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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.988/84

1228

No Special Consideration

IN THE MATTER of the Companies Act

IN THE MATTER of EXCHANGE FINANCE COMPANY LIMITED

Hearing : 2nd October 1984

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

Judgment : 2nd October 1984

(ORAL) JUDGMENT (NO. 2) OF BARKER, J.

This is an application under Rule 2(c) of the Privy Council (Judicial Committee) Rules 1973 for leave to appeal direct from this Court to Her Majesty in Council from a judgment given by me on 26th September 1984.

In my oral judgment of that date, I made two orders. The first was to refuse to Exchange Finance Co. Ltd. ("Exchange") leave to file affidavits in opposition to a winding-up petition. Having made the first order and having heard formal evidence, the second order was made to wind up Exchange on the petition of Lemmington Holdings Limited ("Lemmington"), a company itself in liquidation.

In my judgment, I determined the question of whether affidavits could be filed out of time on the basis of whether those affidavits showed that, even if filed, there was a defence to the winding-up petition. I considered, for the reasons discussed in my judgment, that even if the affidavits were permitted to be filed, they could thwart the winding-up petition. Therefore, I declined the motions to file affidavits out of time. I held that the affidavits could not affect the decision of the Court to make a winding-up order.

A right of appeal certainly would exist against that interlocutory judgment; there has been no attempt to file an appeal to the Court of Appeal against that judgment. Mr Jenkins stated in argument that he wished to take to the Privy Council the judgment of this Court in winding-up Exchange. I am prepared to acknowledge that, in coming to the decision to wind up Exchange, I was influenced by my earlier judgment to refuse leave to file affidavits in opposition. For the purposes of this motion, therefore, I am prepared to assume that in any appeal to the Privy Council against my decision, it would be competent for the would-be appellant to canvass those reasons. I note also that there was a discretionary argument advanced by Mr Jenkins at the winding-up hearing; i.e. that because Lemmington was the petitioner, it would not be just in all the circumstances for a winding-up order to be made against Exchange on Lemmington's petition.

I raised as a preliminary matter the right of Exchange to bring this motion in its own name; it seems clear from the supporting affidavit that the desire to appeal is that of Mr Baillie, the governing director of Exchange and the former governing director of Lemmington. Mr Grove stated that the Official Assignee, as provisional liquidator of Exchange, had not authorised the motion. It does, however, seem settled law that an appeal against a winding-up order can be brought by the company itself, even in circumstances where a contributory, who had the right to appear at the petition and who did not choose to exercise that right, is the person fostering the appeal. That situation is clearly summarised in Halsbury's Laws of England (4th Edition) Vol. 7 Para. 1395 where the learned authors say:

> "An appeal against a winding up order may be brought by a creditor or contributory who has appeared in the winding up court or by the company itself. If the company is the only appellant, security for the costs of the appeal must be given, not out of the company's funds, but from an outside source, namely by the directors or shareholders who are supporting the appeal, and the security must be substantial."

This statement appears justified from the cases cited by Mr Jenkins, namely, Re E.K. Wilson & Sons Ltd, (1972) 2 All ER 160; Re Diamond Fuel Co. Ltd (1879), 13 Ch.D. 400; and Re Consolidated Southrand Mines Deep Ltd, (1909) WN 66. I note that the New Zealand commentary of Halsbury does not contain any dissent from the proposition I have just quoted; indeed, in the leading case of Bateman Television Ltd (in liquidation) v. Coleridge Finance Co. Ltd, (1971) NZLR 929 (J.C.), the appellant was the company which had been placed in liquidation by the Supreme Court and which appealed to the Court of Appeal and then to the Privy Council.

I therefore proceed to consider the motion on the assumption that I have jurisdiction to consider this application which is an extremely unusual one. Although there is jurisdiction vested in this Court to by-pass the Court of Appeal and permit appeals direct to the Privy Council, such jurisdiction has rarely been exercised; so far as my researches allow, the jurisdiction has never been exercised where the decision of this Court has been one of a single Judge, as distinct from one given by a Full Court.

There is a useful article by Dr A.P. Molloy in (1980), NZLJ 455 entitled "Leap-frogging to the Privy Council". The learned author refers to one case where an unsuccessful application was made to appeal direct to the Privy Council from a decision of a single Judge in this Court. That was Lowe & Ors v. Commissioner of Inland Revenue (No. 2) (1979), 3 TRNZ 317. That case in fact ended up in the Privy Council but only after it had been to the Court of Appeal. Counsel for the taxpayer applied to Roper, J. for leave to appeal to the Privy Council direct on the basis that the case was bound to go to the Privy Council anyhow - a submission which the learned Judge considered well founded. However, Roper, J. declined to allow the "leap-frogging" exercise even though he noted that, in Australia, there was a well established pattern of appeals direct to the Privy Council from single Judges and that, in England, litigants could by-pass the Court of Appeal and go direct to the House of Lords in certain circumstances.

Roper, J. noted, however, that there was no such pattern in New Zealand and that for a case involving "indigenous" New Zealand factors in tax law, he considered that the Privy Council should have the benefit of the views of the Court of Appeal. He therefore declined the application.

Another relevant matter to mention, as was indeed done in my judgment of 26th September, is that the Court of Appeal, on 20th September 1984, refused Exchange leave to appeal to the Privy Council against a judgment of the Court of Appeal which refused to make an interlocutory injunction against Lemmington's presenting a winding-up petition. The Court held that the application for leave to appeal did not come within Rule 2(a) of the relevant rules relating to Privy Council appeals; more importantly for present purposes, the Court decided that the matter did not come within Rule 2(b) which is similarly worded to 2(c); it did not involve a question which, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council. The Court stated that counsel wished indirectly to challenge the formulation of the law regarding winding-up petitions when there is bona fide dispute as to when a debt is presently due, as laid down by the Judicial Committee in the Bateman case.

Cooke, J., delivering the judgment of the Court of Appeal, noted that that was a Privy Council decision on a New Zealand appeal of recent date and that the approach of Their Lordships had proved perfectly satisfactory in New Zealand. He saw no call for the Court of Appeal to question it or encourage any challenge to it. Nor did he wish anything in the nature of the question involved in the previous judgment which merited submission to their Lordships.

Mr Jenkins submitted that there are two matters of great general or public importance in the present case which merit consideration by their Lordships. The first was whether, given the premise that there is a bona fide dispute as to a debt of a company faced with a petition based on the ground that the debt is presently due, the company is entitled as of

right to an injunction. In my view, counsel is seeking really to argue again the question upon which Exchange was refused leave to appeal to the Privy Council in the reference that I have just quoted. I am clearly bound by the decision of the Court of Appeal on this question of giving leave; I therefore consider that for the first alleged question of great general or public importance, I am bound by the Court of Appeal's decision. In any event, I see no reason why the appeal should not go through the normal processes of the Courts of this country; this case does not strike me as a proper candidate for the "leap-frogging" process.

Next, Mr Jenkins submitted, as the second question of great general or public importance, whether, given a counterclaim based on substantial grounds exceeding or equal to the amount of the indebtedness of the petitioner, the Court ought either to dismiss the petition or stay the petition pending trial of an action to dispose of claim and counterclaim. The competing contentions in this area were stated in my judgment; I was able, to my own satisfaction, to distinguish the present case from that of Universal Chemicals Ltd v. Hayter, (1980) 2 NZLR 737.

Mr Jenkins pointed out, quite properly, that the Court of Appeal is currently considering an appeal in which would be stated its views on the divergent views expressed on this topic in the Universal Chemicals case and in Re Julius Harper Ltd, (1983) NZLR 215. He submitted that it would be "useful" to have a determination by the Judicial Committee on this point.

So far as the Courts in this country are concerned, one should await the decision of the Court of Appeal in a pending appeal of Anglian Sales Ltd v. South Pacific Manufacturing Ltd. In the circumstances of the Court of Appeal being about to produce a judgment on this very point, I think it quite inappropriate for there to be an appeal to the Privy Council at this stage.

Mr Jenkins next submitted that, in accordance with the

next part of the rule in Rule 2(c) (which does not appear in Rule 2(b)), namely, that this Court should consider the "magnitude of the interests affected", and therefore find justification for granting leave. These particular words in the rule do not seem to have been considered on other occasions. Certainly, the amount in issue is large - in the area of $½ million - but I do not think that size alone is the sole criterion.

I do not consider that just because the amount in issue is large necessarily means that leave should be granted for that reason. The interests affected must surely mean wider interests; there must be some element of public interest in circumstances to justify leave under this heading; I just cannot see this occurring in an area where the law is reasonably well-known.

Finally, under the heading of "any other reason" which equates with the words "or otherwise" in Rule 2(b), I have looked at the summary of instances in Sim & Cain, Para. 2075/3 where the Court of Appeal has granted leave under Rule 2(b). It does not seem that this case approximates to any of the c ases where leave has been given.

I see no reason why this would-be appellant cannot exercise its right of appeal to the Court of Appeal; then, if it fails, it may thereafter seek leave to appeal to the Privy Council. It may well be that, if it fails in the Court of Appeal, it may qualify under Rule 2(a) and be entitled to appeal to the Privy Council as of right.

I mention that in passing because it is now submitted that there is a counterclaim of approximately the same amount as the amount of the claim by Lemmington against Exchange, as determined by the Court of Appeal. In my judgment of 26th September 1984, I stated that there was an excess of about $200,000 by the claim over the counterclaim. This figure was not idly reached. It had been discussed previously in the course of argument with Mr Jenkins for Exchange; he did not dissent from the proposition put to him by the Bench that, in any event, there was an excess of that dimension of claim

over counterclaim. He now submits that the affidavit proposed to have been filed by Mr Baillie shows a counterclaim of about $500,000; namely by showing a claim of $100,000 over 3 years.

In case this matter ever goes further, I record that I did not notice that claim; nor was it ever put to me in argument. The draft affidavit was presented for the first time in the course of the normal weekly winding-up and bankruptcy day when I had numerous other matters to consider. It was not possible to have given the matter full or any consideration prior to hearing. In the absence of counsel pointing the matter out to me, I assumed that the figures discussed in argument were correct at the time when I gave my oral judgment.

Be that as it may, the criticism that I made in the earlier judgment is still valid; there is still no real calculation other than what seems to be a "guestimate" to justify this counterclaim; it is difficult to see how the bona fides of a counterclaim can be established on such meagre evidence as that shown in the affidavit.

It follows therefore, from what I have endeavoured to express, that the application to appeal to Her Majesty in Council from the decision of this Court given on 26th September 1984 must be and is dismissed.

Mr Baillie has offered to give security; it seems clear from the authorities quoted if leave had been given he would have been the one required to give security; I make an order of costs against him in the sum of $200.

R. J. Barker J.

SOLICITORS:

Grove & Darlow, Auckland, for Petitioner.
B.M. Laird, Orewa, for Exchange and Mr L.Y. Baillie.