No Special Consideration

IN THE SUPREME COURT OF NEW ZEALAND
NORTHERN DISTRICT
AUCKLAND REGISTRY

A.202/71

BETWEEN ELECTRIC CONTROL & ENGINEERING (N.Z.) LIMITED (In Liquidation a duly incorporated company having its registered office a Auckland and carrying on business as contractors

PLAINTIFF

AND JOHN GILMOUR TUCK of Auckland, Chartered Accountant

FIRST DEFENDANT

AND PERMANENT NOMINEES (AUST.) LIMITED a company duly incorporated in the State of New South Wales having its registered office at M.L.C. Building, Victoria Cross, North Sydney and carrying on business as Agent and Trustee

SECOND DEFENDANT

Hearing: December 17, 1971

Counsel: Hutchinson, Q.C. and Towle for 1st Defendant in support
Chilwell Q.C. and Amodeo for 2nd Defendant in support
Casey for Plaintiff to oppose

Judgment: December 21, 1971.

JUDGMENT OF McMULLIN, J.

Prior to the 12th December, 1969, plaintiff carried on business as a contractor. On the 22nd December, 1966, it had executed a Deed of Guarantee and Debenture in favour of second defendant whereby it guaranteed the payment of certain moneys to second defendant. The Debenture charged in favour of second defendant the whole of the plaintiff's undertaking. On the 10th December, 1969, second defendant appointed the first defendant as receiver of the plaintiff and since that date second defendant has embarked on the realisation of the plaintiff's undertaking to the point where that realisation is now substantially

complete. Second defendant estimates, and there is no evidence to the contrary, that plaintiff's assets and undertaking will realise a net sum of $500,000 and this estimate is not likely to vary by more than $25,000 either way. Second defendant says, and again there is no evidence to the contrary, that the amount owing to the second defendant upon the security of the Debenture and other securities given by other companies is $5,700,000 (Australian currency) and that, upon the realisation of all other securities and the payment of the proceeds of the same to second defendant, the balance still remaining owing to second defendant will be approximately $1,300,000 towards which balance there will be applicable the sum of $500,000 already referred to.

On the 29th June, 1970, B.N.Z. Finance Co. Ltd., a secured creditor of the plaintiff for a substantial amount, presented a petition for the winding-up of plaintiff but this was withdrawn on plaintiff going into voluntary liquidation. At a meeting of plaintiff's creditors on 12th August, 1970, one H.G.F.Callam was appointed the liquidator of the plaintiff at the instance of the B.N.Z. Finance Co. Ltd., supported by the Eagle Star Insurance Co. Ltd.

In February 1971 plaintiff instituted an action to attack the validity of the Debenture given in favour of second defendant.

The first and second defendants now move for orders that plaintiff give security for their respective costs of the action, and that the proceedings be stayed until such security has been given, and that the time for filing the first defendant's statement of defence be extended for 30 days after and exclusive of the day on which the first defendant is given notice that such security has been given.

The first and second defendants invoke s.467 of the Companies Act 1956. This section formerly appeared

as s.380 of the Companies Act 1933 and is in the very words of s.447 of the Companies Act 1948 (U.K.).

There can be little difficulty in accepting the statements of first defendant, a chartered accountant, that, if plaintiff fails in the action, it will have no assets whatsoever to satisfy any costs awarded against it. That being the case, the question arises as to whether the discretion, which is implicit in the wording of s.467, should be invoked in favour of the first and second defendants. I wish to say nothing which might appear to suggest what considerations the Court should take into account in exercising its discretion under s.467, but, in the present case, apart from the matter to which I will shortly refer, it seems to me that, when a company in liquidation wishes to embark upon litigation impeaching the validity of a Debenture in circumstances where, if the parties propounding the Debenture are successful in their defence, plaintiff will be quite unable to pay the costs which would normally accompany judgment for the defendants, that discretion should be exercised. Generally speaking the section was enacted to provide some security for persons against whom actions may be brought by companies with everything to gain and little to lose by the issue of proceedings. Mr. Casey accepts that the present case is one for the exercise of the discretion, the matter to which I have already alluded apart. That matter is the execution by the plaintiff and first defendant of a Deed dated 13th November, 1970, following upon the arrangement of a sale to Cutler-Hammer N.Z. Ltd. of certain of the plaintiff's assets then in the hands of the receiver. This debenture defining the rights of the parties and ratifying the sale arranged was necessary because the validity of the Debenture over the assets to be sold had been called in question. Clause 3 of the Deed of the 13th November, 1970, provided that the receiver would

retain in his hands or under his control all moneys received from this sale to Cutler-Hammer N.Z. Ltd. until such time as a final decision on the validity of the Debenture should be obtained. Clause 6 read as follows:

> "NOTHING herein contained or implied shall in any wise hamper or restrict the rights of the Liquidator to challenge the validity of the said debenture or to prosecute any action pursuant to any claim that such debenture is invalid except as expressly provided in Clause 4 hereof."

On behalf of the plaintiff it is contended that an order requiring plaintiff to give security for costs would be to hamper or restrict the rights of the liquidator to challenge the validity of the Debenture. I am of the opinion that nothing in the Deed operates as a bar to the exercise of the Court's discretion in the defendants' favour. All the Deed does is to ratify the sale and to preserve the proceeds for a time. There is nothing in it which puts a curb upon the conduct of possible litigation. Plaintiff still has the right to sue but in the pursuit of that right plaintiff must, of course, observe all the normal procedures of litigation and comply with the rules of Court as laid down in the Code of Civil Procedure. The liquidator's position after the Deed was executed in relation to his right to sue was the same as it was before the Deed had been executed. His right to sue before the Deed had been executed was a right to be exercised in accordance with the rules of Court. His right to sue after the Deed was executed can be no different. The present case is one, therefore, where defendants are entitled to an order for security.

It may be, as was observed, that second defendant and the two principal unsecured creditors on whose instance the action has been largely brought are all institutions of substantial means. It may well be that no one of them has been attacked by chill penury, but I do not think

that this is a reason for the exercise of the discretion against the defendants.

Mr. Hutchinson on behalf of the first defendant has informed me that the scale costs of the action if defendants were successful would amount to $15,000, but he seeks an order for security in the sum of $5,000, this sum to be apportioned equally between the two defendants. It is estimated that the action will take some two or three days to hear and it may be necessary to have some evidence taken on commission inAustralia or for the witnesses to be brought to this country. Unless the Court were to certify otherwise, the total cost to be awarded on the action could not exceed $1,000 (R.10, Table C in Third Schedule to Code, Item 38). I think that this figure should be adopted but that each defendant is entitled to security in that amount.

There will therefore be an order that plaintiff give security for the first defendant's costs of action in the sum of $1,000 and for the second defendant's costs of action in the further sum of $1,000, but leave is reserved to each of the defendants to apply for further security if it later appears that the security ordered is insufficient. There will also be an order staying proceedings in the action until security has been given and extending the time for filing first defendant's statement of defence in terms of the motion. Costs on the motion will be reserved.

Solicitors: Buddle, Weir & Co., Auckland, for Plaintiff

Towle & Cooper, Auckland, for First Defendant

Jackson, Russell, Tunks & West, Auckland, for Second Defendant