

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

M.988/84

1377

IN THE MATTER of the Companies Act  
IN THE MATTER of EXCHANGE FINANCE  
COMPANY LIMITED

Hearing : 23rd October 1984

Counsel : G.N. Jenkins for Company in support  
A.W. Grove for Petitioner to oppose

Judgment : 23rd October 1984

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(ORAL) JUDGMENT (NO. 3) OF BARKER, J.

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This is an application under both Rule 35 of the Court of Appeal Rules 1955 and Section 250(1) of the Companies Act 1955 for a stay of proceedings pending disposal of an appeal against a winding-up order made by me on 26th September 1984 of Exchange Finance Company Limited ("Exchange"). The appeal is brought by Mr L.Y. Baillie who was the governing director of and a contributory in Exchange. In my judgment of 2nd October 1984, to which reference will shortly be made, I indicated that the company had a right to appeal against a winding-up order in the name of the company, and referred to Halsbury (4th Edition) Volume 7, Para. 1395.

The litigation to achieve the winding-up of Exchange has had a lengthy history. The petitioning creditor was a related company, Lemmington Holdings Limited (in liquidation) ("Lemmington"). Some of the history of that litigation was referred to by me in my judgment of 26th September 1984 and it is unnecessary to refer to it again. Since that judgment, I have delivered another judgment on 2nd October 1984 refusing an application by in effect Mr Baillie for leave to appeal direct to the Judicial Committee of the Privy Council.

Mr Jenkins in support relies generally on the discretion of the Court to grant a stay so that the right of appeal is not rendered nugatory. Mr Grove opposes the application on the ground that the appeal is doomed to failure and that the effects of allowing the winding-up to proceed whilst an appeal is still pending, are not catastrophic for the proposed appellant. He points out, under Section 250 of the Companies Act, that the onus of proof that proceedings in relation to a winding-up be stayed, rests on the person seeking the stay (i.e. including a contributory); no affidavit has been filed alleging any grounds for the stay.

I think that it is proper that this application should be considered under Section 250 of the Act; even if I have jurisdiction under Rule 35 of the Court of Appeal Rules, I have come to the conclusion that justice does not require a stay.

I had occasion, in the case of Thompson v. Commission of Inquiry into the Administration of the District Court at Wellington, (1983) NZLR 98 at p.113-117, to consider the criteria for the exercise of the Court's discretion under Rule 35 of the Court of Appeal Rules. I do not find it necessary to repeat everything said in that case; but in every situation, there must be a balancing exercise between the right of the appellant to exercise a meaningful right of appeal and the various other considerations of the sort considered in the authorities; these include questions involved in the appeal and the lack of injury to the party affected by the stay.

In this case, there are two principal reasons which make me refuse a stay. The first is that the two issues which will be before the Court of Appeal have been recently resolved by the Court of Appeal in a manner adverse to the appellant. The first of these is the construction of the deed between Lemmington and Exchange which was definitively interpreted by the Court of Appeal after one of the recent appearances by the parties before that Court. The interpretation of the Court of Appeal was totally adverse to Exchange.

The second reason is that the matter still unresolved at Court of Appeal level at the time of my earlier decision, has now

been resolved by the Court of Appeal in a manner adverse to Exchange; that is whether the existence of a counterclaim is a reason for staying a winding-up petition; that is a counterclaim by the company against the petitioning creditor.

In the recent released judgment in Anglian Sales Ltd v. South Pacific Manufacturing Ltd, the Court of Appeal decided to approve the decision of Hardie Boys, J. in Re Julius Harper Ltd, (1983) NZLR 215; therefore, that question which was the central matter argued before me on the winding-up order, has now been determined by the Court of Appeal adverse to the appellant. Therefore, it seems to me that the case of the appellant in the Court of Appeal is not likely to succeed. It is something which someone very rarely says in respect of one's own decision, but it seems that, in view of the two recent decisions to which I have referred, this must be so.

The second reason is that, according to Mr Grove, the only assets of Exchange are a photocopier which the Official Assignee undertakes not to dispose of, and a debt allegedly owing by Mr Baillie to Exchange. Mr Grove indicates that proceedings will be issued to recover this alleged debt; however, even granted despatch by all parties, it is unlikely that these proceedings could be disposed of before the likely date of hearing of the appeal in February 1985.

There are no other creditors of Exchange other than Lemmington; the only point of difficulty raised by Mr Jenkins is that Mr Baillie may, as an officer of the company, be forced to disclose a statement of affairs. In considering all the various matters, it seems to me that this would not be a great hardship; therefore, balancing the various factors as I have indicated, I do not consider that this is an appropriate case for stay. If the application is properly brought under Section 250 of the Companies Act, there is, as Mr Grove points out, no affidavit in support of the application; this is necessary, because the onus under that section is clearly on the applicant for stay to show that an order ought not to be made.

The application for stay is accordingly dismissed.

The question of costs is reserved pending the outcome of the Court of Appeal hearing. Liberty to apply is reserved in respect of the photocopier.

*R. J. Barker J.*

SOLICITORS:

Grove & Darlow, Auckland, for Petitioner.

B.M. Laird, Orewa, for Exchange and Mr LY. Baillie.

