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(3) NZLR X

IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

M. No. 34/82

682

IN THE MATTER of Section 311A (1) of The Companies Act 1955

BETWEEN NANGEELA PROPERTIES LIMITED (in liquidation) a duly incorporated Company having its registered office at Hastings and carrying on business as Property Developers

Applicant

Reported (1984) 2 NZCLC 99,179.

A N D THE WESTPAC BANKING CORPORATION a body corporate having its registered office at 328 Lambton Quay, Wellington

Respondent

Hearing: 13 June 1984

Counsel: M.B. Wigley for Respondent in support
G.W. Calver for Applicant to oppose

Judgment: 21 June, 1984

JUDGMENT OF QUILLIAM J

This is an application under s 311A of the Companies Act 1955 for an order that a disposition made by Nangeela Properties Ltd to (then) the Commercial Bank on 26 June 1981 is not voidable against the liquidator of the company under s 309 of the Act.

On 26 June 1981 a lodgment of $25,599.59 was made by the company to the Commercial Bank for the purpose of repaying advances. On 10 July 1981 the company went into voluntary liquidation and Mr Geenty was appointed liquidator. In the course of his investigations he discovered the payment to the bank, and on 18 March 1983 he gave notice under s 311A that the company in liquidation wished to set aside the disposition. The present application was then made by the bank in opposition to that notice.

Section 309 (1) of the Act provides:

> " Every conveyance or transfer of property, every security or charge given over any property, every obligation incurred, every execution under any judicial proceeding suffered, and every payment made (including any payment made in pursuance of a judgment or order of a Court), by any company unable to pay its debts as they become due from its own money, shall be voidable as against the liquidator, if -
>
> (a) It is in favour of any creditor or any person in trust for any creditor with a view to giving that creditor or any surety or guarantor for the debt due to that creditor a preference over the other creditors; and
>
> (b) The making, suffering, paying, or incurring of the same occurs within 2 years before the commencement of the winding-up of the company. "

Of relevance also is s 311A (7):

> " Recovery by the liquidator of any property or the value thereof (whether under this section or under any other provision of this Act or under any other enactment or in equity or otherwise) may be denied wholly or in part if -
>
> (a) The person from whom recovery is sought received the property in good faith and has altered his position in the reasonably held belief that the transfer or payment of the property to him was validly made and would not be set aside; and
>
> (b) In the opinion of the Court it is inequitable to order recovery or recovery in full, as the case may be. "

The present payment was certainly within the period of two years. Three questions require resolution. They are:

1. Whether the payment was made at a time when the company was unable to pay its debts, as they became due, from its own money.

2. Whether the payment to the bank was made with a view to giving the bank preference over the other creditors.

3. If it was, whether recovery from the bank should be denied under s 311A (7).

1. Ability to Pay Debts

An affidavit was made by the manager of the bank at the time. This simply records that the company requested advances up to $25,000 against an undertaking by U.D.C. Finance Ltd to provide an equivalent amount to clear advances of the bank by 31 May 1981. This was later extended to 30 June 1981 and the payment was duly made on 26 June 1981. The manager deposes that the lodgment was received for the credit of the company's account in the ordinary course of business.

There are then a number of affidavits filed in opposition. These show that between January and June 1981 the company was engaged in the building of a block of three flats for sale. The plumber, electrician and painter employed by the company for that work all depose that they were not receiving payments to which they were entitled and during June each of them threatened not to complete the work. Each was told by the company's Managing Director that unless they finished the work the flats could not be sold and that if all three were not sold there was no prospect of any creditor receiving payment. They were assured that they would be paid out of the money from the sale of the third flat. They therefore completed the work. Payment was not then made but shortly after the company went into liquidation. A further affidavit by a carpenter employed by the company was to the same effect.

The liquidator has annexed to his affidavit a statement of the company's financial position as at the date of liquidation. This shows that there were unsecured creditors to a total of $70,406 and a deficit of $59,926. There were assets not specifically pledged to a total value of $29,400. It is not clear how readily realisable these were, but even if all had been capable of quick realisation there remains a substantial deficit. The only sensible inference that can be drawn is that, at the time the payment to the bank was made, the company was altogether unable to meet all its debts. I should add that in arriving at this conclusion I have applied the principles set out by Richardson J in Re Northbridge Properties Ltd (unreported, Auckland, 13 February 1977, No. M.46/75), but as the matter is so clear I do not think it necessary to refer further to that decision.

2. Intention to Prefer

This is the real question for determination and the onus of proof in respect of it rests upon the liquidator. The argument on behalf of the liquidator was that the circumstances are such that on the balance of probabilities it is established that when the company paid the bank it did so with the intention of preferring the bank to those other creditors it had promised to pay.

In answer to that Mr Wigley, on behalf of the bank, argued that no intention to prefer had been shown and that there were other credible explanations left open. Mr Wigley sought to rely upon the decision of Hardie Boys J in Re World Style Builders Ltd (unreported, Christchurch, 30 August 1982, No. M.511/79). That was a case involving a somewhat complicated set of transactions. For present purposes they may be summarised as relating to the giving of a guarantee by one Blogg, a land developer, of a company's account at the bank. The company got into financial difficulties and could not pay trade creditors. Blogg arranged for an advance to the company to enable it to continue trading. Further difficulties followed and the company found

itself unable to sell a property as it had hoped to do. Blogg then arranged a further advance, pending the sale of the property, to enable the obligation to the bank and other commitments to be met. Payment was duly made to the bank and some other debts were paid, but not those trade creditors who had been pressing for payment. The payment to the bank was sought to be set aside as a voidable preference but Hardie Boys J was not prepared to do so. It was argued in the present case that I should take a similar view, but I am unable to see that the decision in that case can properly be made to apply here.

Hardie Boys J stated the principles to be applied at pp 5 - 6 of his judgment in this way:

> " The liquidator must show, on the balance of probabilities, that in making the payment the company's dominant intention was to prefer. There are two aspects to this concept. The payment must be an act of free will, and not one resulting from pressure from the creditor such as to remove the company's power of choice. And there will not be a preference if the dominant intention is to obtain a countervailing benefit for the company. Thus, in Re Aston (a bankrupt), ex parte Official Assignee [1956] NZLR 703, payments to a bank were held not to be a preference where there were a variety of reasons, including pressure from the bank manager and the hope that further accommodation would be available if the current obligation were cleared. And in In re Fairbrother Official Assignee v Baddeley (1906) 25 NZLR 546, it was held that there was no preference where the creditor, as a condition of providing further funds to help the debtor carry on his business, took a security embracing not only those funds but also an unsecured debt already outstanding. "

This passage appears to be an appropriate summary of the earlier decisions and I respectfully accept and adopt it.

It is at once clear that the facts of the present case, when considered in the light of those principles, produce an entirely different result. In the first place it cannot be said that Mr Black, the Managing Director of Nangeela Properties Ltd, was acting otherwise than by his own free will and so the same must be said of his company. There is no suggestion of any pressure having been applied by the bank or by anyone else to cause the payment to be made. Indeed, the manager of the bank has said no more than that the payment was received in good faith and in the ordinary course of business.

There is also no suggestion of an attempt to obtain a countervailing benefit for the company. The principal matters which influenced the decision of Hardie Boys J are absent and so the conclusion which he reached is of little assistance here. It remains to consider whether the facts of the present case compel the conclusion that the dominant intention was to prefer the bank over other creditors.

Mr Black knew, in June 1981, that the company could not pay its debts. If the creditors working on the flats had stopped work then there was plainly nothing Mr Black could have done to save the position. What he did was to promise each creditor separately that payment would be made out of the proceeds of sale of the third flat as soon as that was sold. When he received the proceeds of sale of that flat he used the money not to honour his promise but to repay the bank. His reason for this cannot have been to enable the company to get further accommodation from the bank and in that way to pay the other creditors. There is no suggestion from the bank or anywhere else that this was contemplated. Mr Black could not have been under any illusion that he could both repay the bank and also pay his other creditors. There is no evidence from him, but the evidence which there is makes this obvious. I can see no other inference open to me than that the payment was made to ensure that the bank received its money in preference to anyone else.

I should mention that a point was raised as to the decision to pay the bank not having been necessarily that of the company but only of one director. This is a matter raised by Richardson J in the Northbridge case. The circumstances, however, seem to be different. In the present case Mr Black is described as the Managing Director which suggests that he had the power to bind the company. Moreover, the payment to the bank was made by the company's solicitors from their trust account and again one must accept the probability that it was the act of the company rather than of any individual.

3. Estoppel

I have already set out the provisions of s 311A (7). It was argued by Mr Wigley that in terms of that subsection the bank had received the property in good faith and had altered its position in the reasonably held belief that the payment was validly made and would not be set aside. I am prepared to accept that the payment was received in good faith and that it may well be the case, also, that the bank reasonably believed the payment was validly made and would not be set aside. The problem which arises, however, is as to whether the bank altered its position in reliance on that belief. The manager in his affidavit has said nothing on this. The argument advanced was that the bank had done so by allowing the undertaking given by U.D.C. Finance Ltd to lapse. I am unable to see the validity of that argument. There was, upon the evidence, no question of the undertaking being allowed to lapse. It was, in its terms, effective only until 30 June 1981. If payment had not been made by the company by that date then the bank could have called on U.D.C. But payment was made and so there could have been no question of U.D.C. remaining under an obligation. It was not, therefore, a question of the bank releasing U.D.C. but of U.D.C. being freed, in terms of its contract, from any further liability. There is no suggestion that the bank altered its position in any other way, and I am satisfied that no estoppel can arise in the bank's favour under s 311A (7).

For the reasons I have given the bank's application is declined and there must be an order in terms of s 311A (4).

There was a submission made on behalf of the liquidator that an order should also be made for interest. This was based upon a passage in the judgment of the Court of Appeal in Re F.P. and C.H. Matthews Ltd [1982] 1 All ER 338 where, in a similar type of case, an order was made for payment of interest. I was at first disposed to think that this submission could not succeed, but on closer consideration I find it necessary to take a different view.

In the Matthews' case the Court of Appeal plainly had, at first, the same kind of hesitation as I had, but then decided the claim for interest was correctly made. The position in England as to interest is governed by s 3 (1) of the Law Reform (Miscellaneous Provisions) Act 1934, which provides:

> " In any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit .... "

That is to be compared with s 87 (1) of the Judicature Act 1908:

> " In any proceedings in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate, not exceeding the prescribed rate, as it thinks fit ...."

It can be seen that for present purposes the provisions are identical.

The Court of Appeal considered whether proceedings in respect of a fraudulent preference were proceedings for the recovery of any debt and concluded that they were (see p 344). That conclusion was reached upon longstanding

authority for the proposition that proceedings for a fraudulent preference give rise to the right to an action for money had and received against the favoured creditor. That decision does not bind this Court, but it is highly persuasive and I think it would be wrong for me to decline to follow it.

The Court of Appeal then went on to consider the date from which interest should be paid and Lawton LJ, delivering the judgment of the Court, said at pp 344 - 345:

> " The next problem is: from what date should interest be payable? No claim for interest was made by the liquidator against the bank until 14 March 1980. It was submitted by counsel for the bank that in those circumstances, until that date, the bank had no reason to think that it was not properly in receipt of the moneys paid into the company's current account on 3 November 1976. It followed, so it was submitted, that it was only after that date that, in equity and in the discretion of this court, interest should be payable. The bank, however, is in a different position from many parties who find themselves receiving money by way of fraudulent preference. It deals in money in the ordinary course of its banking business. As from 3 November 1976 it has had the use of that money and no doubt has used it to its profit. Since the members' voluntary liquidation the creditors of the company have not had the use of that money. It follows, in my judgment, that it is only fair that the bank should pay interest on the usual terms .... "

Again I regard this as persuasive and I think I should follow it.

There will accordingly be an order that the bank transfer to the liquidator the sum of $25,599.59, together with interest on that sum at 11% per annum from 26 June 1981 to the date of judgment. The liquidator is entitled to his costs which I fix at $250 and disbursements, if any, to be fixed by the Registrar.

Solicitors: Langley, Twigg & Co., NAPIER, for Respondent

Simpson, Bate & Partners, HASTINGS, for Applicant