

IN THE COURT OF APPEAL OF NEW ZEALANDC.A. 277/84  
C.A. 285/84

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THE QUEEN

v.

GEOFFREY MOUNTFIELD BENNETT  
JOHN BRIAN KEANE

Coram: Cooke J. (presiding)  
Somers J.  
Savage J.

Hearing: 19 March 1985

Counsel: M.E.J. MacFarlane for Appellants  
G.L. Lang for Crown

Judgment: 28 March 1985

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JUDGMENT OF THE COURT DELIVERED BY SOMERS J.

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Geoffrey Mountfield Bennett and John Brian Keane apply for leave to appeal against their convictions in the District Court at Napier on charges that between 18 February 1981 and 6 November 1981 being directors of Bennett Keane and White Ltd. they failed to take all reasonable steps to secure compliance by that company with the requirements of s.151(1) and (2) of the Companies Act 1955 as to the keeping of accounting records.

The company, Bennett Keane and White Ltd. was formed on

18 February 1981, the first date mentioned in the indictment. It acquired the Criterion Hotel in Napier in April 1981, was put in receivership on 2 November 1981, and ordered to be wound up by the Court on 28 April 1982. The receiver (who later became liquidator) prepared accounts which showed the company had been trading at a loss and at 27 January 1982 had liabilities exceeding assets by about \$80,000. The company had a share capital of \$60,000 divided into 60,000 shares of \$1 each. These were subscribed for equally by the two applicants and one White. All three were directors but the applicants were in day to day management at Napier. There is a difference of opinion between the liquidator and the two applicants as to whether the shares of the latter are paid up.

The case against the two applicants depended upon the evidence of Mr. Palairret, the receiver and liquidator and an experienced Chartered Accountant. He outlined the records and papers he uplifted from the Hotel, which was the registered office of the company, on his appointment as receiver. These comprised items such as invoices, bank statements, receipts, bank lodgment books, cheque butts, debit cards, wages records and the like. Other information necessary to ascertain the financial state of the company was obtained by Mr. Palairret from the solicitors who acted for the company, from solicitors who acted for some secured creditors, from creditors themselves and from the vendor of the hotel.

Mr. Palairret said there were no records which enabled him to ascertain whether share capital was paid. The cash records of

the company showed payments to it by Bennett and Keane of a sum of \$29,710 on an unrecorded day some time on or after 24 August 1981 and without any other record save a handwritten diary note some months before, and an earlier payment of \$6,000 the only details about which are apparently on the drawer's cheque butt. Mr. Palairret also said that there was no summary of debtors, no summary of creditors, no summary of transactions since trading began, no records of stock, no records of regular stock taking, and no bank reconciliations. He said it took him two weeks to ascertain the financial position of the company.

Before turning to the grounds of appeal we set out material parts of s.151 of the Companies Act 1955 as they were enacted by the Companies Amendment Act 1980. They are in similar vein to the provisions of s.12 of the Companies Act 1976 (U.K.) and s.267 of the Companies Act 1981 (Cth) and were recommended by the special committee to review the Companies Act in March 1973 - the Macarthur Committee - see paras. 233-239 of the Report.

"151.(1) Every company shall cause to be kept accounting records that-

- (a) Correctly record and explain the transactions of the company; and
- (b) Will at any time enable the financial position of the company to be determined with reasonable accuracy; and
- (c) Will enable the directors to ensure that any balance sheet, profit and loss account, or income and expenditure account of the company complies with section 153 of this Act; and
- (d) Will enable the accounts of the company to be readily and properly audited.

(2) Without limiting the generality of subsection (1) of this section, accounting records kept pursuant to that subsection shall contain-

- (a) Entries from day to day of all sums of money received and expenses by the company and the matters in respect of which the receipt and expenditure takes place; and
- (b) A record of the assets and liabilities of the company; and
- (c) Where the company's business involves dealing in goods,-
  - (i) A record of all goods purchased, and of all goods sold (except those sold for cash by way of ordinary retail trade), showing the goods and the sellers and buyers in sufficient detail to enable the goods and the sellers and buyers to be identified; and all invoices relating thereto; and
  - (ii) Statements of stock held by the company at the end of each financial year thereof, and all records of stocktakings from which any such statement of stock has been, or is to be, prepared; and
- (d) Where the company's business involves the provision of services, records of the services provided and all invoices relating thereto.

(3) The accounting records shall be kept at the registered office of the company or at such other place as the directors think fit:

"Provided that if accounting records are kept at a place outside New Zealand there shall be sent to, and kept at a place in, New Zealand such accounts and returns with respect to the business dealt with in the accounting records so kept as will disclose with reasonable accuracy the financial position of that business at intervals not exceeding 6 months and will enable to be prepared in accordance with this Act the company's balance sheet, its profit and loss account or income and expenditure account, and any document annexed to any of those documents giving information which is required by this Act and is thereby allowed to be so given.

(7) Any company that contravenes this section, and any officer of a company who fails to take all reasonable steps to secure compliance by the company with the requirements of this section, or who has by his own wilful act been the cause of any default by the company thereunder, commits an offence and shall, in respect of each offence, be liable on conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding \$1,000:

Provided that-

- (a) In any proceedings against a person in respect of an offence under this section consisting of a failure to take reasonable steps to secure compliance by the company with

the requirements of this section, it shall be a defence to prove that he had reasonable grounds to believe and did believe that a competent and reliable person was charged with the duty of seeing that those requirements were complied with and was in a position to discharge that duty; and

- (b) A person shall not be sentenced to imprisonment for such an offence unless, in the opinion of the Court dealing with the case, the offence was committed wilfully.

It is not necessary for the disposition of this case to embark on any extensive analysis of these provisions. We observe however that the word 'kept' in ss(1) in the phrase 'Every company shall cause to be kept accounting records...' is not, as was contended for the applicants, limited to retaining or storing such records as happen to come into possession. It imports as well the obligation to create those records necessary to conform to the descriptions in ss(1) and (2) which are not already in existence and retained.

For the applicants it was submitted that the District Court judge erred in law in seven matters in his direction to the jury and that in consequence the verdicts of the jury could not stand. Some of the matters raised lose their force by reason of the construction we put upon the word 'kept'; others appear to us to have no sufficient basis to merit discussion. We confine ourselves to three matters.

The first is the contention that the payment of share capital by shareholders is not a transaction of the company as that phrase is used in s.151(1)(a). Such a payment is undoubtedly a transaction between shareholder and company and must therefore we

consider be a transaction of the company. Similarly other dealings between company and shareholder are properly so described, as for example loans by and to shareholders and, even more in point, repayments of capital upon an authorised reduction. If there were any doubt it is clearly resolved by s.151(2)(a) which requires accounting records to include entries from day to day of moneys received and the matters in respect of which the receipt takes place. The sums here asserted to have been paid as share capital are not evidenced by any such accounting record as s.151 contemplates.

Next it was said the judge failed to direct the jury that s.151(3) permits accounting records to be kept at a place other than the registered office. (This is to assume, as may well be the case, that records may be kept in more places than one and that no formal resolution of directors is necessary to sanction that). The short answer is that no such issue arose at the trial. The contest was not as to where accounting records were kept but as to whether those required to be kept were kept at all. It was never suggested that all records had to be kept in one place.

The third point is the submission that the jury ought to have been told that the company was not obliged by s.151 to make and retain summaries of its financial position. It will be recalled that Mr. Palairret noticed the absence of summaries of debtors, creditors, and transactions since trading commenced. In cross-examination he said -

"I am quite clear in my mind where a company is in

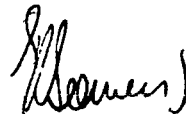
financial difficulties the requirement for summaries goes beyond good accounting practice and while I don't wish to give opinion as lawyer I think that the requirements of s.151 do require summaries of the kind I referred to when a company finds its financial position deteriorating".

In his summing up the judge, in effect, left it to the jury to determine whether, in the circumstances of the company as disclosed by the evidence, the accounting records ought to have included summaries of the kind mentioned. That we consider was an appropriate direction.

Section 151(1) does not stipulate the accounting records to be kept save by the purposes they are to serve and the information they are to provide. What is necessary will vary with the nature of the business and the urgency and state of its affairs.

Further than this we do not at present go. On some future occasion it may be necessary to decide whether among the objects of s.151 is that of having the management of a company know its financial state at all times - see on that Manning v. Cory [1974] W.A.R. 60, 62-63.

We are of opinion that the jury were appropriately directed in this case and that there is no substance in the points taken on their behalf. Accordingly leave to appeal is refused.



Solicitors -

Sainsbury, Logan & Williams, Napier for Appellants  
Crown Solicitor, Napier