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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.988/84

1247

Motion filed — appeal CA. 190/84

IN THE MATTER of the Companies Act

IN THE MATTER of EXCHANGE FINANCE COMPANY LIMITED

Hearing : 26th September 1984

Counsel : A.W. Grove for Petitioner
G.N. Jenkins for Company

Judgment : 26th September 1984

(ORAL) JUDGMENT OF BARKER J

Lemmington Holdings Limited (in liquidation) ("Lemmington") has petitioned for the winding-up of Exchange Finance Company Limited ("Exchange"), alleging a debt of $529,012.09. Exchange attempted to obtain an injunction restraining Lemmington from proceeding with the petition. The injunction was refused by Speight, J. on 26th June 1984. His judgment was upheld by the Court of Appeal on 5th September 1984. On 20th September 1984, the Court of Appeal refused an application by Exchange for leave to appeal to the Privy Council.

In this judgment, the Court of Appeal gave what it called a definite ruling on the interpretation of a deed between Exchange and Lemmington and in effect held that money was due and owing by Exchange to Lemmington; the amount of this sum was variously stated but the lesser figure is $479,474.24.

Having read the judgments of the Court of Appeal, I consider that I am bound by the judgment of that Court to hold that Exchange is indebted to Lemmington in that amount.

Exchange has applied for leave to file out of time

affidavits by Mr Lance Yuill Baillie who was described by the Court of Appeal as the alter ego of both Lemmington and Exchange; he was certainly the principal shareholder and director in both companies at all relevant times.

Mr Grove for the petitioner opposes the filing of the affidavits in opposition. Mr Jenkins submitted that it is understandable that the affidavits were not filed within the normal time provided by the Winding-Up Rules because the decision of the Court of Appeal refusing leave to appeal to the Privy Council was given only a week ago.

In considering that the affidavits should be permitted to be filed, I look at their substance. In the affidavits, Mr Baillie seeks to pursue a substantive claim between Exchange and Lemmington in an action commenced in this Registry under A.436/84. This action was one of those before Speight, J. when he had the application for interim injunction. More particularly, the second affidavit from Mr Baillie goes into greater detail; it refers to matters surrounding the birth of Exchange which is a company which still has a share capital of only $100. The intention was that it should have outside directors and operate in accordance with the normal methods of operation of publicly owned finance companies in this country.

In the affidavit, Mr Baillie alleges that as a result of Lemmington's failure to provide a loan facility to Exchange, Exchange has (a) lost an estimated net profit of $100,000 and (b) lost interest under the facility of the order of $150,000.

In the circumstances, Mr Jenkins for Exchange submitted that it would be unjust for Lemmington to procure the winding-up of Exchange which would be the consequence of my refusing to allow the affidavits to be filed. The basis for this submission was that it was Lemmington's default which had brought about the present situation of Exchange and therefore, Lemmington should not be the petitioner.

With respect, I fail to appreciate this argument entirely;

any damage to Exchange, if it exists at all, has been quantified by Mr Baillie at $250,000; there still exists a claim in excess of $200,000 which, on the ruling of the Court of Appeal, is a valid debt due and owing by Exchange to Lemmington; in respect of which undisputed amount no suggestion has been made by Exchange for payment or security.

The Court does have a discretion to order winding-up or not; the law, as I understand it, is that a Court will rarely refuse to wind up a company where there is a debt due and owing.

Put another way, Mr Jenkins submits that the existence of an alleged counterclaim by Exchange against Lemmington is a reason why the winding-up should be stayed and that the litigation between the parties proceed in the normal way in A.436/84. Although he did not refer to it, I imagine that this submission was based on my own decision in Universal Chemicals Ltd. v. Hayter (1980) 2 NZLR 737 where I enjoined the threatened issue of a winding-up petition where the counterclaim by the company exceeded the claim by the creditor, where the counterclaim by the company was based on substantial grounds and where the company was solvent and in a position to pay its debts.

In a subsequent decision of Re Julius Harper Ltd. (1983) NZLR 235, Hardie Boys, J. declined to follow my decision in Universal Chemicals Ltd. v. Hayter; he refused to grant an injunction where there was a bona fide counterclaim based on substantial grounds which the company had against the petitioning creditor.

This case does not provide the appropriate vehicle for discussing which view is correct; in any event, I understand the matter is before the Court of Appeal currently, though no decision has been given by that Court. Even if the view that I espoused in Universal Chemicals Ltd. v. Hayter is correct, then this case is clearly distinguishable because there, the counterclaim exceeded the claim, the company concerned was solvent and there was little doubt about the

bona fides of the counterclaim of the company against the petitioner.

In the present case, the reverse is so on all those points. First, the claim exceeds the counterclaim by over $200,000. That is even allowing that the counterclaim is correctly assessed; there has been no attempt in Mr Baillie's affidavit to provide any sort of arithmetical or scientific calculation. Secondly, there is no evidence that Exchange is solvent. As I remarked earlier, it has a capital of only $100 and the debt, even allowing for the counterclaim, is very substantial. Thirdly, it is an unreal situation, in my view, to submit that Lemmington and Exchange should be treated as if they had been involved in an armslength transaction. Both at all material times were under the control of Mr Baillie; it is, in my view, not correct to apply equitable principles in the situation by submitting that Lemmington should not succeed on a winding-up petition because its alleged default has brought Exchange to its present situation.

Therefore, the present case is totally distinguishable from Universal Chemicals Ltd. v. Hayter; I see no reason why the creditor should not be entitled to pursue its claim for winding-up. There is also the factor mentioned by the Court of Appeal that there are numerous creditors of Lemmington as distinct from Exchange, some of whom are members of the public, and the Court of Appeal referred to the decision of Eichelbaum, J. in Lemmington Holdings Ltd. v. Commissioner of Inland Revenue (No. 2), (1983) 6 TRNZ, which thoroughly examines the operation of Lemmington with regard to the public and persons seeking to reduce tax liability through Lemmington's schemes.

Mr Grove submitted that Exchange was in receipt of the funds supplied to Lemmington by the investors and that this is a matter which should weigh with me. I make no ruling on that point but observe that Lemmington was the vehicle from which funds were obtained from the tax investors and that although there may have been grandiose ideas for Exchange prevalent at the date of its birth, such did not materialise and it has

been, throughout its life, a $100 company.

Accordingly, I am of the view that even if the affidavits were permitted to be filed, they would not alter the decision that the Court would make on the winding-up order; for that reason, I decline both motions and refuse leave to file the affidavits.

Having heard formal evidence from Mr Bancroft of the Official Assignee's Office, I make a winding-up order for Exchange Finance Co. Ltd. I appoint the Official Assignee at Auckland as the provisional liquidator.

Costs $225 on the winding-up in favour of the petitioning creditor, together with disbursements and witness's expenses as fixed by the Registrar. These costs are in addition to any orders which may have been made by Speight, J. and the Court of Appeal.

R. D. Barker. J.

SOLICITORS:
Grove & Darlow, Auckland, for Petitioner.
B.M. Laird, Orewa, for Company.