1/5 Butterworths

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. M 533/83

384

IN THE MATTER of the Companies Act 1955

A N D

IN THE MATTER of MANSON AND JAMES LIMITED (In Liquidation)

A N D

IN THE MATTER of an application by DONALD LESLIE GOOD

Hearing: 6 April 1984

Counsel: J.N. Matson for D.L. Good in support
G.K. Panckhurst for Liquidator to oppose

Judgment: 13 APR 1984

JUDGMENT AND REASONS FOR JUDGMENT OF SAVAGE J.

There are before the Court two motions. The first is by Donald Leslie Good, the applicant, who seeks an order that a certain debenture made between Manson and James Ltd, the company, and himself is not voidable pursuant to the provisions of s 311 of the Companies Act 1955. The second motion is by the liquidator of Manson and James Ltd, the respondent, who seeks an order either that the debenture be set aside as against the liquidator or that Donald Leslie Good cease to act as the self-appointed receiver and be prohibited from appointing any other receiver. This motion is in terms of s 311B and s 346A of the Act. To understand the point and purpose of these motions it is necessary to give briefly some facts surrounding the making of the debenture, the winding up of the company and the subsequent events.

Manson and James Ltd was incorporated at Christchurch on 19 May 1976 with a share capital of 3,000 one dollar shares. The original directors were persons named Manson and James. On or about the 30th of April 1982 Donald Leslie Good, the applicant, and Rebecca Anne Good became the directors and shareholders of the company. During 1983 there were a series of events that affected the company. In February an investigating accountant was appointed to investigate the affairs of the company pursuant to s 9A of the Companies Act. On the 21st of October the company purported to issue a debenture in favour of the applicant, Donald Leslie Good, one of its directors, to secure a principal sum of $20,000. Six days later on the 27th of October a Mr S.F. Hemsley filed a petition in the High Court at Christchurch to wind up the company. A few days later on the 4th of November an order was made appointing the Official Assignee provisional liquidator upon the ex parte application of the Inland Revenue Department, which was a supporting creditor. This was followed on the 15th of November by the filing in the Companies Office of the debenture and a notice appointing the applicant receiver of the company, and on the 7th of December an order was made on Mr Hemsley's petition winding up the company and appointing the Official Assignee as liquidator. Early in the new year, on the 24th of January 1984, the liquidator, in terms of s 311A(1) of the Companies Act 1955, filed a notice stating that pursuant to s 311 he thereby set aside the debenture upon the grounds that it was voidable as against the liquidator, it having been executed or given by the company within the period of 12 months immediately preceding the commencement of the winding up of the company. The applicant followed this notice by filing an application on the 13th of

February seeking an order that the debenture is not voidable on the grounds that it is a security that relates to money actually advanced or paid or other valuable consideration given in good faith in terms of s 311(3)(a); that is the first motion before the Court to which I have already referred. The respondent liquidator countered this motion by applying for the orders referred to in his motion mentioned earlier which is the second motion before the Court.

An affidavit made by a Mr Saunders, the Deputy Official Assignee, was filed on behalf of the respondent liquidator. In it he stated that a cheque for $20,000 drawn on the personal account of the applicant and his wife was paid into the company's account with the National Bank of New Zealand Ltd, such a payment being consistent with the amount stated in the debenture. However, he stated further that on the same day a cheque for $19,950 in favour of the applicant was drawn on the company's bank account and was debited against the account. The result of these two transactions would appear to be that the company in fact received only $50. Mr Saunders said, "... I am forced to the conclusion that there was not an actual advance of $20,000 to the company by the respondent; but rather an exchange of cheques which had the effect of the respondent advancing the company $50". No affidavit had been filed by the applicant when the proceedings were first called before me on the 4th of April. Mr Langham appeared for the applicant, he having filed the applicant's motion, and asked for leave to withdraw, which was given. The applicant then appeared and asked for an eight week adjournment: I declined this application, as in my view it was necessary that the matter be resolved promptly, the winding up order having been made four months before. Further, Mr Saunders' affidavit

showed that proofs of debt had been lodged amounting to some $168,000. The liquidator had been refused access to the company's records by the applicant, who maintained he was entitled to retain them as receiver; he had also refused to hand over the company's assets, if there be any. However, since the applicant was now without a solicitor, I considered he must be given some opportunity to get advice and adjourned the matter for two days to the 6th of April.

When the case was called on the 6th of April, the applicant was represented by Mr Matson, who tendered an affidavit made that day by the applicant. In it the applicant stated that there had been advanced to the company the sum of $20,000, $19,500 of which was repaid, and that the amount outstanding under the debenture was still $50. He also stated that he had that day, the 6th of April, by deed of assignment assigned the debenture to a company called Corporate Enterprises Ltd. He went on to state that Corporate Enterprises Ltd was not a person specified in any of paras (a) to (c) of subsection (1) of s 311B of the Act and that the assignment was made in good faith and for valuable consideration, though he did not favour the Court with any information as to the nature or amount of this valuable consideration. That section is the section under which the respondent liquidator sought the orders referred to in his motion. The point of this statement by the applicant is that the power of the Court to set aside a debenture such as this one on the ground that in the circumstances in which the debenture was created it was just and equitable to do so ceases if the debenture has been transferred to a third party who does not come within certain categories of person and the assignment was made in good faith and for valuable

consideration. Mr Matson then called the applicant and presented him for cross-examination. Mr Panckhurst cross-examined him at some length and I was able to form a clear view of the applicant as a witness. In my view the applicant said whatever he thought would best suit his purposes; if he had no adequate answer to a question he would hedge or prevaricate. He appeared to think that the whole matter of the operation of the company, its winding up and these proceedings were some kind of business game that could be handled by adroit answers and technicalities. I place no reliance on his evidence. I do not accept that an advance of $20,000 was in fact made or that the debenture instrument represented a genuine transaction at all. It was just a pretence; a matter of form which the applicant thought would strengthen his hand and his control of the company which he knew was in imminent danger of being wound up and which was plainly about to fail one way or another. He contended in his evidence that the advance and debenture were genuine transactions, as also was the last minute assignment of the debenture to Corporate Enterprises Ltd. I am quite satisfied that they were not. There is a story, no doubt apocryphal, that the great Duke of Wellington once said, when given a highly improbable account of an event, that if one believed that one could believe anything. The applicant's version of these transactions is in that category.

Mr Matson did the best he could for the applicant in his submissions. He accepted that of the sum of $20,000 $19,500 was immediately repaid, which is in accord with the applicant's affidavit but somewhat at variance with his evidence which suggested that the $19,950 paid to him was in respect of other debts the company owed him. However,

Mr Matson submitted that the debenture had supported an advance of $50 and was therefore a valid debenture which brought it within s 311(3)(a). He referred me to certain passages in Re Mataura Motors Ltd [1981] 1 NZLR 289 at 292 and 293. This was a judgment of the Court of Appeal which deals with s 311 of the Act, though it relates to the original section, the present section having been substituted for the original section in 1981. However, on the point raised here the wording of the two sections is not dissimilar. The passages relied on refer to some observations of Richardson J. and Cooke J. in their separate judgments which Mr Matson submitted indicated that if there had in fact been some actual advance or payment then the debenture could be supported and thus it would come within the scope of the section.

Mr Panckhurst on the other hand submitted that viewing the transaction as a whole it was unthinkable that a company would give a debenture to secure the sum of $50, particularly in the circumstances that existed then. Apart from other debts at the time the debenture was given, the company owed Mr Hemsley more than $25,000 and the Inland Revenue another $35,000. An advance of $50 and a debenture to secure it could have been of no possible advantage to the company in those circumstances. Mr Panckhurst also relied on Re Mataura Motors Ltd. He referred particularly to the judgment of Richardson J. and submitted, I think correctly, that the case shows that the true test for determining whether the section applies is whether the substance of the transaction brings it within the terms of the section or not. It is the substance of the matter, not the form, that determines whether the transaction is within the section or not and to decide that it is necessary to look at it from a practical and business point

of view. I have already held that on such a basis this transaction was just a matter of form and had no true substance. In the circumstances, in my view, the $50 was but a part of the form adopted by the applicant. I should add that Mr Panckhurst also relied on In re Destone Fabrics Ltd [1941] Ch 319. It is not necessary, in the circumstances, for me to canvass fully the application of this case to the situation here but in my view the principles expressed in the case certainly apply. Destone Fabrics Ltd was hopelessly insolvent and the directors were aware of this. They issued a debenture for 900 pounds in favour of a man named Zimmerman and as soon as the money was received the company paid its two directors 350 pounds each and a Mr Davis 200, these sums being debts then due to them. It transpired, however, that the whole of the 900 pounds had been supplied to Zimmerman by Davis. Simonds J. held that the object and effect of the transaction was not to benefit the company but merely to provide money for the benefit of certain creditors of the company to the prejudice of other creditors. The company was not in substance provided with money but only in form. He emphasised that it was the substance and not the form of the transaction that was important and in result the transaction did not come within the United Kingdom section which was the then equivalent of our present s 311. Though the wording of the United Kingdom section is rather different, in my view the views expressed by Simonds J. apply to our section. I add in passing that the English Court of Appeal upheld the judgment without calling on counsel for the respondent.

In result the applicant has failed to satisfy me that this transaction comes within the terms of s 311(3)(a) and the motion

is accordingly dismissed. It follows that in accordance with the provisions of s 311A(3)(b) the debenture is set aside as against the liquidator from today.

The respondent is allowed $200 costs against the applicant. The respondent's motion referred to earlier is adjourned sine die to be brought on for hearing on three days' notice to the applicant.

Solicitor for applicant: J.N. Matson (Christchurch)

Solicitor for respondent: Crown Solicitor (Christchurch)