor winding up or a winding up by the court of a company on the grounds that it is just and equitable to do so. There is therefore a silence of the NBCO on that point.

[10] The power to dissolve a company under the NBCO is contained Part I of that act; S97 (1) for instance provides

“Except as otherwise provided in its articles of incorporation, a corporation may be dissolved if, at a meeting of shareholders, the holders of two thirds of an outstanding shares entitled to vote on a proposal to dissolve, by resolution consent that dissolution shall take place. A certified copy of such resolution shall be filed with articles of dissolution.”

It is quite clear that the legislature addressed the question of dissolution or winding up of a company.

[11] The following sections under part XI also touch and concern the issue of dissolution, sections 98-101.

[12] Mr. Brantley contended that Section II of The Eastern Caribbean Supreme Court (St. Kitts and Nevis) Act Cap 3.11 (ECSC ACT) provides an avenue for litigants to rely on in circumstance where legislation offers no assistance on a particular issue.

[13] Mr. Brantley referred to Nigel Hamilton Smith, Peter Wastell Joint Liquidators V Alexander M Fundora.<sup>1</sup> In that case reference was made to S.31(2) of the Eastern Caribbean Supreme Court Act and cases decided in accordance with this act in this court.

[14] There are a host of authorities in our jurisdiction that decided this. This provision is applicable in deciding question of practice and procedure when our legislation is silent on matters of practice and procedure. (See Hugh C Marshall Snr and Antigua Aggregate Ltd and others)<sup>2</sup>

[15] Section 11 (i) of ECSC Act provides as follows:

“The jurisdiction vested in the High Court in Civil proceedings, and in Probate, Divorce and Matrimonial causes shall be exercised in accordance with the provisions of this Act or any other law in operation in the state and of the rules of Court, and where no special provision is therein contained such jurisdiction shall be exercised as may be in conformity with the procedure law and practice for the time being in force in the High Court of Justice in England.”

[16] On 22<sup>nd</sup> June 2011 in relation to the application for the appointment of provisional liquidators, this court ruled that S.11 of ECSC Act cannot pray in aid, where the NBCO is silent, as Section 11 permits the importation of English Procedure laws, not English Substantive Law. Learned counsel for the Petitioner contends that the issue of the jurisdiction of this Honourable Court to wind up a company on a petition by a judgment creditor is a live issue.

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<sup>1</sup> HCVAP 2010/031 Antigua and Barbuda

<sup>2</sup> Antigua and Barbuda Civil Appeal No. 23 of 1999

[17] Mr. Brantley submitted that the jurisdiction of the High Court to import English Substantive law and procedural laws into Nevis to fill a luceana is to be found in sections 7 and 11 of ECSC Act.

[18] He argued that both Sections 7 and 11 when read together establish the necessary jurisdiction and the rules governing that jurisdiction in permitting the Nevis Court to import English (Substantive) law and procedure for the winding up of a company.

[19] Section 7 of the ECSC Act provides:

“The High Court shall have and exercise within the state the same jurisdiction and the same powers and authorities identical to such jurisdiction as may from time to time be vested in the High Court of Justice in England”

[20] In an analysis of S7 of the ECSC Act Mr. Brantley put forward the following propositions:

(i)The Nevis Court shall have and exercise within Nevis the **same jurisdiction** as may from time to time be vested in the High Court of Justice in England.

(ii)Such jurisdiction and incidental powers and authorities are the same **as may from time to time be vested in the High Court of Justice in England.**

(iii) Such jurisdiction and incidental powers and authorities are the same **as may from time to time be vested in the High Court of Justice in England.**

[21] Mr. Brantley further argued that the jurisdiction vested by Section 7 of the ECSC Act is therefore what is vested in the English High Court from “time to time.”

[22] It therefore follows, according to Mr. Brantley, that the jurisdiction vested in the Nevis High Court is the identical jurisdiction that is currently vested in the English High Court.

[23] He further argued that Section 7 of the ECSC Act contains no limitation as to time when the jurisdiction of the English High Court can ride in aid to determine the current jurisdiction of the English High Court.

[24] Mr. Brantley contended that Section 7 is not dependent on the origins of the jurisdiction of English High Court. Whether or not that jurisdiction flows from Stature or rules of procedure or custom or inherent jurisdiction of the Court, Section 7 makes it clear that the same jurisdiction as applicable in the English High Court applies mutatis mutandis in the Nevis High Court.

[25] Mr. Brantley then went on to make this submission “Put differently the Nevis High Court can import such jurisdiction as the English High Court may have from time to time in dealing with any matter which arises before the Nevis High Court and on which the laws of Nevis whether substantive or procedural may be silent.”

[26] In my considered view the last part of this submission, Mr. Brantley has taken a quantum leap in order to get to the final part of his submission. Because in my opinion which is called for is a strict interpretation of Section 7 of ECSC in order to determine whether the St. Kitts Nevis legislature in enacting section 7 intended that English Substantive law should be imported in the Federation of St. Kitts and Nevis whenever there is a lucana or perceived lacuna in any legislation enacted by the independent Assembly of St. Kitts and Nevis of a law enacted in similar terms as a law enacted by the Parliament of England.

[27] In other words whenever legislation is enacted in United Kingdom and similar legislation is enacted in St. Kitts and Nevis, if the legislation which is enacted by independent Assembly of St. Kitts and Nevis does not contain a particular provision which is contained in the United Kingdom legislation, the absence of that provision in the local legislation is to be regarded as a lacuna in the local legislation.

[28] In my considered view that is what the argument in the case at bar boils down to. I would have thought that the legislature of the OECS territories had gone passed that stage.

[29] Before I get back to the analysis of S7, I wish now to analyse the argument put forward by Mr. Brantley that Section 7 of ECSC is also not dependent on the origins of the jurisdiction of the English High Court whether that jurisdiction flows from statute or procedure or customs or inherent jurisdiction of the court. I do not know that Mr. Brantley has any authority to support that proposition but he mentioned none.

[30] In my considered opinion the word “jurisdiction” here means the ability/”authority” to try certain matters. It cannot mean any more or less. In other words S7 means, in my opinion, that the Nevis Court shall have an exercise within the state of Nevis the same authority and powers incidental to such jurisdiction as may from time to time be vested in the High Court of Justice in England.

[31] In fact I think Mr. Brantley recognises this when in his second (ii) proposition above he said

“ The Nevis Court shall have and exercise within Nevis the same powers and authorities incidental to such jurisdiction as may from time to time be vested in the High Court of Justice in England.”

In my view this means nothing more than as stated.

- [32] However Mr. Brantley in my opinion when he argued that the Nevis High Court can import such jurisdiction as the English High Court may have, and which the laws of Nevis is silent, whether it be procedure or substantive. In my considered view Mr. Brantley is equating jurisdiction with law.
- [33] S.7 says quite clearly the High Court shall have and exercise within the state the same jurisdiction, not the same “laws”. So when the independent legislature of St. Kitts and Nevis enacts legislation e.g similar to United Kingdom legislation and the former does not contain all the provisions which are contained in the latter. It cannot be said, in my opinion, that there is a lacuna in the former because the latter contains provisions which are absent in the latter.
- [34] The NBCO like the English Insolvency Act, makes elaborate provisions for the winding up of a company which is insolvent. However the latter contains the winding up of a company by a creditor of a company which is insolvent. The former does not contain that provision. Could it be seriously argued because the Nevis legislature did not choose to enact a similar provision that it is a lacuna in the St. Kitts and Nevis law? That argument in my view must be skewed having regard to the fact that the St. Kitts and Nevis Assembly has the power and authority to pass whatever legislation it sees fit, once that legislation does not offend the St. Kitts and Nevis Constitution.
- [35] In this regard I reject the argument that there is lacuna in the NBCO because there was no provision made therein for the winding up of a company by a creditor when the company is insolvent as is provided for in the English and other legislation viz in the B.V.I legislation.



[36] I am sympathetic with the argument advanced by learned counsel, Mr. Brantley that if the procedural rules of the Insolvency Act of England can be imported into our jurisdiction, Why can't substantive law then be imported into St. Kitts and Nevis in my judgment the answer is obvious. An independent country, as St. Kitts and Nevis by its constitution is vested as the sole authority to legislature laws for the peace order and good governance of the country.

[37] I am also sympathetic with the argument of Mr. Brantley that the absence of such a provision i.e. the ability of a creditor to bring a winding up petition may result in an injustice to the creditor. However that is a situation which can be corrected only by legislature of St. Kitts and Nevis.

[38] Mr. Brantley in his argument contended that he was unable to find any relevant authorities to support the proposition for which he was contending i.e. the importation of English Laws in our system where our laws are silent. To my mind it is obvious why Mr. Brantley was faced with such difficulty. However Mr. Brantley referred to two authorities from the B.V.I which he considered "to be of passing interest." **Ocean Conversion (BVI) Limited V Attorney General of the Virgin Islands**<sup>3</sup> and **Pasiq Ltd. Et a v RWC et al.**<sup>4</sup>

[39] Both are judgments of the High Court of Justice of the B.V.I delivered by Bannister J. The former concerned the question of the court's jurisdiction to award pre-judgment interest. It was accepted that there was no statute in the BVI permitting the award of prejudgment interest. The English Law Reform [Miscellaneous Provisions] Act 1934 permitted such an award. The claimant ought to rely on Section 7 of the West Indies

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<sup>3</sup> BVIHCV/2009/0192

<sup>4</sup> BVIHC(.) 24 of 2010

Associated States Supreme Court (Virgin Islands) Act to import the provisions of the local reform [Miscellaneous Provision] Act 1934 .

[40] Bannister J at paragraph 16 of his judgment in **Ocean Conversion** opined

“If this submission were correct, it would mean that every statute in force in England at the beginning of 1940 and which gave the High Court in England power to make orders of any sort.... would have effect in the Territory by a sidewind. In my judgment the submission is misconceived. Section 7 of the Act dealt with (a.) jurisdiction and (b.) powers and authorities incidental to jurisdiction is (sic) in this context is, the power to decide matters.. “

[41] When S7 of the Act refers to powers and authorities incidental to such jurisdiction, it is referring, in my judgment, to inherent jurisdiction. “It is not referring to specific powers conferred on the High Court under particular English Statutes. Such specific powers are not vested in the High Court under particular English Statutes. Such specific powers are vested in the High Court. They are made available to it by legislation passed for that purpose.”

[42] Mr. Kelsick argued that S.7 of the ECSC does not allow for the importation of Substantive English Law in Nevis because of any laucana or perceived lacuna in the Nevis law.

[43] Mr. Kelsick referred to Halsburys Laws Volume 10 paragraph 314 which provides as follows:- “meaning of jurisdiction” By “jurisdiction” it is meant the authority which a court has to decide a matter that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of authority are imposed by the

Statute Charter or Commission under which the court is constituted and may be extended to restrict by similar means.”

**In Act of 1873 S16**

**Jurisdiction and Law**

16 “The High Court of Justice shall be a superior Court of Record, and subject as in this Act mentioned there shall be transferred in the High Court of Justice. The jurisdiction which, at the commencement of this Act, was vested in or capable of being exercised by, all or any of the Courts following.”

[44] There under is listed a number of courts. In my judgment what this meant was transferring the jurisdiction of all the court listed, to the High Court of Justice.

[45] In conclusion jurisdiction is the authority which is vested In the Court to hear and determine matters which are brought before. It does not mean that the High Court of Nevis can import Substantive English Law into Nevis. The claim brought by the Petitioner is therefore dismissed.

[46] Costs to the respondent to be agreed if not to be assessed.



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Albert J. Redhead  
High Court Judge