11th September

85/95

IN THE ROYAL COURT OF THE ISLAND OF JERSEY

Before: P.L. Crill, C.B.E., Deputy Bailiff

Jurat M.G. Lucas

Jurat D.E. Le Boutillier

BETWEEN	Hotel Beau Rivage Company Limited	**PLAINTIFF**
AND	Careves Investments Limited	**DEFENDANT**

Advocate J.A. Clyde-Smith for the Plaintiff

Advocate J.G.P. Wheeler for the Defendant

Advocate C.E. Whelan for the liquidator of the Defendant Company

DEPUTY BAILIFF: "This is a continuation of the hearing between the company, Hotel Beau Rivage Limited, the plaintiff, and Careves Investments Limited, the defendant, which was part heard in December, 1984, and in respect of which an interim judgment was given by this Court on 28th January, 1985. That judgment should be read in conjunction with the present one.

The issue before the Court originally was whether the application to declare the defendant "en désastre" should be granted or whether the appointment of M.W. Forrest as liquidator should be confirmed by the Court accepting the appointment and ordering it to registration. The last paragraph of the Court's judgment of the

28th January, 1985, reads as follows:

"We regard Mr. Forrest as an independent liquidator, but nevertheless we are going to order that he investigates the claims which had been notified to him by Mr. Clyde-Smith and report of the first instance to the Court. We will expect him to make recommendations and we will expect him to set out in detail either that he is pursuing a claim against the parent company, or his reasons for not doing so. We order the parent company to provide Mr. Forrest with all proper accounts and information to enable him to arrive at a decision as to whether there is a sustainable claim against it or not. In the meantime, whilst the Resolution appointing Mr. Forrest will be registered, no payment is to be made to any creditors and the company is to remain in being. We will reserve our decision as regards costs of this application until we have received Mr. Forrest's report".

At the resumed hearing Mr. Forrest presented his report - I interpolate here to say that I do not think it is necessary for me to read it, it's familiar to the parties and therefore, I think, Counsel may take it as being read. He supported that report by giving evidence upon which he was cross-examined. We now have to decide whether it would be right for the Court to accept the registration of Mr. Forrest which has already ordered to be registered or whether we should rescind that registration and in his place accept the declaration of désastre and of course in the ordinary way the Court will not interfere with the liquidation as we said in our earlier judgment. I want to repeat that the Court is in no doubt that in appropriate cases it has the power to interfere in a liquidation. Mr. Clyde-Smith attacked the report which he said was defective because although the two specific matters which the Court had asked Mr. Forrest to investigate were: (a) the amount of the service charges paid by the defendant to the groups head office over a number of years and (b) the declaration of a dividend of £10,000 in favour of the group by the debtor when the directors of the defendant were under notice of substantial claims against it. Mr. Forrest ought to have examined a number of

other matters that came to light as a result of his investigations of two specific matters and reported in detail his findings to the Court. Mr. Clyde-Smith's main criticism is maybe said to be these:

(1) the method adopted by the group who are assessing the service charge to be allocated to each of its subsidiary companies was that of the turnover of each company in question. That method was wrong because the effect of it had been to "hive-off" what would have been in some years at least a fair profit and change it into a derisory one. To this Mr. Forrest replied that in his opinion the method was clear because the debtor company was spared the cost of providing its own secretarial, managing and food purchasing staff, all of which were supplied by the group;

(2) the statement by the debtor's auditors in the last accounts as at the 31st October, 1983, that the account showed a true and fair view of the state of affairs of the debtor company was palpably wrong because of the substantial claims we have mentioned and Mr. Forrest ought not to have accepted the audited reports when assessing the effect of the payment of the dividend of £10,000. We had noted that on the same report on page 5 the auditor says this: "In order to comply with the terms of the lease the company has to carry out certain repairs to the leasehold property. The amount involved is subject to negotiation between surveyors representing the company and the landlords and has not yet been ascertained". Since the action for the cancellation of the company's lease was pending at that time and in fact was heard before the Court shortly afterwards and certainly before the auditors with the directors signed the accounts which are dated 14th February, 1984, and judgment was indeed given on 25th January, 1984, that observation, to say the least, by the auditors was inaccurate. To this and to the further following criticisms, Mr. Forrest replied that he was only at the beginning of or perhaps halfway through his examination of the position and that he had had concentrated on the two specific requests made to him by the Court and

had stopped thereafter and was awaiting further instructions,

(3) Mr. Forrest had not appeared to apply his mind to a possible claim for negligence or breach of their duties against the debtor's directors. To this Mr. Forrest replied that he had been advised verbally by his lawyer that such a claim would not succeed and therefore he had not included it in his report. He admitted that he had not obtained a written opinion on the matter; (4) Notwithstanding the calculation of the service charges as including afore-named matters - that is to say accounting and book-keeping services, catering and equipment purchasing, advertising, reservation and general administrative services, together with some minor benefits in respect of bookings at the Inn on the Park - in fact the debtor had been charged in part, at least, for Mr. Caro's salary, for the running expenses of Mr. Caro's motor car and for a contribution to the cost of the group finance in respect of funding developments elsewhere. Mr. Forrest said that as regards the question of group finances, none of the contributions had gone to finance other developments. The contribution, in fact was related solely to a share of the group's overdraft; and

(5) Lastly, and this is a point which Mr. Clyde-Smith urged before us at the first hearing, the position of Mr. Forrest was untenable, it was equivocable in as much as he owes his primary duty to the debtor company and not to that of the group. Mr. Forrest agreed that where the company was in difficulties, and it is clear to us that the defendant company certainly was in difficulties at the time of Mr. Forrest's appointment by the board, he owed his first duty to the company and not to the group. Nevertheless, we were told by Mr. Forrest that he had been asked by Mr. Caro to act when Mr. Ireson's appointment as liquidator was terminated and he had been told by Mr. Ireson that his fees would be looked after. It follows that if Careves Investments Limited is unable to pay those fees then Mr. Forrest would undoubtedly be entitled to look to be paid by the group as a whole and that alone could lead to a conflict of interests. It is true to say however, that in reply to a

question posed by Mr. Clyde-Smith in correspondence in 1984, Mr. Forrest made it clear that he had no previous financial or other involvement with Mr. Caro and that he had in fact, only met him socially during the course when they both pursued a particular hobby. We of course appreciate the difficulties facing a liquidator in the position of Mr. Forrest and we do not wish our judgment to be read in any as impuning his professional integrity but we have noted that even Mr. Forrest himself at least when the question of funds was raised, felt that without funds - and he has none and it is difficult to know whether he would get some - he would be in a position of double jeopardy, that is to say he would be under pressure from the plaintiff for not pursuing the directors and from the directors if he embarked on what he called and with some jusification, speculative litigation. He felt that in such a position his own position was untenable.

A careful reading of our earlier judgment in January of this year shows that the Court required to be provided with the fullest explanation by Mr. Forrest. Even if that meant that certain matters which were not apparent at the beginning of his investigation came to light as a result of his attempting to answer our two specific queries - that is to say the question of the service charge and the dividend. Mr. Clyde-Smith mentioned a number of other matters in addition to what we have already touched upon as indicating that we have not received a full and detailed report as the Court, he said, was expected to receive and as we have indicated we likewise expected one to be made in that way. First, that Mr. Forrest did not look into the question of when the managing service charge was first started. Secondly, Mr. Forrest did not even know the names of the defendant's directors until prompted in Court and thirdly, the unexplained rise in the management services charges in 1975 and 1978 which was totally unrelated to the increase in inflation during that period. All in all we have therefore come to the conclusion that it would be better for all concerned if the Viscount conducted the liquidation of the company. We therefore accept Mr. Clyde-Smith's submission, rescind the

registration of Mr. Forrest's appointment as liquidator and declare the defendant "en désastre". It follows that the Viscount will now be responsible for winding up the affairs of the defendant. The cost of the first hearing with the present continuation will be paid by the defendant company.