IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

Set 2 M.18/76

IN THE MATTER of the Companies Specia
Investigations Act 1958

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IN THE MATTER of the Companies Act 19

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IN THE MATTER of GRAZING & EXPORT MEAT COMPANY LIMITED, GEMCO HOLDINGS LIMITED, GEMADMIN (1973) LIMITED, GEMADMIN (1974) LIMITED, GEMADMIN (1972) LIMITED, GEMADMIN (1975) LIMITED, and GEMADMIN (1976) LIMITED.

Hearing: 20 August 1984

Counsel: Mrs J.O. Medlicott for Liquidator
R.J. Somerville for investors other than Gemadmin (1976) Ltd
C.S. Withnall for Gemadmin (1976) Ltd investors
J.M. Conradson for unsecured creditors
M.H.N. Haggitt for Mr D.C. Rosser and Bank of New Zealand
A.J. Logan for Westpac Banking Corporation
R.V. Duell for Directors of the companies

Judgment: 23 AUG 1984

JUDGMENT OF COOK J.

On the 3rd March 1976, on the petition of Mr J.A. Valentine, who had been appointed receiver of the group of companies listed above pursuant to the Companies Special Investigations Order 1975, an order was made by Roper J that each of the companies be wound up under the provisions of the Companies Special Investigations Act 1958; that they be wound up together and as if they were one company, subject however to

the provisions of the order of the Court made on the 2nd April 1976. Mr Valentine was appointed liquidator and granted, as additional powers pursuant to s 22 of the Act, the powers given by the order of 2nd April 1976; that is, to sell all or any of the cattle managed, bailed or held by, or under the control of the said companies or any of them, subject to the liquidator retaining the net proceeds of sale with power to invest such proceeds in trustee securities until the respective rights and interests of all persons claiming right, title or interest in the cattle or any of them, or in the proceeds of sale, had been determined or otherwise disposed of. A further term of the order was that the liquidator, in terms of s 25 of the Act present to the Court a scheme for the settlement of ranking of claims.

In a lengthy affidavit sworn on 16 September 1982, the liquidator reported upon the progress of the liquidation and put before the Court a scheme for consideration. The proposal is annexed to the notice of motion for approval and is as follows:

"A. The net proceeds of the realisation of the Fund be apportioned pro rata among the Investors in the following manner -

	%
Canterbury Syndicate	0.19
North Otago Syndicate	0.46
Otago Syndicate	0.47
Taieri Syndicate	0.44
D.C. Rosser	3.75
Gemadmin 1972 Investors	35.73
Gemadmin 1973 Investors	35.21
Gemadmin 1974 Investors	20.76
Gemadmin 1975 Investors	2.99
	100.00

B. The net proceeds of the realisation of plant equipment and other assets owned by the Companies be distributed in accordance with the provisions of the Companies Act 1955 and the Companies (Winding Up) Rules 1956. "

At the time of filing the notice of motion an application was made for directions as to service. On 14 December 1982 an order was made directing that the application and the scheme be served on certain named persons and that, in addition, copies of the originating motion and the affidavit in support were to be lodged at each Registry of the High Court and every creditor who had filed a proof of debt and every investor was to be advised by letter of the contents of the scheme and informed that the liquidator's supporting affidavit might be inspected at the nearest High Court Registry. Each interested party was requested to advise the liquidator, within 48 days of notification of the contents of the scheme, whether he opposed its provisions. The order further stated that counsel were to be appointed by the Court to represent investor and to accept service on their behalf with leave for counsel so appointed to apply to the Court for further directions.

In November 1983, the liquidator reported by affidavit that the order had been complied with and that, whereas it had been anticipated that there would be a considerable number of objections to the proposed scheme, there had in fact been few. Objections had been received from directors of the company, certain persons who contributed to the separate fund administered by Gemadmin (1976) Ltd (to which further reference will be made), two persons who invested in stock managed by Gemadmin (1973) Ltd and a grazier. Following that, an order was made appointing Mr N.A. Carroll to represent the creditors of the company other than the banks and investors in Gemadmin (1976) Ltd and Mr R.J. Somerville to represent investors in that latter company and other investors who objected to the proposed division of the proceeds of livestock among the various investing groups. It was then realised that there might be conflict between the interests of the two groups for whom Mr R.J. Somerville was appointed to act, that is the investors in Gemadmin (1976) Ltd as opposed to the other investors. Accordingly, Mr Withnall was directed to represent the investors in Gemadmin (1976) Ltd, leaving Mr Carroll to represent the unsecured creditors other than the banks (which had their own representation) and Mr Somervill to represent other investors who might object to the proposed

division. Consequently each interested party, or each group of interested parties, was represented at the hearing.

For present purposes the operations of the group need not be described in any detail. From 1969 onwards, Grazing & Export Meat Company Limited (Gemco) obtained funds from members of the public for investment in cattle stock. The basic scheme was that identified herds of cattle, each of about 100 head, were to be allocated to syndicates of investors, so that each syndicate was the owner of the particular animals while responsibility for management and care of the herd lay with Gemco and the farmer who grazed the cattle. Eventually the concept of syndicates was abandoned, as it was becoming expensive and inconvenient to identify the separate herds, and a pooling system was adopted whereby all the expenses and revenues for Gemco investors would be pooled and allocated proportionately to each investor's holding of cattle, irrespective of the actual cost and revenue in relation to his own stock. In order to facilitate this arrangement, administration companies were formed for each year's group of investors and it was for this reason that the companies, Gemadmin (1972) Ltd and so on, came into existence. It was proposed at that time that the investors in a particular year would bail their cattle to their own Gemadmin company which would have no staff or assets other than livestock purchased from borrowed monies or cash representing unutilised working capital. Each company was to be the vehicle for the co-ordination of the trading activities of each year's capital pool. The liquidator found upon investigation that, in fact, the pooling arrangement was wider than this, involving the total pooling of all the Gemco herds with complicated accounting arrangements to allocate shares of costs and revenue to each Gemadmin company. Problems arose and considerable financial difficulties were experienced, culminating in Mr Valentine's appointment as receiver. Gemco had undertaken extensive borrowing from bankers and made substantial sales of cattle stock and also raised funds from an investors' support scheme to which furth

reference will be made. He found that the stock position had deteriorated from a figure in excess of 18,000 head (belonging to all investors) to 5,602 at the date he took over.

The extensive depletion of the herd, as a result of sales to provide cash to meet herd maintenance and other costs and the Gemco system of pooling, made it impossible for the liquidator to trace the ownership of many cattle. There were a number of other difficulties also and the liquidator reports that the result was that the Gemco herd was a mixed mass representing:

(a) cattle originally purchased and allocated to particular investors whose identity had become unascertainable except in a few cases;

(b) cattle purchased by Gemco to replace sold stock or as an investment not allocated to any particular owner; and

(c) the progeny of (a) and (b).

This mixing had taken place over several years.

The liquidator found no indication that Gemco ever claimed to be the beneficial owner of the cattle, so that the assets coming into his hands fell clearly into two groups; the cattle together with the proceeds of sale, which belonged to the investors, and the other assets which were assets of the companies. According to the statement of receipts and payments for the period 1st December 1975 to 1st August 1984, the funds available from the sale of cattle together with interest, but after deducting expenses, was $425,523.40 and the corresponding amount from the sale of assets other than cattle, $122,719.21. In each case the figures are subject to income earned and costs incurred subsequent to 1st August.

An important problem facing the liquidator was the manner in which he should deal with the claims by the companie against the investment herds and the investors themselves for a sum of $947,635.00 expended in managing the herds but not recouped before the liquidation from the sale of stock or other sources. In a later section of his affidavit, the liquidator gives full details of the legal relationship betwee investors and the companies, but in the first section he states that, if the companies had remained going concerns and had wound up the investment herds in 1975, there could have been considerable dispute as to whether the companies were liable in whole or in part for losses of capital incurred by investors. Claims might have been based on the companies' failure to use proper care and skill in managing the herds or for breaches of contract. In his capacity as liquidator of the companies he had to consider whether he should take proceedings to establish the companies' rights over the proceeds of sale of the cattle in view of the probability of such claims being asserted in answer to any proceedings and the considerable expense such proceedings would entail. He summarised the position as follows:

> " I have taken legal advice and unless I am directed by this Honourable Court to the contrary, do not propose to exercise any claims on behalf of the abovenamed companies against the proceeds of the sale of the stock. I am advised that the herd belonged not to Grazing and Export Meat Company Limited (hereinafter called "Gemco") nor the Gemadmin Companies, but to the investors, and for the Gemco group and its creditors secured or unsecured to share in the proceeds of the stock it must be established that the companies have a legal right of lien or recoupment. I am further advised and accept that there is little prospect of success if the companies brought proceedings to enforce such rights. That advice is based on the facts hereinafter set out taken from the records of the companies which became available to me when I became Liquidator or discovered as a result of the investigations of my staff, my solicitors, and in a Police investigation into the affairs of the group."

This decision of the liquidator has been accepted by all parties and groups represented in relation to the application so that all further consideration of the matter proceeds on that basis.

The liquidator further states, in Part IV of his affidavit, that he also sought advice as to whether there was anything in the inter-company contracts and the Gemadmin companies which enables them to claim a prior right over the proceeds of the sale of stock. The details of the inter-company arrangements need not be traversed now; it is sufficient to say the liquidator decided that there was not and that is also accepted.

As to the mode of division between the various groups of investors, the method of calculation which produced the percentages contained in the proposed scheme (set out abov are explained in detail in the liquidator's affidavit, but need not be given further consideration; either no objections were raised by the members of particular groups or syndicates or, if once made, they are no longer pursued. No opposition to the liquidator's proposal in this respect was raised at the hearing.

The banks involved are Bank of New Zealand and Commercial Bank of Australia Limited (now Westpac Banking Corporation). The Bank of New Zealand held debentures over the assets of Gemco, Gemadmin (1972) Ltd and Gemadmin (1973) Ltd, but there were no inter-locking company guarantees and the liquidator has been advised that the debenture from Gemco is voidable. In any event, there was a credit balance in Gemco's bank account at the date of receivership. The Gemadmin companies had no assets on which the charges could attach other than the rights of lien or recoupment which all accepted to have been lost. Commercial Bank held a debenture over the assets of Gemadmin (1974) Limited and that company had no assets either. Accordingly, the security of either Bank was worthless and the liquidator accepted that both Banks should rank with the unsecured creditors; a

question in relation to this decision was raised by counsel for the unsecured creditors, however. The liquidator concluded his affidavit by stating that he believed that the proposed scheme for the ranking of claims represents the most just and equitable mode of division of the funds under his control.

In addition to the affidavit, a most comprehensive and helpful memorandum of submissions has been filed by counsel for the liquidator, setting out the legal issues arising and the legal and equitable principles of law which apply. At the commencement of the hearing it was indicated by counsel as follows: by Mr Haggit, that the Bank of New Zealand would abide the decision of the Court and that Mr Rosser, an investor whom he represented, approved the scheme By Mr Duell, for the directors, that they did not wish to be heard on the application and would abide the decision of the Court. By Mr Somerville, appointed to represent investors (other than Gemadmin (1976) Ltd) who had expressed objection to the proposed division of livestock among the various investor groups, that there was no longer opposition. By Mr Logan, that Westpac did not oppose. Certain submissions were made, however, by Mr Conradson for the unsecured creditors (other than the Banks), Mr Conradson having been instructed by Mr Carroll who was appointed for that purpose, and by Mr Kithnall for the Gemadmin (1976) Ltd investors.

1. Mr Conradson first submitted that the circumstance in which both banks came to be classed as unsecured did not entitle them to be put in the same class as the trade creditors; that for the purpose of an order under s 25 it was not just and equitable that this should be so. He stres that the companies over which the Banks held securities had assets other than rights of lien and recoupment which were accepted as having been lost. He submitted further that th true position is that the Bank of New Zealand is an unsecure creditor of the 1972 and 1973 Gemadmin companies and of no other and that, by the same token, Westpac is a creditor of Gemadmin (1974) Ltd; that the order made under s 24, i.e.,

the winding-up order of 1976, did not affect the standing of the creditors of the various companies; and that in any event the Court has a complete discretion under s 25.

In her written submissions, with reference to the Banks, Mrs Medlicott had pointed out that when, on receivership, the floating charges crystallised there were no assets to which the charges could attach other than the rights of lien or recoupment which had been lost. Her submissions, however, were designed to show that it would be contrary to the meaning and intent of the direction, that the companies be wound up as if they were one company, if the Banks' charges could attach against assets held by Gemco; that consequently they should rank as unsecured creditors and share in that portion of the funds which are the proceeds of assets other than cattle. She had not touched on the point raised by Mr Conradson, no doubt because it had not previously been raised.

Mr Logan submitted that what Mr Conradson said was inconsistent with the order made under s 24. There was no basis for distinction between a bank as an unsecured creditor of one company or another and other unsecured creditors.

It is clear that, from a practical point of view, the banks are unsecured. If there had been one company only and the security from that company held by a bank had proved worthless, the bank holding it would have ranked as an unsecured creditor with all the other unsecured creditors for whatever it might have been owed. To my mind, the situation is already determined by the order made under s 24; in particular, that the companies be wound up together and that they be wound up as if they were one company. Section 24 (1) reads as follows:

> "(1) Where in the opinion of the Court the affairs of 2 or more companies ... to which this Act applies have been so carried on that it is just and equitable that they should be wound up together by the Court, the Court, on the application of the receiver or liquidator of any of the companies, may order that, subject to such conditions as the Court may impose, the companies shall be wound up together and, to the extent that the Court considers it just and equitable, that they shall be so wound up as if they were one company, and the order shall have effect and all the provisions of the Companies Act 1955 shall apply accordingly.

In relation to the companies being wound up as one company, the reference is "to the extent that the Court considers it just and equitable", but there is no limitation upon the extent in the order which was made.

I can only read the reference to being wound up "as if they were one company" in the manner, which is indicated by the introduction to the section - "Pooling of assets of several companies"; in other words, that the assets of all the companies form a common pool and are available to meet, so far as they may extend, the claims of all unsecured creditors. No doubt, if particular assets should be subject to a charge in favour of a creditor, they would remain so charged, but the fact the security which is held from one company proves worthless does not to my mind, in the absence of some limitation in the order, mean that that particular creditor's rights are limited to other assets (if any) of that particular company, or that the creditor's rights are extinguished if there are no other assets. I find that the liquidator is entitled to regard the banks as unsecured creditors ranking with other unsecured creditors and entitled to share with them pari passu in the assets of the group after the preferred creditor has been paid.

2. The second point raised by Mr Conradson is that, as the liquidator does not propose to pursue on behalf of the companies any right of indemnity against the investors, a decision with which there is no quarrel, this has the effect of allowing to the investors the full proceeds of the sale of the stock, a proposal which must operate against the interest of the creditors. He submits that the result is not just and equitable. While accepting that the companies' rights were not worth pursuing, he submits that the creditors should be entitled to have some rights in respect of the fund produced from the sale of stock; that it would be just and equitable for that to be so.

I cannot see merit in this claim, however. The liquidator has not favoured the investors upon any grounds that it would be just and equitable to do so; he has taken advice and exercised his judgment in coming to the decision that, unless the Court should otherwise order, he should not pursue claims against the investors. The legal grounds for such a decision are fully set out in Mrs Medlicott's submissions, but I need not touch on that as no-one has suggested that it should be otherwise. If a claim had been made on behalf of the companies against the investors and failed (as advice which the liquidator received anticipated would be the result), the creditors could have had no entitlement to any portion of the fund; I cannot see that the existing situation can be manipulated to produce a different result. The submission in this respect cannot succeed.

3. Mr Wathnall represents the investors who contributed loan monies to what is referred to in the liquidator's affidavit as the "Support Scheme", for the operation of which Gemadmin (1976) Ltd was incorporated. It seems that in mid-1974 Gemco approached the investors advising them of the difficulties in the beet market and the shortage of revenue to pay for the current working of the operation. In a

circular of 27th May 1974, investors were recommended to subscribe additional funds as "support working capital". Having introduced the topic by reference to the financial problems, the letter states that the investors' managers are presented with two clear alternatives; either to sell off considerable stock on the already seriously depressed market at a substantial loss, or approach the owners for a cash contribution towards grazing and food costs. The manage recommended that a contribution of $200 per $1,000 investment be made to enable the herd to be retained secure. The lette states "all contributions will be expended and calculated on an equitable basis", but what that should be taken to mean is very difficult to say. According to the liquidator's affidavit, the companies' difficult circumstances were revealed in successive circulars and meetings of investors around the country were scheduled in December 1974. Investo were encouraged to provide support funds and finally, in a letter of 25th March 1975, there was set out procedures for giving security for support funds. Approximately $120,000 was contributed, most of it by May, 1975. The scheme was that the funds would be channelled through Gemadmin (1976) Limited, that company would pay the money to the various othe Gemadmin companies where it would be applied in the purchase price of "revenue stock" to be sold at a future date to Gemadmin (1976) Ltd. The security in the meantime took the form of debentures given by the various Gemadmin compani to the 1976 company and that company, in turn, gave a debenture to Gemco as trustee for the support investors. The support investors had the option of taking an allocation of stock or else being repaid in cash.

As I understand the position there is no value in the securities and these investors, so far as the loan monies they provided are concerned, can only be regarded as unsecured creditors. The liquidator states in his affidavi that he is advised that the support scheme investors have no special claims against the trust fund held for the investors generally and I do not understand that to be disputed.

Mr Withnall stresses that the investors who contributed in this way believed that they were making a secured investment. He does not disagree with Mrs Medlicott submission that, the securities of the support group being worthless so far as the companies which gave them are concerned, the charges cannot attach against assets belonging to Gemco, but he submits that the support group should fare better than the general body of unsecured creditors; that in some way a greater proportion of the funds available for such creditors, $112,000 approximately, should be allocated to the support group. He urges that they invested on the understanding that adequate security would be available, that, unlike the Banks who were independent and capable of forming their own assessment of the situation, they relied on the directors of the company and that they acted, not only to protect their own investment, but to keep the ship afloat and thus protect the investment of others. Further, that, as opposed to others who could write off bad debts, they were unable to obtain any taxation advantage in respect of their loss. Accordingly, it was just and equitable that there should be some additional dividend paid to them. In all, a strong plea for special consideration.

The duty of the Court is to see that a scheme that is proposed is "just and equitable". The only dictum of the Court to which I have been referred is that of Casey J. in the Home Loans Fund (N.Z.) Limited application, (Christchurch M.589/78, judgment 7 December 1982, unreported) with which I respectfully agree:

> " There is little authority to guide me on the interpretation of the words 'just and equitable' in settling the order of claims under s 25. Obviously it contemplates a departure from the priorities laid down in the Companies Act 1955. I think Parliament intended the Court to have the broadest discretion to effect a result which accords with common notions of fairness in all the circumstances, bearing in mind the cardinal principle underlying insolvency administration, that there should be equality among creditors of the same standing. This is recognised in

> the provisions of sections 351A to C of the Companies Act 1955 (as inserted by the 1980 Amendment Act) dealing with the liability for debts of related Companies and joint winding up. It makes provision for pooling of assets corresponding to those in the Companies Special Investigations Act, and also directs that unless the Court otherwise orders, the claims of all unsecured creditors of the Companies shall rank equally among themselves. (S.315(e)). That amendment does not apply to the present situation but I regard this provision as demonstrating legislative acceptance of the importance of equality in the distribution of insolvent Company assets."

In the present case, one may feel considerable sympathy for these particular investors, but if they are to be preferred in any way it must be at the expense of the ôthe unsecured creditors. There is no suggestion that it should be from the fund held for the investors generally or, indeed, that it would be possible to make some extra provision for them in that way, that fund being the property of those investors. There is no information as to the trade creditor and graziers who go to make up the other unsecured creditors (apart from the Banks) but, in any event, there is nothing to suggest that they or the Banks are in any sense responsible for the situation in which the members of the support group find themselves. I am unable to see that it would be just and equitable to say that the former should have less so the latter may receive more.

Turning to the realities of the situation, I was informed by Mrs Medlicott that, on the basis of the latest figures, the investors stand to receive 15.1c in the dollar and the unsecured creditors (after a preferred debt of $10,590 is paid) to receive 14.99c in the dollar, so that at least the support group should receive approximately the same dividend on their later contribution as on their main investment.

I am unable to see that there is any special consideration that could properly be granted them and the submissions made on their behalf must fail.

The liquidator is entitled to an order approving the scheme on the lines sought, but with some amplification to cover points raised at the hearing. Accordingly, it is ordered:

1. That the net proceeds of sale of the cattle sold by the Liquidator under the authority of the Court (as shown in the statement of receipts and payments annexed to the liquidator's affidavit of 15 August 1984), together with any further income which may accrue and subject to the payment of further costs incurred, vest in the investors who subscribed the funds for the total herd managed, bailed to, or held by or under the control of the companies or any of them in the proportions set out in the scheme proposed by the liquidator and annexed to the notice of motion dated 16 September 1982.

2. That the net proceeds of the realisation of plant equipment and other assets owned by the companies be distributed in accordance with the provisions of the Companies Act 1955 and the Companies (Winding Up) Rules 1956, and as if the proceeds were the assets of one company and the unsecured creditors of the companies were the unsecured creditors of that one company; that the Bank of New Zealand, Westpac Banking Corporation and the members of the support group, their securities being worthless, rank as unsecured creditors with all other unsecured creditors of the companies

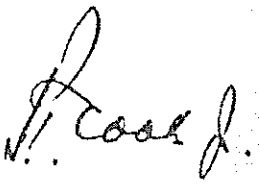
3. Leave is reserved to apply for any further orders that may appear necessary.

4. In accordance with the memorandum submitted the costs of counsel appointed by the Court are fixed as follows:

Mr Withnall:	$1,000
Mr Carroll (for himself and counsel instructed by him):	$1,000
Mr Somerville:	$750

Any other questions relating to costs are reserved.

As to the precise wording of the order, if it is wished a draft order may be submitted, or I could see counsel if necessary.



Solicitors:

Cook Allan & Co, DUNEDIN, for Liquidator
Sim, McElrea, O'Donnell & Thomas, DUNEDIN, for the Companies
Paterson & Lang, DUNEDIN, for unsecured creditors
Brent, Haggitt & Co, DUNEDIN, for D.C. Kosser and bank of New Zealand
Ross, Dowling Marquet & Griffin, DUNEDIN, for Westpac Banking Corporation
Anderson, Lloyd, Jeavons & Co, DUNEDIN, for Directors of the Companies.