File C-P.J

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M.399A/83

IN THE MATTER of The Companies Act 1955

A N D

IN THE MATTER of RADIO TIMES COMMUNICATIONS LIMITED (In Voluntary Liquidatio:

Hearing: 28 September 1983

Counsel: Mr Couch for D.J. Crichton
Miss Mitchell for R. & G.I. Brazukas
Mr Whiteside for Liquidators

Judgment: 8/2/84

JUDGMENT OF HARDIE BOYS J.

These are motions under s 311A(2) of the Companies Act 1955 for orders that two dispositions made by the Company are not voidable against the liquidators, who have given due notice that they wish to set them aside under s 309 as voidable preferences.

The company was incorporated on 5 March 1982 with a capital of $10,000 in $1 shares. Seven thousand of the shares were subscribed for by Mr David John Crichton and his wife Mrs Susan Jane Crichton, and three thousand by Mr Ronald Brazukas and his wife Mrs Gail Isobel Brazukas. These four were the directors. None of the capital was paid up until 11 August 1982. Prior to that, the shareholders had advanced substantial sums, without security, to the company, some of it prior to incorporation. Mr Crichton deposed that he and his wife advanced a total of $13,500. The liquidators have identified $12,500 of this, $2,500 having been advanced on 18 February 1982 and $10,000 on 2 July 1982. They have also been able to confirm Mr and Mrs Brazukas' evidence that they advanced a total of $10,785, all in February 1982.

On 11 August 1982 there was an exchange of cheques. Mr and Mrs Crichton took a cheque from the company for $7,000 as part repayment of advances they had made, and they thereupor

gave the company a cheque for $7,000 in payment of their share capital. Mr and Mrs Brazukas obtained and paid cheques for $3,000 for the same purposes. The cheque which they gave to the company was one which they had drawn on 7 May 1982 for the purpose of paying up their shares, but which they had retained, partly, they said, because they were waiting for the Crichtons to pay for their shares too, and partly "because of overlooking the same". These exchanges of cheques, it was said, took place because in July 1982 the company's accountants advised that the capital should be paid up, and the sole purpose of the payments to and from the company, was to pay it up. Mr Crichton made it clear that he could not have paid it up otherwise. As the amounts were the same, it was added, the company's position was not altered. But no one was so ingenuous as to suggest that the shareholders' own position had similarly remained unaltered. For the effect of the exchange of cheques was to eliminate their liability on their shares and to reduce the amount of the unsecured indebtedness of the company to them; a not insignificant benefit, for the company went into voluntary liquidation on 1 November 1982.

It was accepted by all counsel that in proceedings of this kind the onus of proof rests on the liquidators, and that where, as here, liquidators seek to set aside transactions on the grounds that they were voidable preferences, they must establish four things: first, that a payment was made by a company unable to pay its debts as they became due from its own money; secondly, that the payment was in favour of a creditor; thirdly, that it was made "with a view to giving that creditor .... a preference over the other creditors"; and fourthly that it was made within two years of the commencement of the winding up (s 309(1)).

Only the third of these was put in issue. The fourth was clear beyond doubt. I assume for present purposes that the second was too. There was no argument on the point and I express hesitation about it simply because on the material before me there is no evidence to establish how the shareholders became creditors in respect of moneys put in to the business prior to incorporation. But I assume that the

matter was appropriately dealt with at the time, and that it need not concern me now. As to the first, despite blan assertions in Mr Crichton's affidavit that in July 1982 the company "had adequate funds and needed no further injection of capital" and that to the best of his knowledge and recollection "the company was at 11th August 1982 able to meet its debts as they fell due", both Miss Mitchell and Mr Couch accepted that the position was otherwise. The facts are that the company began its existence with an overdraft of $5,500 (limit $5,000) and then obtained a term loan of $20,000. The overdraft limit was frequently exceeded and in the period from 3 June 1982 to 11 August 1982 cheques were dishonoured on nine occasions. As at 11 August the account was overdrawn in excess of $9,000 and the term loan balance was $19,166. Paye tax deductions from employees' wages were not paid from June 1982 on. The company was in default under one of its principal contracts which required it to account for a percentage of advertising revenue it received. As at 31 July 1982 it owed $31,883.71 in this respect alone - it was one of the major debts - and although some reductions were made prior to 11 August the debt remained large: it was $25,618 as at 30 September. By 11 August this creditor had threatened a winding-up petition, and the cheque paid to avert that had been dishonoured. Other creditors were pressing for satisfaction. The statement of affairs prepared for the liquidators as at 1 November 1982 showed unsecured creditors of $137,966, with free assets of $8,963 to satisfy them. Clearly the company was insolvent on 11 August.

The fact that a payment is made to a creditor by an insolvent company within the prescribed period before the winding up does not of itself prove a preference. The Court must be satisfied on the balance of probabilities that in making the payment the company's dominant intention was to prefer that creditor over the others. There must be "a conscious decision which is an act of free will" (Richardson J in Re Northridge Properties Ltd, Auckland, M46-99/75, 77/75, 13 December 1975 - see February 1983 New Zealand Law Journal p 44). And of course the relevant decision is that

or persons
of the person/whose mind or minds can be said to be that of the company (see Tesco Supermarkets Ltd v Nattrass /I972/ AC 153, 170-171 per Lord Reid). Where there are more than one of these, then as Richardson J said in the Northridge case (NZLJ p 47):

> "... where a collective decision is involved, the persons concerned must either individually be of one mind or there must be a consensus for any intent to be attributed to the company."

It is unusual for there to be any direct evidence as to this, and normally it is a matter of the inference properly to be drawn from the proved facts.

In this case, the requisite intention must be found, if anywhere, in a consensus reached by the four shareholders in their capacity as directors. In my view, the fact that what was done involved them all, and they all participated in it, can mean only that it was done by their common accord. What then was that accord?

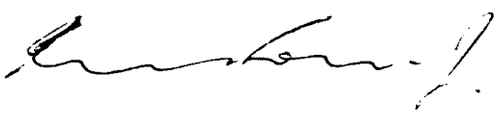
Mr Couch, supported by Miss Mitchell, submitted in effect that in the absence of evidence to the contrary I had no alternative but to accept the evidence of the directors. However I do not accept that that is so. The inferences to be drawn from the facts may speak louder than self-serving statements of those involved. In this case, the directors in their evidence do not quite address themselves to the critical point. They claim that the sole purpose of the transactions was to pay up the capital. That certainly explains their payments to the company, but it does not fully explain the company's payments to them. This was in reality but one transaction, and must be looked at in its entirety. One may then ask why it was necessary or desirable on 11 August to pay up the capital when the company, which certainly needed the money, was not to retain it but was to pay it straight back. The transaction was of no benefit to the company. It was solely for the

benefit of the shareholders. On 11 August the nature of that benefit was very apparent. I must assume that the directors were aware of that, and I consider I am entitled to infer that they intended to secure that benefit for themselves. For there was no other point in what was done.

In the case of Mr and Mrs Brazukas, I regard the position as crystal clear, for they were ready to pay for their shares at any time after their cheque was drawn. They give no reason for being paid by the company in return. Mr Crichton - his wife did not tender any evidence - said he needed the cheque from the company in order that he could pay the company. Whilst that is no doubt correct, it does not provide an explanation for the transaction in its totality.

Given the knowledge that the directors must be taken to have had of the company's financial situation as at 11 August 1982 - aptly summarised in one of Mr Crichton's memoranda by one word and one punctuation mark: "Phew!" - and given the pointlessness of the transaction from the company's point of view, there is in my opinion only one conclusion to be drawn, and that is that the preference which the transactions in fact gave to the shareholders was their dominant purpose as directors, in effecting them. (cf. Re F.P. & C.H. Matthews Ltd /1982/ 1 All ER 338).

In my opinion the liquidators were correct in the view they formed of the matter. The motions before me are therefore dismissed and I order that the payments be set aside. Leave is reserved to the liquidators to apply if necessary under subs (4) of s 311A.



Solicitors:

Weston Ward & Lascelles, CHRISTCHURCH, for D.J. Crichton
Smithson Cleland Fountain & Gilroy, CHRISTCHURCH, for R. & G.I. Brazukas
Wynn, Williams & Co, CHRISTCHURCH, for Liquidators.

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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

IN THE MATTER of The Companies Act 1955

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IN THE MATTER of RADIO TIMES COMMUNICATIONS LIMITED (In Voluntary Liquidation)

JUDGMENT OF HARDIE BOYS J.

Set I

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M.399A/83

IN THE MATTER of the Companies Act 1955

AND

IN THE MATTER of RADIO TIMES COMMUNICATIONS LIMITED (in voluntary liquidation)

Hearing: 11 April 1984

Counsel: P.F. Whiteside for Liquidators
A.A. Couch for David John Crichton
J.E. Skinner for Mr and Mrs Brazukas

Judgment: 23 MAY 1984

JUDGMENT OF ROPER J.

This is an application by the Liquidators pursuant to s.311A(4) of the Companies Act 1955 for an order directing repayment to the company of certain sums paid to shareholders which have been held to be voidable preferences.

Radio Times Communications Limited was incorporated on 5 March 1982 with a capital of $10,000 in $1 shares. Mr and Mrs Crichton subscribed for 7000 shares and Mr and Mrs Brazukas for the remaining 3000. All four were directors. None of the capital was paid up until the 11th August 1982, and prior to that the Crichtons had advanced about $12,500 to the company without security, and the Brazukas $10,785 on the same basis. On the 11th August there was an exchange of cheques. Mr and Mrs Crichton took a cheque from the company for $7,000 as part repayment of their advances and immediately gave the company a cheque for $7,000 in payment for their shares. The Brazukas

obtained and paid a cheque for $3,000 for the same purpose. The company went into voluntary liquidation on the 1st November 1982 owing over $137,000 to unsecured creditors with only $8,963 in free assets to satisfy them.

The Liquidators duly gave notice pursuant to s.309 of their intention to have the payments of $7,000 and $3,000 set aside as voidable preferences, and the shareholders then applied to the Court for orders that the dispositions were not voidable. The application came before Hardie Boys J. who, in a decision of the 8th February 1984, ordered that the payments be set aside, with leave reserved to the Liquidators to apply under s.311A(4) for repayment.

This present application has not been served on Mrs Crichton but Mr Whiteside submitted that the circumstances were such that it was a case of joint and several liability so that an order for repayment could be made against Mr Crichton for the full sum.

The effect of s.311A(4) is that the Court may order that persons to whom dispositions were made, but not bona fide purchasers from them, shall transfer to the liquidator the property concerned, or any part of or interest in it retained by them; or, in lieu of a transfer of property, a money payment may be ordered.

Both Mr Skinner and Mr Couch argued that the remedy provided by the section is a discretionary one and called in aid s.311A(7) which reads:-

> " (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 circumstances which the Brazukas claim would make an order for repayment inequitable are:-

1. The company owes them $10,975 by way of an unsecured loan which they raised by a second mortgage on their home.

2. That they altered their position to their detriment by paying up the share capital.

3. That they acted on professional advice in obtaining the cheque from the company and then repaying it on account of their indebtedness.

4. That in addition to the $10,975 they are owed $13,000 for publishing rights sold to the company.

5. Their financial circumstances are such that there is no way they could meet an order for repayment.

I have sympathy for the Brazukas but I cannot accept that any of the matters raised aid them in terms of subsection (7). I fail to see how the payment of share capital amounted to a detrimental change of position or how in the circumstances they could possibly have had any reasonable belief that the payment would not be challenged. I also have reservations concerning the alleged "professional advice".

In affidavits filed in the earlier proceedings Mr Crichton and the Brazukas deposed that the company's accountant had advised in about July 1982 that "it was desirable that the

share capital be paid up". Given the state of the company's finances one must question that the accountant would have advised that the payment be made in the manner it was.

Mr Crichton also relied on the company's indebtedness to him and the fact that he is liable as a guarantor for a large part of the company's indebtedness to the Westpac Bank. Demand has already been made for over $29,000. He also relies on the "professional advice", and the circumstance that he is now separated from his wife when it would be inequitable to saddle him with the full sum of $7,000 as the 7000 shares were not jointly owned. Each subscribed for $3,500 and the effect of the transaction was that the wife's shares are now fully paid up.

I am by no means convinced that equitable relief is justified. It is not disputed that there is joint and several liability to repay the $7,000 cheque and Mr Crichton has his remedy against his wife.

This is in essence a dispute between shareholders and creditors and I see no reason why the shareholders should benefit to the detriment of the creditors.

The Liquidators' motion raises a further issue which concerns Mr Crichton alone. They seek an order that Mr Crichton "pay the said sum of $7,000 by way of set-off from the moneys held in the trust account of Coopers and Lybrand Chartered Accountants for the credit of David John Crichton". The credit arose in this way: a dispute arose between the Liquidators and Mr Crichton concerning a motor vehicle owned by the company in which Mr Crichton claimed an interest. Following proceedings in the District Court, and an appeal to this Court, it was determined that of the $14,214 held by the Liquidators (being the proceeds of sale of the vehicle) the company was entitled to 10.67% thereof and Mr Crichton the balance. Prior to the appeal to this Court the liquidators

had agreed to delay executing the judgment of the District Court in relation to the motor vehicle on the following conditions (which are contained in a letter from the Liquidators' solicitors dated the 31st August 1983):-

"1. Crichton pay the sum of $10,500 to the liquidators by 5 p.m. on Wednesday 7 September 1983.

2. The liquidators will apply that money initially in satisfaction of the debt outstanding to General Finance Limited.

3. The liquidators will hold the balance then remaining on deposit and will accept that the interest earned therefrom will be taken by them in full satisfaction of any claim they might have in respect of interest paid on the company's overdraft with the bank to the extent of such balance.

4. The liquidators acknowledge that the $10,500.00 represents payment in full for any interest the company has in the car.

5. The liquidators undertake that, in the event of the Appeal being successful, they will refund to Mr Crichton the sum which represents the value of such interest as he may be found to have in the car. For the purpose of this assessment the value of the car shall be deemed at present to be $10,500.00 less the amount that has to be paid to General Finance Limited.

6. This Agreement, and the payment of these moneys, to be treated as a matter entirely separate from all aspects of Mr Crichton's relationship with the company, i.e. any payment back to Mr Crichton subsequent upon determination of the Appeal to be made in money and not treated as a set off against any claim the liquidators or the company may then have on Mr Crichton in respct of matters not concerning the car. The liquidators do however, make it clear that they do not waive any rights they may have at any time in the future to recover from Crichton any sum and that they do not in any way undertake to refrain from taking any step to recover any debt or to execute any Judgment that would be available to them.

7. The liquidators shall register a change of ownership in the car so that it is put in the name of Mr Crichton, the ownership papers shall, however, remain with the liquidators and Mr Crichton shall acknowledge that his interest in the car shall be assigned to the liquidators as security for payment of the sum of $1,256.35 and costs, disbursements and witness expenses for which Judgment was given by the District Court and for such further sum the High Court might Order Mr Crichton to pay on account of costs on the Appeal. (The liquidators acknowledge that if the Judgment of the District Court in respect of such sums is reversed on Appeal such debt shall be deemed to have been fully discharged)."

There was further correspondence between solicitors, which has not been exhibited, and on the 22nd November Mr Crichton's solicitors wrote:-

"Messrs Wynn Williams & Co.
Solicitors
Christchurch

Dear Sirs

re: RADIO TIMES COMMUNICATIONS LIMITED - D.J. CRICHTON

Thank you for your letter of 17th November. We have discussed its contents with Mr Crichton and have now received his further instructions.

Mr Crichton will not oppose the sale of the car provided:

(1) That the liquidators undertake to use their best endeavours to obtain the best price available in the current market - we think this is relevant in light of the current rising market for used cars.

(2) The net proceeds of such sale are held on interest bearing deposit and on the same conditions as those set out in your letter to us of the 31st August 1983 in relation to the $10,500.00 then agreed to be paid to the liquidators by Mr Crichton in lieu of sale of the car.

(3) That the liquidators not oppose the application for stay of execution in respect of that part of the District Court Judgment which was for a sum of money.

We would be obliged if you would let us have your reply to this proposal as soon as possible so that we might know whether or not an extensive affidavit will be required in support of the application for stay of execution.

In respect of the appeal, we enclose a Praecipe for your signature and return.

Yours faithfully,
WESTON WARD & LASCELLES"

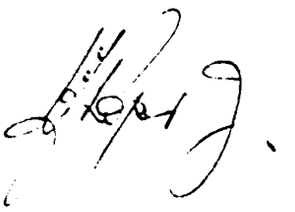
The three conditions set out in that letter were accepted by the Liquidators' solicitors on the 28th November.

Mr Couch has submitted that condition 6 in the Liquidators' solicitors' letter of the 31st August is a bar to recovery of the $7,000 by way of set-off. Mr Whiteside argued that the condition meant no more than that the Liquidators would not "unilaterally" set-off, while reserving the right to set-off in accordance with a judgment of the Court. He further argued that the condition was contrary to public policy if it purported to oust the jurisdiction of the Court to order payment from the fund.

Although the matter is not entirely free from doubt I think I must accept Mr Couch's submissions on this issue. One must presume that the Liquidators saw some advantage in imposing the condition, which on an ordinary reading appears to wholly exclude set-off as a remedy, while still retaining the right to pursue other remedies. There is no complete ouster of the Court's jurisdiction.

There will be an order for payment to the Liquidators of $7,000 by Mr Crichton and $3,000 by Mr and Mrs Brazukas.

No order for costs.



Solicitors:
Wynn Williams & Co., Christchurch, for Liquidators
Weston, Ward & Lascelles, Christchurch, for David John Crichton
Smithson, Fountain, Cleland & Gilroy, Christchurch, for Mr and Mrs Brazukas