

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

NRK

A.436/84

590

*"Appeal" reported
/ appeal vs strictly
from Speight J's
judgment of 26/6/84*

BETWEEN EXCHANGE FINANCE COMPANY
a duly incorporated company
having its registered
office at Orewa, Financier

Plaintiff

AND LEMMINGTON HOLDINGS LIMITED
(In Liquidation) a duly
incorporated company having
its registered office at the
offices of The Official
Assignee Lorne Towers,
10-14 Lorne Street, Auckland
Holding Company

Defendant

Hearing: 15th May, 1984
Counsel: Jenkins for Plaintiff
Bogiatto for Defendant
Judgment: 18 May 1984

JUDGMENT OF SINCLAIR, J.

The Defendant company is in liquidation pursuant to an order for winding up made in this Court on 15th December, 1982. On 11th March, 1981 the Plaintiff and Defendant entered into what is alleged to be a deed whereby the Defendant company agreed to make available to the Plaintiff by way of advances the sum of \$1,000,000. As at 11th November, 1983 the Official Liquidator contended that there was \$529,012.09 due by the Plaintiff to the Defendant and pursuant to the alleged deed of 11th March, 1981 whereas the Plaintiff contends that the figure due was \$479,474.24.

The deed has some quite novel provisions, one of which

provides for repayment of any amount outstanding on 11th March, 2001, some 17 years away. Another provision in the deed provides that the principal sum was to be advanced "upon demand", those words having the meaning ascribed to them in the fifth schedule of the Chattels Transfer Act 1924, but subject to the proviso that when such demand was made the Plaintiff company was to be permitted to seek refinancing of the sum demanded from a suitable and proper finance institution or lender. The provision in the purported deed went on to provide that until such time as the Plaintiff could arrange such refinancing upon the terms referred to in the document, the Defendant could not enforce the demand.

At the present time the Official Liquidator has made demand upon the Plaintiff pursuant to the provisions of S.218 of the Companies Act 1955 in respect of the amount the Official Liquidator claims is owing by the Plaintiff to the Defendant. At the moment the Plaintiff seeks to resist that demand and in pursuance of that resistance desires leave of the Court to issue a writ against the Defendant seeking an injunction restraining the Defendant from claiming any money is due at the present time by reason of the fact that the Plaintiff relies on the terms of the purported deed and has not, as yet, been able to obtain the necessary finance to enable it to meet the demand.

The Defendant company being in liquidation, the Plaintiff must seek the leave of the Court to commence the proceedings pursuant to S.226 of the Companies Act 1955, but the Court may grant such leave on such terms as it may impose. The Defendant for its part does not seek to prohibit the Plaintiff

bringing its action, but desires to have security for costs fixed so that there will be some control over the proceedings and so that the many creditors of the Defendant company will not be disadvantaged by the proceedings, particularly having regard to the fact that there is a common denominator within the two companies in that one Lance Yuill Baillie was a shareholder and Director of the Defendant and is the Governing Director of the Plaintiff.

From an affidavit filed by Mr Pain it appears probable that the moneys which found their way into the hands of the Plaintiff from the Defendant have been on loan to Mr Baillie.

The financial position of the Plaintiff is not clear but appears, to say the least, to be precarious and it may be but marginally solvent at the present time, even if one can treat the amount due to it by Mr Baillie as being recoverable in toto.

By reason of the provisions of S.467 of the Companies Act 1955 this Court has reposed in it the power to require the Plaintiff to provide security for costs in circumstances such as exist here as it has been made to appear that the Plaintiff, on what is disclosed at the moment, would be unable to meet the costs of the Defendant if it is successful in its defence.

Mr Baillie's personal position is not disclosed, but the authorities show that in circumstances such as these the Court can regard the shareholders as being a possible source of providing the necessary security if the Court sees fit to order it.

Having regard to all the circumstances of this case and in view of the fact that if the injunction proceedings are successful, further proceedings may be required to determine the precise amount owing, I am of the view that the appropriate amount to order by way of security which I feel ought to be provided in all the circumstances is \$2,500.

There will therefore be an order that the Plaintiff do provide security for costs in respect of the action it proposes to issue in the sum of \$2,500; that security is to be provided by a deposit of that amount in this Court within 28 days of the date of this decision. In the meantime all further proceedings between the parties will be stayed and if the security is not lodged within the time above referred to then there will be a final order staying any further action as between the Plaintiff and the Defendant.

In the meantime the costs of and incidental to this particular motion are reserved, but I intend to reserve liberty in any event to either party to apply further so that if security is found the Court can keep some control over the proceedings.

It is desirable from the Defendant's point of view that the litigation be brought to an end promptly and it is also desirable that costs be kept to a minimum in the interests of the Defendant's creditors. By reserving leave to apply the Court will be able to keep control over the proceedings to ensure that they are dealt with speedily and to that end, if necessary, to set time-tables in relation to procedural matters.

D. P. J.

SOLICITORS:

B. M. Laird, Orewa for Plaintiff

Anthony Grove & Darlow, Auckland for Defendant



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