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IN THE SUPREME COURT OF NEW ZEALAND
HAMILTON DISTRICT
IN BANKRUPTCY

G.R.74/66

IN THE MATTER of JAN MAARTEN VAN DER LEEDEN of Rotorua, Logging Contractor, a Bankrupt.

BETWEEN HANNAHS BAY GARAGE LIMITED a duly incorporated company now in voluntary liquidation suing by EVAN ANTHONY DAVIS of Rotorua, Public Accountant, the Liquidator thereof

APPELLANT

A N D THE OFFICIAL ASSIGNEE IN BANKRUPTCY of the property of Jan Maarten Van Der Leeden having his office at Rotorua

RESPONDENT

Hearing: 14th September 1966

Counsel: Bishop for Appellant
Jamieson for Respondent

Hearing: 26th August, 1968

Counsel: Bishop for Appellant
Sandford for Respondent

Judgment: 30th August 1968

JUDGMENT OF MOLLER, J

Prior to 1958 JAN MAARTEN VAN DER LEEDEN (hereinafter called "the bankrupt") was a garage-proprietor in Rotorua, and, in 1958, he decided to form his business into a private company. This company, Hannahs Bay Garage Ltd. (hereinafter called "the company"), was registered on 31st July 1958 with a nominal capital of £4,000 divided into 4,000 shares of £1 each. Of these the bankrupt held 3999, the remaining share being held by an accountant called Burnett. The company went into voluntary liquidation on 2nd March 1964, and Mr E.A. Davis, a public accountant in Rotorua, is now the liquidator.

At the time the company was formed one of the assets in the bankrupt's business was a section of land upon which the garage buildings were erected; and, on 20th May 1964, the bankrupt

signed a transfer of this property to the company, this transfer being registered on 7th August of that year.

On 4th June 1965 the bankrupt was adjudicated bankrupt as the result of a creditors' petition, and, on 16th June, Mr Davis, as liquidator of the company, filed with the Official Assignee a proof of debt in the bankrupt's estate in respect of the sum of £4613: 17: 10d. The way in which this alleged debt came to be owing was shown in a statement of account which set out the financial dealings between the bankrupt and the company and which was attached to the proof.

In an affidavit filed in these proceedings, Mr Burnett says that, at the time of the formation of the company, the bankrupt's instructions to him were that the company "was to take over the business and the assets" of the bankrupt's business and "to assume the liabilities .....as a going concern." He adds that the assets to be taken over were to include "the land and the garage building". Mr Burnett then opened up books for the company, adopting, with the full approval of the bankrupt, the book value of the assets as they appeared in the bankrupt's balance sheet at 31st July 1958 as the price at which they were to be acquired. The total was £6391: 1: 10d., and the evidence shows clearly that the land and buildings accounted for £3198: 4: 9d. of this sum. No written agreement for the sale and purchase of these assets was ever entered into between the bankrupt and the company, or between him and a trustee for a company to be formed. No cash payment was made by the company to the bankrupt in respect of them, and the bankrupt made no cash payment to the company for the 3999 shares that he received.

Because of these dealings the statement of account attached to the proof of debt begins by crediting the bankrupt with the sum of £6391: 1: 10d., from which are then deducted the liabilities taken over at the same time. All these items are shown as having reference to the year 1958. The bankrupt remained as an employee of the company, and for

the year ended 31st March 1959, he is debited with "Cash Withdrawals" but not credited with any salary or dividend. In the year ended 31st March 1960, he is debited with "Cash Withdrawals", but credited with salary and dividend. In the following two years the picture is the same, except that there was no dividend. In the year ended 31st March 1963, it is again a matter of debiting the bankrupt with "Cash Withdrawals", and crediting him with salary, dividend, and commissions. He is finally debited with "Cash Withdrawals", without any credits, in respect of the period from 31st March 1963 to 11th March 1964. At this point the statement shows an amount owing to the company of £3368: 17: 9d. However, while still remaining employed by the company, the bankrupt carried on business on his own account as a logging contractor, and, it seems, from time to time purchased a number of his requirements in this connexion from the company. As a result of this he was indebted to the company for a further sum of £1245: 0: 1d. The two figures I have just mentioned, when added together, make £4613: 17: 10d., the amount shown in the proof of debt.

On 24th February 1966 the Official Assignee rejected the proof, setting out in his notice of rejection the following grounds:-

" (a) That the Company has failed to give credit to the bankrupt for the value of garage premises and land transferred by the bankrupt to the Company.

(b) That no valid agreement exists entitling the Company to a transfer of the said garage premises and land from the bankrupt.

(c) That the registered transfer of the said garage premises and land between the bankrupt and the company is void as being for a past consideration.

(d) That the failure of the Company to give credit for the value of the garage premises and land in its proof of debt would have the effect of defeating the creditors of the bankrupt to the extent of the value of the said garage premises and land."

Finally, on 23rd March 1966, the company filed the present notice of motion in which it seeks an order

"pursuant to Section 101 Subsection 5 of the Bankruptcy

> Act 1908 reversing the decision of the Respondent dated the 24th day of February 1966 rejecting the Proof of Debt filed by the Appellant for £4,613.17.10. dated the 16th day of June 1965....."

In the alternative, the company asks for an order amending the proof if, in the circumstances disclosed by the evidence, that should be the proper thing to do. In view of the decision that I have reached on the first question I have found it unnecessary to consider this alternative prayer.

The application initially came before me at Hamilton on 14th September 1966. Mr Bishop then appeared for the company and Mr Jamieson for the Official Assignee. After the hearing had progressed for some considerable time, it became obvious to me, and to Counsel, that it would be unwise for me to attempt to reach a decision on the evidence as it then stood, because there were many important matters either not directly touched by the affidavit then filed, or referred to in it only as the result of hearsay, which might or might not have been reliable. It also seemed that more satisfactory evidence should be obtainable, and it was therefore agreed that the matter should be adjourned to enable further affidavits to be filed. This was done, and the hearing was continued on 26th August of this year. The new affidavits seem to supply all that the earlier one had not; and, on this occasion, Mr. Bishop again appeared for the company, but Mr Sandford appeared for the Official Assignee.

At the very beginning of the first hearing, when it was abundantly clear that the Official Assignee was strongly opposing the company's application, Mr. Jamieson conceded that his client was bound by the grounds set out in his notice of rejection, and that he had therefore to confine his defence of the Official Assignee's action to the transaction between the bankrupt and the company involving the "garage premises and land" It seems to me that the provisions of section 101 of the Bankruptcy Act 1908 make this a very proper concession.

At the second hearing a rather unusual procedure was adopted, because Mr Sandford immediately indicated to the Court that he would be in considerable difficulty in attempting to justify some, at least, of the grounds of objection; and he

therefore suggested that he should begin, sin ce Mr Bishop would then know exactly what he had to answer, and the hearing would, undoubtedly, be considerably shortened. Mr Bishop, needless to say, readily agreed to this course of action, and I am as grateful as he no doubt was to Mr Sandford for his very realistic approach to the issues involved in the application.

The result of this was that Mr Sandford freely admitted that he could not say anything to support the first ground of rejection. He pointed out that the statement attached to the proof of debt showed that, at the outset in 1958, the bankrupt was credited with the sum of £6391: 1: 10d. as the value of his assets sold to the company, and he then referred to the evidence which showed that, of this sum £3198: 4: 9d. was in respect of the garage building and land.

Mr Sandford then passed to the second ground, which alleged that "no valid agreement" existed "entitling the Company to a transfer of the .....garage premises and land from the bankrupt". It is clear, of course, that there was no written agreement between the bankrupt and the company for the sale and purchase of these assets; but Mr Sandford conceded that writing was necessary only to make such an agreement enforceable by action, and that, for the purposes of this case, it would be sufficient if the company could show that there was, in fact, an oral agreement in pursuance of which the subsequent memorandum of transfer was signed and registered. Mr Sandford then analysed very fairly and accurately those parts of the affidavits that had a bearing upon the question whether or not such an oral agreement existed. I am not going into the details of this evidence, and content myself with saying that I am quite satisfied that, when the company was formed, such an agreement certainly was made.

However, Mr Sandford did not leave it at that, because he felt bound, on his instructions, to invite the Court to give

consideration to certain subsidiary arguments.

The first of these was that there was no valid agreement because there was no consideration. Mr Sandford realised that, in view of the evidence, he could not expect this submission to be upheld. The second was that the consideration was inadequate. Once again, on an analysis of the affidavits, Mr Sandford felt that this contention could not be supported. With respect I entirely agree with the views that he expressed, and therefore reject both submissions.

The third was that the transfer was in breach of section 75 of the Bankruptcy Act, which, for Mr Sandord's purposes, reads as follows:

> "Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser on incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife -
>
> (a) Shall, if the settlor is adjudicated a bankrupt under this Act within one year after the date of such settlement, be void as against the Assignee:
>
> (b) ....."

The argument here failed because all the available evidence showed that the transaction <u>was</u> "made in favour of a purchaser .....in good faith and for valuable consideration". However, I think it could well be that the submission would have to be rejected on another ground. Mr Sandford based his argument upon the fact that the transfer was registered on 7th August 1964, the bankrupt being adjudicated on 4th June 1965. He therefore submitted that the order of adjudication was made within one year "after the date" of the transaction. But as I have just indicated the adjudication must take place "within one year after the <u>date</u> of such settlement", and this transfer was signed on 20th May 1964, so that it could be argued that the period of one year had expired by about a fortnight before the adjudication took place. I do not expressly decide this point, but it seems to me that the correct date for consideration in this case is that of the execution of the transfer, and not that of its registration.

I take the view that, for the reasons I have given, the

Official Assignee's second ground of objection cannot be supported.

The third ground of objection was that the transfer was void "as being for a past consideration". If there had been no agreement for sale and purchase in 1958but money had then passed between the company and the bankrupt, and if, in 1964, the company had, in effect, said to the bankrupt: "In 1958 we paid you certain moneys: you had better now transfer that land to us", it might, perhaps, be argued successfully that the transfer was for a past consideration. But I have found that there was an agreement for sale and purchase in 1958, albeit an oral one, when credit was given to the bankrupt for the amount of the purchase price, and, therefore, the transfer was properly executed in pursuance of that agreement, and not, in my view, for a past consideration.

Mr. Sandford found himself quite unable to offer any argument in support of the fourth ground of rejection.

Then, however, Mr. Sandford felt himself bound, on his instructions, to submit that, although it might well be that none of the grounds set out in the notice of rejection could be sustained, there were other grounds upon which the rejection might be supported.

I have already said that, in my opinion, the Official Assignee must be restricted, in this application, to the grounds of rejection set out in his notice, and, consequently, I hold that the other grounds upon which I allowed Mr. Sandford to submit argument cannot be taken into consideration by me. Nevertheless, I think I should make some mention of them.

The first was in connexion with the debits of "Cash Withdrawals" and the credits of salary. Mr. Sandford referred to the year ended 31st March 1959, and drew attention to the fact that, in that year, there were a debit for "Cash Withdrawals", but no credit, as in 1960 to 1963 (both inclusive), for salary. His argument was that, since the bankrupt was employed by the company, the debit in 1959 should be treated as salary, and that, if this were done, the amount due to the company would be reduced

by £772: 7: 7d. However, from the affidavit sworn by Mr. East, the solicitor who acted in connexion with the incorporation of the company, it appears that, shortly after its formation, the bankrupt spent "approximately twelve months overseas", and this seems to me to be a sufficient explanation of the company's failure, during its first year of operation, to pay him a salary. Moreover, it might not be unreasonable to infer that the "Cash Withdrawals" in that year were taken by the bankrupt for the express purpose of supplying him with the finance necessary to enable him to make this journey abroad.

The final point made by Mr. Sandford was in connexion with the debits appearing in the statement of account attached to the proof under the heading "Logging Contracting". I allowed Mr. Sandford to inform me from the bar that, when the bankrupt began his business as a logging contractor, he acquired a motor-vehicle of some kind from the company on hire-purchase, the hire-purchase agreement being assigned to another company called, I believe, Lombard New Zealand Ltd. This company obtained judgment against the bankrupt for £811 which was owing under the hire-purchase agreement, and it was Lombard New Zealand Ltd. which, on the basis of this debt, petitioned for an order of adjudication. It seems that Lombard New Zealand Ltd. were largely instrumental in having the Official Assignee reject the company's proof of debt, one of its suggestions being that the amount of £1245: 0: 1d. shown as owing to the company by the bankrupt in respect of "Logging Contracting" might contain within it the purchase price of the motor-vehicle. I can say, in connexion with this aspect of the matter, only that there is not one scrap of evidence to justify the suggestion made by Lombard New Zealand Ltd., and that, in fact, the evidence that does touch upon the matter seems to me to raise the clear inference that the whole debt was incurred for "petrol, goods, and other services".

Even, therefore, if I could consider in this application these additional grounds for rejection of the company proof, I would have no hesitation in holding, on the evidence at present before me, that they could not be supported.

I therefore make an order reversing the decision of the Official Assignee by which he rejected the proof of debt filed by the Company in the bankrupt's estate for £4613:17:10d. and dated 16th June 1965.

The matter of costs was not discussed by Counsel before I left Hamilton, and I therefore reserve the question so that they can make to me, if they wish, written submissions on the subject.