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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M.229/83

IN THE MATTER of the Companies
Act 1955

1417
AND

IN THE MATTER of WAINONI GARAGE LIMITED
(In Liquidation)

Hearing 24 October 1984
Counsel R A MacDuff for Official Assignee
T Weston for Wainoni Garage Ltd
Judgment 26 October 1984

(ORAL) JUDGMENT OF DAVISON C.J.

Wainoni Garage Limited (In Liquidation) (which I shall refer to as "the Company") was incorporated on 7 April 1977. Its authorised capital is \$6,000, divided into 6,000 ordinary shares of \$1.00 each. The shares were held by Mr Fletcher - 4,000; and Mrs Fletcher - 2,000.

On 6 April 1983 an order for winding up of the Company was made. The winding up has proceeded to the point where moneys due to the creditors at the present time amount to approximately \$13,000. The present assets in the liquidation are:

1. The contributories liability on current account of approximately \$9,000.
2. An action by the Company against Wainoni Garage Ltd which seeks to recover the sum of \$16,270 plus interest.

The Official Assignee has arranged for a compromise of that action in the sum of \$9,000. The sum of \$9,000 if received will enable the Official Assignee to pay a dividend to the creditors of approximately 70 cents in the dollar. A payment by the contributories of a further sum of \$4,000

against their liability on current account of \$9,000 would enable the Official Assignee to pay the creditors in full.

The Official Assignee has sought the approval of this Court under s 240 of the Companies Act 1955 to the compromise of the action in the sum of \$9,000. The application for approval has been opposed by Mr Weston on behalf of the contributories. The ground of opposition substantially is that the compromise will be prejudicial to the contributories and deprive them of a real opportunity to recover far more than the compromise would allow and will also limit the amount which the contributories are required to pay to the Official Assignee on current account.

On looking into the matter it appears to me -

(a) That the action must succeed for at least \$6,510 plus interest if awarded, which could take that sum to approximately \$8,500. This is because of an admission of liability for \$6,510 which has been made by the defendant in its statement of defence.

(b) That the contributories are able to pay the amount of their current account of \$9,000 not immediately but given a short period of time, but in the meantime they are prepared to secure that sum to the Official Assignee by way of second mortgage over a freehold property which they own. That freehold property has a capital value of \$82,000 and is encumbered by a first mortgage of only \$10,000. The sum likely to be recovered in the action, together with the contributories liability on current account, would produce between \$15,000 and \$17,500, which should be more than enough to pay off the creditors even allowing for the costs of the action.

(c) If the action for \$16,270 and interest succeeds then a sum of approximately \$21,000 might be recovered which, even after the costs are deducted, would be more than enough to pay off the creditors in full \$13,000 and leave a

substantial return to the contributories and also relieve them from paying any of their current account.

(d) If the compromise is approved, however, then the Official Assignee will get \$9,000 from the action but will require the contributories to pay some \$4,000 of their current account to enable the creditors to be paid in full.

Mr MacDuff for the Official Assignee says in answer to the contributories request that the compromise be not approved -

1. To refuse approval and allow the action to proceed would substantially delay payment to the creditors.
2. There is no immediate prospect of a hearing.
3. The prospect of success in the action depends on credibility of the contributories as witnesses as the contract which concerns the sale of a garage was largely an oral contract.
4. The chances of success are put at no more than 50/50 by the Official Assignee and his solicitor from whom he has had advice.

Mr MacDuff acknowledges that the compromise would greatly reduce the amount which the contributories might obtain were they successful in the action.

The legal principles I must apply in dealing with this matter are contained :

1. In s 240 of the Companies Act 1955.
2. The discretion which I have to approve or reject the compromise is a judicial discretion and must be exercised on evidence that the compromise is expedient and beneficial:
Northumberland Banking Co ex parte Totty
1 Dr. & Sm. 273, 282.

3. The Court can approve any compromise it deems expedient and beneficial even though there is strong opposition to it: re Risca Coal Co 30 Beav. 528.
4. The Court should have regard to the interests of all persons affected by the compromise and not only to the interests of the creditors. The interests of contributories should also be adequately taken into account.
5. Where the application is one for the compromise of an action it is not necessary for the Court to conduct a virtual hearing of the action to determine the prospects of success, but the Court is able to reach a decision on the basis of its assessment of the prospects of the action on information reasonably placed before it.

In the present case I have reached a conclusion that the prospects of the plaintiffs succeeding in the action against Wainoni Motors Ltd are better than 50/50 and although it is correct, as Mr MacDuff says, the action depends on credibility, the plaintiffs case is also supported by the evidence of the solicitor who acted for the contributories at the time of the contract and his recollections of events are contained in a memorandum which he prepared contemporaneously with the events in question.

I think it would be unjust to refuse the contributories the opportunity to have the action contested in Court or else to have the opportunity to settle at a higher figure because the benefits to them from the action could be substantial. I am conscious of the Official Assignee's concern that payment to the creditors should not

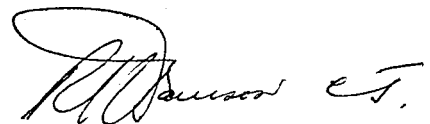
be long delayed and that they should not be prejudiced unduly by allowing the action to proceed.

Mr Weston on behalf of the contributories, having given to the Court the undertaking from the contributories that they will secure their current account to the present limit of it, has gone some way towards meeting reservations I had about refusing compromise, and as I have now been able to give to the parties to the action a fixture before Christmas, the question of delay no longer looms large.

In those circumstances, I think it proper to decline the Official Assignee's application for approval of compromise and to direct -

1. That the contributories secure their current account to the Official Assignee by second mortgage over their property.
2. That the action proceed on either 22 November or 10 December as the parties to the action may elect.
3. It is a condition of the action being allowed to proceed that the contributories within seven days enter into an agreement with the Official Assignee that they will pay to the Official Assignee such sum as may be necessary in order to allow the Official Assignee to pay to the creditors 100 cents in the dollar. In the event of the contributories declining to meet that condition, leave reserved to the parties to apply to the Court for reconsideration of the Official Assignee's application.

Costs reserved.



Solicitors for Official Assignee:

Solicitors for Contributories:

Office of Official Assignee
(Christchurch)
Weston Ward & Lascelles
(Christchurch)