

A Re Assico Engineering Ltd (in liq.).

Chancery Division.

John Martin QC (sitting as a deputy judge of the High Court).

Judgment delivered 2 February 2001.

- B** *Winding up – Liquidator – Appointment of liquidator – Creditors' voting rights – Creditors' rights disputed – Proofs admitted marked objected to – Creditors voted for appointment of liquidator – Other liquidator appointed – Application to disallow purported creditors' votes for appointment of liquidator – Whether votes should be allowed – Test to be applied on evidence – Insolvency Rules 1986 (SI 1986/1925), r. 4.70(3).*

- C** **This was an application which was in substance an appeal against a decision of the chairman of a creditors' meeting to allow two purported creditors of a company to vote on the appointment of a liquidator to the company.**

- D** **The company was incorporated in March 1989 to manufacture engineering products. In 1991 Mr Assi was appointed director and his wife company secretary. In 1995 Mr Assi resigned his directorship having been disqualified from being a company director for a period of eight years, and was eventually replaced as director by his wife. The company ceased to trade in August 1999 and in the following month its landlords excluded it from its business premises. Following an aborted attempt to put the company into creditors' voluntary winding up, a compulsory winding-up order was made in relation to the company in April 2000 on a petition by two employees for non-payment of wages. On 22 May at a creditors' meeting to appoint a liquidator, Mr and Mrs Assi lodged proofs of debt for unpaid wages. The landlords lodged proofs of debt for arrears of rent. Mr and Mrs Assi objected to the landlords' proofs and the landlords objected to the Assis' proofs. The chairman at the creditors' meeting marked both sets of proofs as objected to under the procedure in r. 4.70(3) of the Insolvency Rules 1986 and allowed the votes, subject to them being declared invalid if the objections were sustained on appeal. The candidate supported by the landlords was appointed liquidator. Mr and Mrs Assi appealed against the decision to allow the landlords to vote, on the basis that the large part of the proof, which was for £16,000, was for rent up to the liquidation when they argued that the tenancy have been forfeited when the company was excluded from the premises in September 1999. The landlords issued their own application as an appeal against the chairman's decision to allow Mr and Mrs Assi to vote at the meeting in the sums of £12,536 and £10,070 respectively, a total of £22,606. Although the Assis' candidate was not appointed liquidator, it was apparent that if the Assis' challenge to the landlords' vote was successful and the landlords' challenge to the Assis' vote was unsuccessful, then the Assis' candidate would become liquidator. The instant application concerned the landlords' challenge to the Assis' votes in respect of £22,606 alleged unpaid wages.**

- G** *Held, dismissing the landlords' application:*

- H** **1. The sole question for decision was whether the Assis could satisfy the court on a balance of probabilities and the totality of the evidence that they were creditors of the company (Re a Company No. 004539 of 1993 [1995] BCC 116 applied). In the absence of proper records the case turned on the oral evidence of Mr Assi and an account book alleged to have been maintained by Mrs Assi.**
- 2. Although Mr Assi's evidence was unsatisfactory and he was frequently evasive, those factors could be taken fully into account but beyond that the court would not go. A former director of the company who was an independent and reliable witness recognised the accounts book as one into which Mrs Assi had transcribed payroll figures and he also knew that the company had reached an agreement with all its employees that a proportion of their wages be postponed until the company was able to pay them. The**

accounts book should be taken at face value and the wages entries did not have the appearance of forgeries. Mr Assi had little motive for a false claim: it appeared that the idea that he might try to influence the choice of liquidator had not previously occurred to him, nor would he gain anything financially as neither he nor his wife claimed to be preferential creditors and the dividend for unsecured creditors was likely to be small. Also, the Assis' claim for unpaid wages was lodged soon after the start of the liquidation, at which stage there was no reason for the Assis to know if the claim was capable of influencing the choice of liquidator (and at that stage the liquidators had only put in a small claim). Mr Assi stated in cross-examination that he did not mind who the liquidator was, that he had merely picked his nominee at random and his true concern was that the landlords should be shown to be 'bogus creditors'.

3. The application should be dismissed for the purpose only of deciding whether or not the Assis were entitled to vote. They were so entitled and any liquidator's investigation might throw a different light on whether the Assis were entitled to be regarded as creditors for other purposes.

The following case was referred to in the judgment:

Company No. 004539 of 1993, Re a [1995] BCC 116.

Daniel Lightman (instructed by Ian Guyster & Co) for the applicant landlords.

The respondents appeared in person.

JUDGMENT

John Martin QC: This is one of two similar applications arising in the liquidation of Assico Engineering Ltd ('the company'). In substance, although not in form, the applications are appeals against the decision of the chairman of a creditors' meeting to allow certain creditors to vote on the choice of liquidator.

The company was incorporated under the name Assico Dynamics Ltd on 29 March 1989. Its business was the manufacture of engineering products. In 1991 Mr Surjit Assi was appointed a director and his wife, Mrs Suchit Assi became the company secretary. In August 1995 Mr Assi was disqualified from being a company director for a period of eight years, and shortly thereafter he resigned as a director of the company. Mr Frederick Haslam became a director for a little under a year, being replaced first by Mrs Assi and then, from March 1999, by Mr and Mr Assi's son, Tony.

The company ceased to trade at the end of August 1999 and in the following month its landlords, two brothers, Suprinder Singh Bhachu and Tarsan Singh Bhachu, excluded it from its business premises. Steps were taken to put the company into creditors' voluntary liquidation; but these steps failed, and in February 2000 two employees petitioned to wind up the company for non-payment of wages. A winding-up order was made on 12 April 2000.

On 22 May 2000 a meeting of creditors was held pursuant to s. 136(4) of the *Insolvency Act* 1986. Its purpose was to choose a liquidator to replace the official receiver. Mr and Mrs Assi lodged proofs of debt for unpaid wages, and the Bhachu brothers lodged a proof for arrears of rent. The Bhachu brothers objected to the Assis' proofs and Mr Brian Davis, who was proxy holder for five creditors including the Assis, objected to the proof lodged by the Bhachus.

The chairman of the meeting, following the procedure set out in r. 4.70(3) of the *Insolvency Rules* 1986 (SI 1986/1925), marked the proofs as objected to and allowed the Assis and the Bhachu brothers to vote, subject to their votes being declared invalid if the objections were sustained on appeal. The effect was that the candidate supported by the Bhachus, Jeremy Berman of Berley & Co, was appointed liquidator.

On 31 May 2000 Mr Davis issued an application effectively appealing the decision to allow the Bhachus to vote. The ground was that the large part of the proof, which was for £16,000, was for rent up to the liquidation; whereas according to Mr Davis the tenancy had been

A forfeited when the company was excluded from the premises in September 1999. This application was defective, since Mr Davis had insufficient standing as a mere proxy holder; but on 19 January 2001 I substituted Mr Assi as applicant. The application was not otherwise before me and is due to be heard by another judge later today.

B On 30 June 2000 the Bhachu brothers issued an application of their own. It was this application which I heard and to which this judgment relates. In substance their application is an appeal against the chairman's decision to allow Mr and Mrs Assi to vote at the meeting. Mr Assi's proof was for £12,535.66 and Mrs Assi's for £10,069.94, a total of £22,605.60.

C At first sight there is no point in the Bhachus pursuing this application since the Assi's choice of liquidator, Mr Patel of D M Patel & Co, was not elected even with their votes taken into account. However, the key is in the voting figures. Creditors totalling £37,115.63 voted for Mr Berman and creditors totalling £32,192.26 for Mr Patel. If the challenge to the Bhachus' vote succeeds, but the Assi's votes stand, nearly £16,000 would have to be deducted from Mr Berman's votes, making Mr Patel the winner. Conversely, if the Bhachu's application succeeds, Mr Berman's appointment would stand even if the application to disqualify their own vote also succeeds, for less than £10,000 would have voted for Mr Patel as against over £21,000 for Mr Berman. This application is accordingly a form of insurance against the possibility that the Bhachus' debt will be almost entirely disqualified – a possibility which, on the limited amount I have seen, certainly cannot be wholly discounted.

D The sole question which arises for decision on the application before me is whether or not Mr and Mrs Assi have satisfied me, on a balance of probabilities and on the totality of the evidence before the court, that they are creditors of the company: see *Re a Company No. 004539 of 1993* [1995] BCC 116. With some hesitation I have come to the conclusion that they are and that the appeal should be dismissed.

E As I have said, the debts claimed by Mr and Mrs Assi are in respect of wages. One would expect a claim for wages to be readily capable of proof or disproof by reference to the company's records, but the position is greatly complicated by the fact that a substantial number of its books are now missing. There was something of a dispute about this which I was unable to resolve. The Bhachus suggested that the books had been handed to Mr Assi by the firm of accountants, Oury Clark, which had acted in relation to the abortive voluntary liquidation; whereas Mr Assi suggested that the books were still in the company's premises, inaccessible to him because the locks had been changed by the Bhachus. The assistant official receiver told me that a representative of the official receiver had collected five boxes of records from the company's premises when the compulsory liquidation began, but that there appeared to be no wages records among them; that Oury Clark had no record of having had the company's books and claimed never to have had them; and that Oury Clark thought that some unidentified records had been taken by Mr Assi when the voluntary liquidation failed. It seems to me most likely that the main records were indeed provided to Oury Clark in the context of the intended voluntary liquidation; but what happened to them after that, I cannot tell. I do not, however, accept the suggestion that Mr and Mrs Assi now have them.

G In the absence of any proper records the Assis' case turns on two things: the oral evidence of Mr Assi, and an account book said to have been maintained by Mrs Assi. The account book, which was produced to the official receiver only in August 2000, contains on a few consecutive pages in the middle of the book what appear to be wage arrears from 1998 onwards. These pages are surrounded by blank pages which are themselves surrounded by other entries. A page is devoted to each of Mr and Mrs Assi. That for Mr Assi shows accumulated arrears of £12,535.66 by August 1999 and that for Mrs Assi shows arrears of £10,069.94. These amounts correspond to the debts claimed in the disputed proofs. There are also pages for other employees of the company including Messrs Powell, Roopra and Sehmi, all of whom gave evidence before me.

H I return later in this judgment to the weight to be given to the account book.

As to Mr Assi's oral evidence, it is right to say that it was in many respects unsatisfactory. He was frequently evasive; and on one important matter, the provision of information for the statement of affairs in the intended voluntary liquidation, in which neither he nor his wife appeared as creditors, his oral evidence differed from what was said in his witness statement without it being at all clear which, if either, was correct. Moreover he was unable to provide adequate explanations for substantial payments made by the company, such as cheques drawn to cash or to 'The barman' at the time of Tony Assi's wedding, which might represent payments by the company to him or his family far in excess of the amounts he and his wife now claim.

The evasive way in which Mr Assi dealt in his evidence with these and similar matters is relevant to the view I take of Mr Assi's credibility, and I take it fully into account for that purpose. Beyond that, however, I am not prepared to go. It is certainly the case that the liquidator, whoever he turns out to be, will have matters to investigate in relation to the conduct of the company's affairs and the part played by Mr Assi in them. I am not, however, prepared to regard any of the matters raised by the Bhachus as sufficiently clearly established at this stage as to amount to a set-off or cross-claim against the amount the Assis say is due to them for wages. The documents put before me are a selection made by the Bhachus from material to which Mr Berman allowed them access. There has been nothing approaching full disclosure, even of the documents that the liquidator has got; and the possibility remains that further accounting records of the company will turn up. In these circumstances I think that it would be premature and potentially unfair to take a firm view of what the documents show. To take one example only: Mr Assi was cross-examined about an invoice purporting to be from the Bhachus' timber supply business, the Bhachus suggesting that it was a forgery. However Mr Haslam, who as I have said was a director of the company in 1998 and 1999, instantly and without prompting recognised the invoice as being in respect of timber staging; and his evidence was particularly telling because he had not been in court when Mr Assi was cross-examined on this topic.

On a more restricted level there were problems with Mr Assi's evidence which went directly to his claim to be a creditor. He could not say what agreement had been made as to the amount of his wages, and both he and his wife had failed to include any claim to wages in the statement of affairs prepared for the abortive voluntary liquidation. Moreover there was no clear or adequate explanation for Mrs Assi's failure to give evidence about the accounts book beyond an assertion that she was unwell, although she was not too unwell to try to arrange for others to give evidence on her behalf.

Despite these problems, although with some hesitation because of them, I have as already indicated decided that Mr and Mrs Assi's claims are well founded. There are three main reasons for that view.

First, Mr Haslam's evidence provided important support for the Assis' case. Mr Haslam's witness statement was produced very late in the day, and initially he was not present for cross-examination; but when he did attend on the second morning of the hearing I thought it right to allow him to give evidence, while bearing in mind that Mr Lightman might not have had a full opportunity to prepare his cross examination. I have no hesitation in accepting Mr Haslam as a witness of truth who was largely disinterested and plainly reliable. He recognised the accounts book as one into which he had frequently seen Mrs Assi transcribing figures from the company's PAYE records; and, although he could not speak to the precise figures, he went a long way towards authenticating the accounts book and the information in it, in particular stating that in his view the information in the book reflected that in the company's full records. He was in no doubt that Mr and Mrs Assi were creditors, having agreed to postpone payment of their wages frequently while he was a director. On this last point he provided evidence – which contradicted that given by Messrs Powell, Roopra and Sehmi, but which I nevertheless accept in preference to theirs – that he had reached an agreement with all of the employees that a

A proportion of their wages would be postponed until the company was able to pay them. Such an agreement provides a reason for the entries in the accounts books showing arrears of wages for the employees.

B Secondly, I consider that the accounts book can be taken at face value. I have already mentioned Mr Haslam's evidence; but even that evidence leaves open the possibility that the entries were forgeries. I do not think that is likely, however. The wages entries do not have the appearance of having been made up after the event. Moreover the amounts shown for the other employees I have mentioned do not tally with the amounts they have claimed in their proofs in the liquidation. Much was made of this fact by Mr Lightman in support of his submission that no reliance could be placed on the figures shown as owing to the Assis; but to my mind it tends the other way. If the entries were forged, they would have been made up to support the erroneous claim made by Mr and Mrs Assi in the liquidation. Given that the book was not produced until August 2000 there would have been ample opportunity to produce a forgery which matched in every respect the claims made by the other employees so as to give spurious authenticity to the Assis' claim, but that was not done. Despite Mr Assi's difficulty in explaining the inconsistencies, I regard them as supportive of his case.

C Thirdly, I cannot see what motive the Assis have for advancing a false claim. On the face of it the obvious one is to procure a liquidator sympathetic to their interests; and as Mr Lightman remarked, Mr Assi at least had some experience of hostile liquidators. But when this motive was put to Mr Assi in cross-examination his answer, that he did not mind who the liquidator was, that he had merely picked Mr Patel out of the *Yellow Pages* and that his true concern was that the Bhachus should be shown to be 'bogus creditors' 'had the ring of absolute honesty (unlike, I have to say, many of his other answers). It seemed to me clear that the idea that he might be trying to influence the choice of liquidator had not previously occurred to him, even though it had been put in the forefront of the Bhachus' written evidence. Nor is he likely to gain much financially: neither he nor his wife claims to be a preferential creditor, and he acknowledged that the dividend for unsecured creditors is likely to be small. Moreover, the chronology seems to me to be on his side. The claim for arrears of wages was lodged soon after the start of the liquidation. At that stage there was no reason for the Assis to know if the claim was capable of influencing the choice of liquidator. In particular there was no reason for them to suppose that the Bhachus had put in a large claim: in the voluntary liquidation they had included a claim only for £600. When it became clear that the Bhachus were advancing what D Mr Assi regarded as an unjustified claim it was he, via Mr Davis, who appealed the chairman's decision. He clearly feels strongly about the exclusion of the company from its premises and the retention within them of valuable machinery which he says belongs to another of his family's companies; and I am satisfied that the claim for rent after the exclusion was something he regarded, rightly or wrongly, as wholly unwarranted. The Bhachus' retaliation came a month later, and Mr and Mrs Assi have simply been caught up in defending it.

E For these reasons I dismiss the appeal. It is however important that it should be understood that I am doing no more than deciding whether or not the Assis were entitled to vote. I am satisfied on the material available to me that they were. I have however remarked on the existence on the one hand of circumstances which a liquidator is likely to want to investigate, and on the absence on the other of the major financial records of the company. These investigations and records are capable of throwing a quite different light on whether Mr and Mrs Assi are entitled to be regarded as creditors for other purposes; and nothing I have said is intended to prevent a different view of the matter being taken if different material emerges.

H

(Application dismissed)
