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IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

A.No.39/82

1032

BETWEEN BROADLANDS GUARANTEE CORPORATION LIMITED a duly incorporated company having its registered office at Auckland and carrying on business there as a Guarantee Company

Plaintiff

AND NOEL OWEN CAVE and GARY JOHN BAIRD both of New Plymouth, Chartered Accountants

Defendants

Hearing: 24 and 27 August, 1984.

Counsel: J.A. Laurenson for Defendants
G.M. Ross & A.F. Johnston for Plaintiff.

Judgment: August, 1984.

REASONS FOR ORDER OF VAUTIER, J.

These are successive motions filed on behalf of the defendants seeking an order for the adjournment of the trial of this action a fixture having been allocated for the hearing on 29 August during the current sittings of the Court in New Plymouth On 27 August I made an order that the action stand adjourned until a further fixture is allocated by the Registrar and said that I would give my reasons in writing for making this order.

In the plaintiff's statement of claim it is alleged that it is the debenture holder in respect of debentures granted by two named companies and that on or about 20 March, 1981 it

appointed the defendants as receivers and managers of these companies pursuant to the powers contained in the debentures. It is further alleged that the defendants commenced to realise the assets and that after payment of various disbursements they held in their capacity as receivers a sum believed to be $107,000, that the indebtedness of the companies to the plaintiff as at 24 October, 1982 was in the vicinity of $92,538.95 with further interest accruing in respect thereof at the rate of $43,84. It is further alleged that the defendants have not accounted to the plaintiff for any part of the moneys realised by them as receivers. Judgment is accordingly sought against them for the sum abovementioned together with interest accruing down to the date of judgment.

The defendants who are chartered accountants practising in New Plymouth by their statement of defence admit the allegations as to the plaintiff being a debenture holder in respect of the companies and their appointment as stated and further admit that they have realised a nett sum of approximately $107,000. The only matters put forward by way of defence are that the plaintiff, it is said, is only a second debenture holder in respect of the companies, that they have not yet completed the realisation of the companies so as to be in a position to account both to the first debenture holder, the Bank of New South Wales (now Westpac Banking Corporation) by whom they were also appointed receivers and managers and to the plaintiff and that the disbursement of the proceeds of realisation is the subject of a dispute between the first debenture holder mentioned and the plaintiff. They further plead that they will be making application to this Court pursuant to

s.345(1) of the Companies Act 1955 for directions as to the disbursement of the nett proceeds of the realisation.

In relation to the first motion seeking adjournment the defendants sought leave in terms of R.411 of the Code of Civil Procedure for leave to use on the argument of the motion an affidavit made by one of the defendants and filed in support of the notice of motion which was filed in this Court on 18 May, 1983 seeking orders pursuant to s.345(1). Leave to refer to the affidavit in question was granted by me without opposition on behalf of the plaintiff and I have looked at the notice of motion referred to and find that that simply seeks "an order for directions in relation to particular matters arising in connection with" the performance of the functions of the defendants as receivers and managers of the two companies upon the grounds that an issue has arisen between the first respondent and the second respondent who are respectively the Westpac Banking Corporation and the abovenamed plaintiff concerning the application of the funds realised in the course of the receivership.

The lengthy affidavit filed in support of the motion to which a number of copy documents are annexed indicates that there are questions of law involved as to the interpretation of documents and it appears also complex questions as to accounting and factual matters.

The sole ground advanced for the adjournment of the trial was thus the fact that there was in existence and undisposed of this application in terms of s.345 of the Companies

Act 1955 which, it was said, should be heard and adjudicated upon prior to the trial of the present action.

After hearing brief submissions on 24 August, 1984 in relation to the first motion filed seeking an adjournment I declined to grant an adjournment. Although the point was not taken on behalf of the plaintiff that motion was one which the plaintiff was in all probability entitled to regard as a nullity because the necessary notice in terms of R.399 was not given and no application for abridgment of time was sought in the motion. I did not deal with the matter on any such basis as this, however, but on the basis of the information then presented I could see no valid ground upon which the plaintiff on whose behalf there was strenuous opposition to any adjournment could be denied a hearing. On the pleadings in the action and the record in that action the defendants had not disclosed any actual defence and the admissions made by them in my view appeared to be such as to entitle the plaintiff to immediate relief. The plaintiff was clearly entitled on the basis of the facts actually pleaded and the admissions made to an accounting and it was conceded that no such accounting had been accorded.

I also noted that the action had been commenced as long ago as 20 October, 1982, the statement of defence being filed on 19 October, 1982, that there were no outstanding interlocutory matters and the plaintiff had filed this praecipe to set the action down for trial on 2 April, 1983 and been authorised on 26 May, 1983 to set the action down for trial unilaterally. It was clear, in my view, that in these circumstances the

defendants being in the position where they were liable to account to the plaintiff although they might also be liable to account to the other party named, should have, without delay, on receiving the writ, made application in terms of R.482 of the Code of Civil Procedure by way of interpleader to protect their position so that one or other of the orders could have been made in terms of that Rule as was deemed appropriate by the Court. The order obviously required in my view was an order in terms of R.482(3) requiring that one of the claimants to the moneys obtained from the realisation should commence an action against the other so that the issues between them could be determined. Alternatively, of course, the defendants could have made application in terms of R.95 of the Code of Civil Procedure seeking an order for the joinder of the Bank of New South Wales as it then was, as a third party in the plaintiff's action on the grounds that the question or issue in the action should properly be determined not only as between the plaintiff and themselves but also as between the plaintiff and the Bank. Instead, the defendants here have chosen simply to rely upon the application made by them under s.345(1) of the Companies Act which they have pursued in an extremely leisurely manner giving rise, in my view, to the very justifiable complaint of the plaintiff that it has continued for all this time to be delayed in the prosecution of its action against the defendants simply on the ground that there is some other application before the Court brought by the defendants and involving a party which has no standing in the plaintiff's action.

In relation to the second motion which was made in the form of an application in terms of R.426A seeking the rescission of my previous order refusing the adjournment, my attention was drawn to the detailed history of the application under s.345(1) and it is in the light of further consideration to this that I, albeit with some hesitation, finally came to the conclusion that there would be a possibility of substantial injustice as regards the defendants if they were compelled to proceed to trial on the hearing date allocated and that notwithstanding what I regard as their wholly misconceived assumption that they could simply continue to resist a hearing proceeding on the plaintiff's action by reliance on the fact that their application under s.345(1) remained undisposed of and their failure to take advantage of the procedures properly open to them, an adjournment should be granted subject to costs.

In my view an application in terms of s.345(1) of the Companies Act 1955 was, in any event, an inappropriate form of procedure for the defendants to invoke in the circumstances of the present case. Section 345(1) reads:

> "Receivers and managers appointed out of Court - (1) A receiver or manager of the property of a company appointed under the powers contained in any instrument may apply to the Court for directions in relation to any particular matter arising in connection with the performance of his functions, and on any such application the Court may give such directions, or may make such order declaring the rights of persons before the Court or otherwise, as the Court thinks just."

This provision is in my view intended to provide for the situatic where questions arise regarding the carrying out of a receivershi which can be readily determined by an appropriate order of the

Court made without any lengthy hearing being necessary, and where there are no substantial disputed questions of fact. That procedure is completely inappropriate to the present situation, as is fully borne out by what has here occurred. The two respondents in relation to the motion under s.345(1) have incorrectly in my view been permitted to obtain orders for discovery against each other. There is no authority at all in my view for the requiring of discovery between the parties in relation to a motion such as this. Rules 161 and 161A are in terms applicable only to actions and I know of no authority whereunder a motion such as this can be classed as an action in terms of the Judicature Act 1908. Just how inappropriate the orders for discovery which have been made are as regards the motion in question is made plain by the fact that the motion as I have indicated gives no details as to the actual directions which are sought or as to the nature of the issue said to exist relating to the application of the funds. It would thus be completely impossible for any solicitor/counsel called upon to advise one or other of the parties as to what documents were relevant and discoverable to reach any conclusion. Furthermore, the fact that the issues arising are matters which could not possibly be dealt with conveniently on an application under s.345(1) is made very obvious when one finds that an affidavit of documents has been filed on behalf of one or other of the respondents (the document does not make it clear which one) which occupies 38 pages and contains reference to many hundreds of documents. The matter is thus very obviously one which calls for determination in an ordinary witness action and not on the basis of affidavit evidence as would of course be necessary if the matter was being dealt with

simply on a motion. The position here arising is, I think, somewhat analagous to that arising regarding applications under s.61 of the Administration Act relating to the grant of probate and the alternative of an action for probate in solemn form.

It is of interest to note, I think, that s.345(1), like the corresponding section in the United Kingdom Act, confers a specific power upon the Court to make orders declaratory of the rights of persons who are not before the Court. This again makes it plain in my view that serious questions or substantial disputes are not intended to be dealt with by the Court under this provision. The corresponding section in the Australian statute, the Companies Act 1961 s.183(3), as is pointed out in Re Bismarck Australia Pty. Ltd. (Receivers and Managers Appointed) Sicree and Watt v. Deputy Commissioner of Taxation (1981) VR 527 is worded quite differently and is regarded as enabling questions of substance to be determined but there is no express power to make orders binding upon respondent parties (see p.536).

The inappropriateness of the course which the parties have followed in relation to the disputed questions evidently arising is further illustrated by the fact that there has now been lodged in the Court for filing in this action a memorandum of counsel for the Westpac Banking Corporation in which it is mentioned that it is understood that the defendants, as receivers, are now proposing to make a payment into Court of funds in their hands and concern is expressed as to the Court making an order for payment out of these funds to the abovenamed plaintiff without consideration for the claims of the Westpac Banking

Corporation. What has to be said with regard to this memorandum is that Westpac Banking Corporation is not a party to this action and has no standing whatever to be heard in this way.

I should mention, finally, that Mr Johnston submitted that I could not rescind the order made by me on 24 August because the order, although made by me in Chambers, was a Court order by reason of the fact that the motion was directed to the Court. I do not think there is any substance in this procedural point because the Court could, of course, in any event, entertain a further application for adjournment at any stage even after the hearing had commenced.

It was the fact that the plaintiff in this action has clearly gone along to a substantial extent with the use of the procedure under s.345(1) as a mode of determining the disputed questions which led me in the end to grant the adjournment. The injustice which could otherwise arise as regards the defendants if the action had proceeded to trial is, of course, that the defendants might end up with having to pay twice. They have, I think, clearly been lulled into a false sense of security not only no doubt by reason of the advice they have received from their own legal advisers but also by reason of the actions of the plaintiff in taking out an order for discovery in the application in proceedings, M.No.27/83. This it did on 4 August, 1983. Mr Johnston for the plaintiff was unable to furnish any explanation to me as to why the plaintiff company as second respondent in those proceedings did not file an affidavit of documents in response to the order which had been made against it on 27 July, 1983

until 29 March, 1984 and, furthermore, as to why no copy of this affidavit was served upon the second respondent with the result that further delay occurred as is evidenced by the letter from the first respondent's solicitors to the plaintiff's solicitors dated 10 July, 1984 (copy annexed to Mr Cave's affidavit sworn 20 August, 1984 and filed in the present proceedings). He similarly was unable to explain why the plaintiff, if it considered that the motion under s.345(1) was being unjustifiably delayed, did not itself seek a fixture for the hearing of that motion on a unilateral basis.

The plaintiff, however, was having regard to the state of the pleadings in the action entitled to set this action down for trial and obtain a fixture for the hearing. The defendants in my view have taken the matter far too lightly and for this reason and because they have failed to adopt the proper procedure they have placed themselves in the position of grave risk in which they at present stand. The adjournment must accordingly be on the terms that they pay costs in respect of the plaintiff's preparation for trial. They will remain at risk of course while the pleadings stand as they do at present because the plaintiff is clearly, I think, entitled on the pleadings to move for judgment against them. Without wishing to say anything which would in any way inhibit another Judge dealing with this matter subsequently it appears to me that the defendants, unless all parties agree otherwise, can now protect their position satisfactorily only by paying the amount held by them into Court to abide the order of the Court and moving forthwith for an order pursuant to R.482.

I accordingly order that the action stand adjourned but the defendants are ordered to pay the sum of $250 by way of costs to the plaintiff in respect of this adjournment. I should mention that counsel are seeking a conference with a Judge as to the most convenient mode of disposing of not only this action but other actions or proceedings which arise out of or are connected with the same receivership or allied concerns. Such a conference, of course, can clearly be best dealt with by the Executive Judge at Hamilton who will be in the best position to consider how the hearing or hearings required can be most conveniently dealt with and what timetable should be laid down if such is deemed necessary or desirable.

SOLICITORS:

Anthony Grove & Darlow, Auckland, for Plaintiff.
Govett Quilliam & Co. New Plymouth for Defendants.