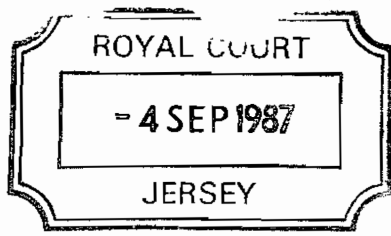

IN THE ROYAL COURT OF JERSEY

Before: Sir Peter Crill, CBE, Bailiff

87/45.

~~Between SINGLA & CO. Plaintiff~~

~~And BANK OF BARODA Defendant~~

In the matter of the Representation of Surjit Kurma Singla, carrying on business as "Singla + Company"
re Zaki Limited

The Bank of Baroda convened.

Advocate A. J. Dessain for ~~Plaintiff~~ Mr. Singla

Advocate R. J. Michel for ~~Defendant~~ the Bank of Baroda

This matter arises from a representation by Surjit Kumar Singla who practises as a firm of Chartered Accountants at New Broad Street House, 35, New Broad Street, London EC2, under the name of Singla & Company

Zaki Limited is a company incorporated in Jersey on the 21st November, 1979. On or about the 1st June, 1982, Zaki Limited purchased the freehold of 49, Berwick Street, London W1. In order to secure its indebtedness to the Bank of Baroda, a company, incorporated in India, having a place of business in England and authorised to carry on the business of banking, Zaki Limited gave two charges over the Berwick Street property.

On the 21st August, 1985, an Extraordinary General Meeting of Zaki Limited was held and a Resolution passed which was subsequently confirmed at a further Extraordinary General Meeting on the 10th September, 1985, whereby the company was dissolved and Singla & Co. was appointed Liquidator. On the 30th September, 1985 an application was received at the Commercial Relations Office from Zaki Limited to order the registration of the Resolution. The Judicial Greffier made an Act dated the 30th September, 1985, registering the Special Resolution. The terms of the Special Resolution are as follows:-

> "That the Company be dissolved and Messrs. Singla & Company BE AND ARE HEREBY appointed Liquidator of the Company for the purpose of winding-up the affairs and distributing the assets of the Company.
>
> THAT the Liquidator be hereby authorised to distribute the whole or any part of the assets of the company in specie.
>
> THAT the Liquidator be hereby authorised to appoint any person or persons as his Attorney or Attorneys, with power of substitution for the purpose of carrying out abroad all, or any, of this (sic) powers and duties as Liquidator of the company.
>
> THAT the powers of the Directors shall cease, except so far as the Company in General Meeting or the Liquidator sanction the continuance thereof, and subject thereto, that all powers of the Directors shall subject to the provisions of the Companies (Jersey) Law 1861 to 1968, vest in the Liquidator, who shall have the authority alone to witness the seal."

In November, 1985, the Bank of Baroda appointed Arunkumar Jashbai Patel as receiver pursuant to the terms of the charges and on or about the 11th April, 1986, the Bank instituted proceedings in England against Zaki Limited claiming a declaration that the charges were valid against the Liquidator notwithstanding that they had not been registered under Section 95 of the Companies Act 1948 of the United Kingdom (now Section 395 of the Companies Act 1985 of the United Kingdom). On the 27th April, 1986, Zaki Limited and Messrs. Singla & Co. instituted proceedings in England claiming that the charges were invalid because they had not been registered as required by English law.

The Bank of Baroda has challenged the validity of the appointment of Singla & Co. as Liquidator, and its ability to seek to contest the validity of the charges. On the 27th May, 1987, Singla & Co. obtained an Order from the High Court of Justice of England and Wales under the British Law Ascertainment Act 1859, as extended to the Island by Order in Council of the 31st May, 1910, whereby the High Court of Justice seeks the opinion of this Court on certain questions.

On the 12th June, 1987, the present Representation came before the Court for the first time and the Court ordered that a copy of it be served on Arunkumar Jashbai Patel and that he be convened to appear on the 19th June, 1987, when Advocate Michel appeared and advised the Court that the Prayer of the Representation should have requested that the Bank of Baroda be convened and not Mr. Patel, and, accordingly, Mr. Michel accepted service forthwith on behalf of the Bank. The matter was adjourned for argument until the 1st July, 1987. On that day Mr. Dessain appeared for Singla & Co. and Mr. Michel for the Bank of Baroda. By agreement of the parties each question was taken seriatim, and I shall deal with them accordingly.

I shall refer to the Companies (Jersey) Laws 1861 - 1968 as the Companies law.

Question 1

Do the laws of Jersey recognise the status of "Liquidator" in respect of a company incorporated under the Laws of Jersey?

There have been numerous cases in which the status of Liquidator has been recognised and indeed the Court has of its own motion appointed a Liquidator when companies have been unable to find one willing to act, or circumstances have required the Court to exercise its inherent jurisdiction. See for example the case of Hotel Beau Rivage Company Limited - v - Careves Investments Limited, 1985 - 86 JLR 70.

Question 2

If the answer to Question 1 is "Yes", who may act as the Liquidator of a company incorporated under the Laws of Jersey?

The Companies Law is silent, as likewise are the Articles of the company. There is no authority in point. Certainly, an individual may act as a Liquidator and in the vast majority of cases a single individual, often an accountant or a lawyer, is appointed. There have been many cases where the Court has approved the appointment of more than one individual as Liquidators. Non-resident Liquidators and foreign Liquidators have been appointed. There are cases where a limited liability company has been appointed as a Liquidator. It may be doubted whether a partnership can be appointed Liquidator; the named partners in a partnership may be appointed, but the appointment should be to them individually and not to the partnership as a firm.

However, in this case, Mr. Singla, an individual, has adopted a trading style of Singla & Company, and he is the sole proprietor. No question of partnership arises. The term "sole partner", although used commercially, is inept and misleading in such a context. (see Lindley on the Law of Partnership 15th Edition P 35). Although Singla & Company was nominated in the Resolution, the intention was to appoint Mr. Singla. Accordingly, if I were asked to order an amendment substituting his name for that of the Company, I should do so but, in any case, in my opinion, the appointment is really that of Mr. Singla as an individual and is valid.

I shall take Questions 3 and 4 together, which are:-

Question 3

What was the effect of the passing of the Resolution referred to in Paragraph 4 above ("the Resolution")?

Question 4

What was the effect of the delivery of the Resolution to the Judicial Greffier?

Article 27 of the Companies Law is in the following terms, (in translation. I ignore the so-called official translation, which is highly defective):-

"Every resolution of an ordinary or extraordinary general meeting of a Company shall be deemed to be a special resolution and shall have that effect if the following conditions are complied with:-

1. that the members or shareholders of the Company have been notified, by means of a properly served notice, of the intention to submit to that meeting the proposition which is the subject of the said resolution;

2. that the said resolution has been adopted by a majority of at least two-thirds of the votes cast;

3. that the resolution has been confirmed by an absolute majority of the votes cast at a subsequent general meeting duly convened and held not less than fifteen days and not more than thirty days after the date of the meeting at which the resolution was first adopted. A copy, under the seal of the Company, of every special resolution shall, under pain of being declared void, be sent to the Judicial Greffier who shall register it in the Register mentioned in Article 3."

The words in Article 27 (3) of the Companies Law are "sous peine de nullite". The literal translation is "on pain of nullity", but I believe the correct translation to be "under pain of being declared void". (see Harrop's Standard French and English Dictionary, Part One p575). In Jackson v Hurst (Mrs. Gray, formerly Jackson)(1970) J.J. 1285, the Royal Court held that the word "nul" in Article 10 of the "Loi (1851) sur les testaments d'immeubles" was a "moyen de nullite", that is to say that the will and the devise stood until they fell and they could be made to fall only by the "moyen de nullite" or ground of nullity, in other words by means of an action brought before the Court in due time to set aside the will or devise. In that case the Court also said, obiter, that the words "nul ab initio" in Article 42 of the "Loi (1850) sur la propriete fonciere" merely create a further "moyen de nullite".

In Deacon v Bower (1978) J.J. 39, the Royal Court decided that the words "nul et non avenu" in the judgment of the Court in ex parte Edouard Mauger (1870) 195 Ex 37 relating to a contract passed during a "remise de biens" meant not void, but voidable. In that case the Court distinguished "nul ab initio" from "nul et non avenu", but that is not material to the question asked here.

The only tenable view, as I comprehend it, is that Article 27 (3) calls upon the Judicial Greffier to discharge a ministerial duty and, accordingly, the Greffier is bound to register any document which purports to be a special resolution, provided it is authenticated. If the Company fails to cause it to be registered then it is voidable and it is open to any aggrieved person, e.g. a creditor, to take action before the Royal Court to have the special resolution declared void. But that right cannot, in my view, be exhaustive. The Greffier cannot pass judgment, for example, upon the identity of the persons present at the meetings, or the validity of the notice served on the shareholders or the number of votes cast or on the counting of those votes. Nor can the Court pass judgment on persons unheard or on issues untried.

However, insofar as a Special Resolution to dissolve a Company is concerned it seems that the words "sous peine de nullite" are somewhat meaningless, because Article 38 of the Companies Law applies.

Article 38 of the Companies Law, in translation, provides that:-

"A Company incorporated under this Law shall be dissolved:-

....

3. Where, at any time, the dissolution of the Company shall have been decided by a special resolution taken in general meeting, the dissolution shall be effective from the date on which an authenticated copy of the resolution shall have been lodged with the Judicial Greffier."

Clearly, therefore, there are no circumstances in which a Special Resolution to dissolve a Company need be declared void for lack of registration because, in any event, the dissolution is effective only from the date of delivery of the Special Resolution to the Greffier.

Thus, in answer to Question 3 the passing of the Resolution has no effect unless and until it is delivered to the Judicial Greffier, except that it records the intention of the Company in general meeting.

Article 39 of the Companies Law, in translation, provides that:-

"Commencing from the date of its dissolution, a Company incorporated under the present Law shall not be able to contract any transactions, nor incur any debts, nor enter into any agreements, except those that are essential to the winding-up and liquidation of the Company.

The persons who were members or shareholders of the Company at the date of its dissolution shall be liable jointly and severally and without limitation of responsibility, for all other transactions, undertakings, debts and agreements contracted in the name of the Company from its dissolution."

In answer to Question 4, the effect of the delivery of the Resolution to the Judicial Greffier, and thus of the registration of the Resolution is to dissolve the Company and, where a Liquidator is appointed, to vest in the Liquidator, in the lieu and stead of the Directors, the power to take all those steps that are essential to the winding-up and liquidation of the affairs of the Company.

Questions 5 and 6 are as follows:-

<u>Question 5</u>

Without prejudice to the generality of Questions 3 and 4 above, was Singla & Co., on the true construction of the terms of the Resolution, validly appointed by the Resolution to be the Liquidator of Zaki?

<u>Question 6</u>

If the answer to Question 5 is "Yes", does Singla & Co., on the true construction of the terms of the Resolution, retain the status of the Liquidator of Zaki?

In my opinion, the answers to both Questions 5 and 6 has to be in the affirmative. I have already expressed the view, in answer to Question 2, that the appointment of Mr. Singla, in his firm's name of Singla & Co. is valid. Prima facie, the Special Resolution is valid. I did not hear evidence as to whether all the requirements of Article 27 of the Companies Law were fulfilled but, on its face, the Special Resolution validly appoints Singla & Co. to be the Liquidator of the Company. Singla & Co., on the true construction of the terms of the Resolution, retains the status of the Liquidator of Zaki until the winding-up of its affairs and the distribution of its assets have been completed. I have no doubt that the Royal Court has and would exercise an inherent jurisdiction to remove a Liquidator if in any particular case there were sound reasons for doing so. In such event the Royal Court would, no doubt, appoint a new Liquidator to complete the winding-up and distribution and such Liquidator might well be the Viscount, as an Officer of the Court. But no matter has been disclosed to me requiring the investigation of the Court as affecting the status of the Liquidator of Zaki. There is no time limit (apart from the Court having the power to remove a Liquidator) on the term of office of the Liquidator.

Question 7

When, on the true construction of the terms of the Resolution, did, or does, the dissolution of Zaki occur?

The date of the dissolution of Zaki, subject to the answer to Question 8, was the 30th September, 1985.

Question 8

Does Zaki, on the true construction of the terms of the Resolution, continue to exist as a legal entity?

The Companies Law makes no provision for a company to continue to exist as a legal entity, except by inference. Moreover the statute makes no distinction between a dissolution, a winding-up and a voluntary liquidation. I refer again to Article 39 of the Companies Law which I cited in my answer to Question 4.

The words in that Article are echoed in Article 19 which, in translation, is as follows:-

"Every Company incorporated under the present Law, the number of whose members or shareholders shall be reduced to less than three and which, during a period of six consecutive months, shall continue with less than that number of members or shareholders, shall, at the end of that period, be dissolved without further legal process. The members or shareholders of whom the said Company was composed at the date of its dissolution shall be responsible jointly and severally and without limitation for all debts and transactions entered into in the name of the said Company from that date, except those that are essential to the winding up and liquidation of the affairs of the Company thus dissolved.

"Minors and interdicts who are members of a limited liability Company shall not be included in the number of the three shareholders required by the Law for the continuation of a Company."

It follows that after a company's dissolution, that is to say, upon the registration of a Special Resolution to dissolve the Company, it has to cease all business activities, except those permitted by Article 39. A line of Jersey cases suggest that the Court will not sanction the appointment of a Liquidator to wind-up a company until it has been dissolved. Equally, however, there are many examples of the words "dissolution" and "winding-up" being used indiscriminately by companies and of Special Resolutions in the terms of either word being registered at the Judicial Greffe. The word "dissolution" is used in Articles 6, 19, 38, 38A, and 39 of the Companies Law.

Subject to Articles 19 and 39, a company continues to exist as a legal entity but only through its directors or liquidator, who must take all proper and necessary steps to effect its winding-up and only for the purposes of the winding-up and distribution of its assets. It may therefore be said that, whilst the company itself has been dissolved, its legal entity is continued, for the restricted purposes of Articles 19 and 39.

Question 9

In the events which have happened, has Singla & Co., under the provisions of the Laws of Jersey capacity as the Liquidator of Zaki to challenge the validity of the First and/or Second charges?

If the challenges to the two charges are deemed by the Liquidator of Zaki, acting in good faith, to be essential for the proper winding-up of the Company, upon which I express no opinion, then the Liquidator of Zaki would have capacity to challenge their validity.

Question 10

Did Zaki, as a Company incorporated under the Laws of Jersey, have capacity to incur obligations as guarantors and/or to charge its real property in circumstances where Zaki did not itself receive any monies, or derive any commercial benefit therefrom?

Zaki has the power to charge its real property and/or to act as guarantors, having regard to paragraphs (a) (f) and (g) of Clause 3 of its Memorandum of Association.

A Jersey company, if it has the appropriate powers in its Memorandum, may exercise those powers in the United Kingdom. Clause 3 of the Memorandum is, in a sense, ambiguous, because some of the objects are expressly stated as extending to any part of the world and others are not. However, there is a "sweeping-up" provision at Clause 3 (ii) of the Memorandum which empowers the Company to do all or any of the foregoing objects in any part of the world. A general power is conferred by Article 105 of the Articles of Association upon Zaki's Directors. It follows, in my opinion, that the Directors of the Company had the necessary powers to charge its real property in the United Kingdom and to incur obligations as guarantors. Nevertheless the Royal Court will set aside the exercise of such Directors' powers if they were exercised for improper purposes (see Golder - v- Societe des Magasins Concorde Limited. Jersey Judgments 1967 - 1969 p721) where the Directors exercised their powers by effecting a sale in order fraudulently to defeat the claims of judgment creditors).

I was referred to Rolled Steel Products (Holdings) Limited v British Steel Corp and others (1984) BCLC 466. Paragraph (3) of the headnote to that case, at p468, is as follows:-

"(3) A clear distinction should be drawn between transactions which were beyond the capacity of a company and those which were in excess or an abuse of the power of directors. Whether or not a particular transaction was ultra vires, in the sense of being beyond the capacity of a company, must depend on a true construction of the company's memorandum of association. Although each provision in the memorandum was to be given its full effect, a particular provision might by its very nature be incapable of constituting a substantive object or its wording might indicate that it was intended only to constitute a power ancillary to the other objects.

Where a particular transaction was capable of being performed only as something incidental to the carrying out of a company's objects, it would not be rendered ultra vires merely because the directors, in entering into the transaction on behalf of the company, did so for purposes other than those set out in the memorandum. Such a transaction would bind the company because a company holds out its directors as having ostensible authority to enter into transactions falling within the powers expressly or impliedly conferred on it by its memorandum, unless a person dealing with the company had actual or constructive notice that the directors were exercising their powers for unauthorised purposes. On the facts, cl 3 (K) pf RSP's memorandum of association was not a substantive or separate object but was merely designed to confer on the company an ancillary power to give guarantees and grant security. And, therefore, although RSP was apparently capable of entering into the transactions with C Ltd., the power had been exercised for a purpose not authorised by RSP's memorandum, and C Ltd., and therefore BSC, was aware of this, and accordingly BSC could not rely on the ostensible authority of the directors and hold RSP to the transaction".

The judgment of Slade LJ, giving the first judgment, on what was conveniently called "the ultra vires point" is set out at pages 499 - 509 inclusive and need not be repeated here. The principles to be applied are also set out in the judgment of Browne - Wilkinson L.J. at pages 517 and 518.

Applying the principles to the present case I am satisfied that the purchase of real property, the charging of that real property and the giving of guarantees are all independent objects of Zaki and, therefore, are intra vires.

The further question, then, is whether the directors acted improperly, or in excess or abuse of their powers. I have no doubt that Zaki had the capacity to incur obligations as guarantor and/or to charge its real property in circumstances where Zaki did not itself receive any moneys or derive any commercial benefit therefrom. That, effectively, disposes of Question 10. But I think that I should add, by way of caution, that whilst there would be no question of the relevant transactions having been beyond the corporate capacity of Zaki, they might have involved breaches of duty on the part of directors and, thus, be liable to be set aside.

In Re Horsley & Weight Ltd (1982) 3 ALL ER 1045, at p1051, Buckley L.J. says this (at letter (d):

> "the doing of an act which is expressed (by the company's memorandum) to be, and is capable of being, an independent object of the company cannot be ultra vires, for it is by definition something which the company is formed to do and so must be intra vires".

And at p1052 (at letter(e):

"The objects of a company do not need to be commercial; they can be charitable or philanthropic; indeed they can be whatever the original incorporators wish, provided that they are legal, nor is there any reason why a company should not part with its fund gratuitously or for non-commercial reasons if to do so is within its declared objects".

As a matter of construction I find that Zaki is not entitled, by its objects, to part with its funds gratuitously, except to the limited extent contained in Clause 3 (ff) of its memorandum.

I was also referred to Rosemary Simmons Memorial Housing Association Ltd v United Dominions Trust Ltd (Bates & Partners (a firm), third party) (1987) 1ALL ER 281. However, in my view, that case turned on its particular facts, since it dealt with implied powers to give away assets of a charitable body to a non-charitable body. The Court there found that it could not be implied that a charitable housing association had corporate capacity "gratuitously" to guarantee the liabilities of a third party with whom it had no legal tie. The Court found that it was beyond the corporate capacity of the plaintiff to give the guarantee to the defendant and accordingly the guarantee and mortgages were void. The principal question in that case as Mervyn Davies J said, was whether or not a gratuitous guarantee by a charitable housing association was valid. There was no express reference to guaranteeing either as an object or as a power. So the Court had to consider what if any power to guarantee might be implied. Accordingly, that case has no application to the instant case.

The question addresses itself to the receipt of monies or the derivation of commercial benefit from the transactions. Jersey law requires that there should be a 'cause' for a promise which is to be enforceable. The exact meaning of 'cause' in this doctrine has not been defined. (see Gallichan v Gallichan (1954) Jersey Judgments 1950 - 66, 57). In Granite Products Ltd. v Renault (1961) Jersey Judgments 1950 - 66, p163, the Court said, at p169 that:-

"In our opinion there was sufficient proper 'cause' for this agreement. 'Cause' is not the same thing as 'consideration', an element necessary to the validity of a contract in the United Kingdom, but not so necessary to a contract here. The 'cause' for this agreement was, in our opinion, the continued employment and lodgement of the defendant."

In Wightman v Cathcart Properties Ltd (1970) Jersey Judgments 1970 - 71 p1433, at p1441, the Court said that:-

"Such agreement of variation would not be enforceable unless there was sufficient proper 'cause'. 'Cause' is not the same thing as 'consideration' an element necessary to the validity of a contract in the United Kingdom, but not so necessary to a contract in Jersey.

We think that there was sufficient proper 'cause' here and that it consisted of three benefits received by the plaintiff, to none of which he was entitled as of right - (1) an additional three weeks paid leave; (2) permission to the plaintiff to take the whole of his leave at once; (3) payment of two months salary in advance."

Therefore, although Zaki might not itself receive any money or derive any commercial benefit from giving a guarantee it is possible, for example, to contemplate a situation where the directors of Zaki acting in good faith, and in the best interests of Zaki, would have given a guarantee to a third party against a promise, by that third party, of future business. If the guarantee was given gratuitously and the Bank of Baroda had actual or constructive notice of that fact and the Directors were unable to show a 'cause' for the guarantee having been given in good faith and in the best interests of Zaki, and that, on the contrary, the Directors had abused their powers for the benefit of the Bank of Baroda or other third parties then the Royal Court would, in my opinion, set aside the transaction.

Cases Cited in the Judgment.

Hotel Beau Rivage Company, Ltd. -v- Careves Investments, Ltd: (1985-86) JLR 70.

Jackson -v- Hurst (Mrs Gray formerly Jackson) (1970) J.J. 1295

Deacon -v- Bower (1978) J.J. 39.

Crowder -v- [illegible] Limited (1967-1969) J.J. 721.

[illegible] Products (Holdings) Ltd -v- [illegible] (1984) [illegible]

Re Horsley and Weight, Ltd (1982) 3 All E.R. 1045.

Rosemary Simmons Memorial Housing Association -v- United Dominions Trust Ltd (Bates & Partners (a firm), third party) (1987) 1 All E.R. 281

Gallichan -v- Gallichan (1954) J.J. 1950-66, 57.

Granite Products, Ltd -v- Renault (1961) J.J. 1950-66, p.163.

Wightman -v- Cathcart Properties, Ltd: (1970) J.J. 1970-71, p.1433.

Legislation Construed.

Companies (Jersey) Laws, 1861-1968.

Further Authorities Cited (Cases, Legislation, and Texts.)

1. British Law Ascertainment Act, 1859 and Receuil des Lois (1908 - 1915) confirming Registration.

2(a) Companies Act, 1948. Section 95
(b) Companies Act, 1948. Section 416
(c) Companies Act, 1981. Section 109
(d) Companies Act, 1985. Section 395
(e) Companies Act, 1985. Section 699

~~3. The Companies (Jersey) Laws, 1861 - 1968.~~

4. In Re: Representation of Abraham de Gruchy & Company Limited (1972) J.J. Vol.1 2265.

5. Le Gros: Traite du Droit Coutumier de L'Ile de Jersey. p.456.

~~6. Hotel Beau Rivage Company Limited v Careves Investments Limited (Unreported) 29th January, 1985.~~
~~a) Act of the Royal Court~~
~~b) Judgement of the Court~~

7. Stephen Matthews Limited (Unreported) (1980)

8. Asplet -c- C. Asplet & Company Limited (1893) 216 EX 49 122.
   a) Act of the Royal Court dated 2nd June, 1893
   b) Translation

9. Le Breton -c- Gallichan (1891) 214 EX 559
   a) Act of the Royal Court dated 29th August, 1891

10. Huelin -c- de la Haye (1892) 215 EX 385, 435
   a) Act of the Royal Court dated 12th September, 1892
   b) Act of the Royal Court dated 15th October, 1892

11. Laverny -c- Laverny (1890) 214 EX 91

12. Representation of T. McMurray re Killaloe Investments Limited (1978) 265 EX 61

13. Application of Jannine Singer (nee Demange) re Cheevey Limited (1980) EX 183

14. Lindlay on the Law of Partnership, 15th Edition, pp 34 - 38.

15. Harrops French and English Business Dictionary Part 1, pp 54, 104, 109 & 230.

16. Harrops New Shorter French and English Dictionary.

17. Bowstead On Agency, 15th Edition pp 127 - 129

18. Palmers Company Law, 23rd Edition, Volume 1 pp 188 - 192; 826 - 829; 852 - 855; 870.

19. Gore-Browne on Companies, 44th Edition, para 26.4