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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.1604-6/76
M.1612-14/76

IN THE MATTER of the Companies Act 1955 and the Companies (Winding Up) Rules 1956

AND

IN THE MATTER of applications pursuant to Sections 320 and 321 of the Companies Act 1955, by HAROLD GOODMAN, the Liquidator of SECURITIBANK LIMITED (In Receivership and in Liquidation), MERBANK CORPORATION LIMITED (In Liquidation), COMMERCIAL BILLS LIMITED (In Liquidation), SECURED DEPOSITS LIMITED (In Liquidation), SAFE CUSTODY NOMINEES LIMITED (In Liquidation) and MORTGAGE MANAGEMENT LIMITED (In Liquidation)

BETWEEN HAROLD GOODMAN

Applicant

AND JOHN SPENCER RUTHERFURD

First Respondent

AND OTHERS

Hearing: 30 October 1985

Counsel: A.R. Galbraith and C.E. Sturt for Liquidator
Miss S. Elias as Amicus Curiae

Judgment: 30 October 1985

(ORAL) JUDGMENT (NO. 37) OF BARKER, J.

This is a further motion for directions by the liquidator; he seeks an appropriate order as to the destination of settlement moneys received by him from the former auditors of the Securitibank Group, Messrs Barr, Burgess & Stewart (as they then were).

Counsel for the liquidator have advised that counsel for the directors have been advised of today's hearing, but wish to take no part in it. This is understandable since the directors are not directly concerned with the detail of the liquidator's distribution of the settlement moneys received from the auditors.

At an earlier hearing in March 1985, I appointed Miss Elias as amicus curiae to consider the arguments advanced by the liquidator on the question of the distribution of settlement moneys; she was to take an overview of the various proposals and to make submissions as to the appropriate order to make. Miss Elias was aware at all times that if, in her view, further representation of opposing interests was called for, she should apply for a further representation order. In her view, however, further representation at this stage is unnecessary. However, at a later directions hearing concerning interest payments to creditors, there may well be need to have various categories of creditor separately represented before the Court.

At a hearing in open Court on 11 March 1985, the Court was advised by counsel that the liquidator had accepted a settlement offer made on behalf of the auditors. The payment was made without any admission of liability. The payment was made in respect of the various motions under

the Companies Act 1955 ("the Act") (Ss. 320 and 321); the auditors were officers of the company and therefore susceptible to the special procedures under the Act.

At the same time, and as part of the settlement, the common law proceedings brought by the liquidator against the auditors were discontinued. I was never able to discern what real difference there was between the applications under the Act and the common law proceedings; I should have thought that the liquidator had greater flexibility under the former. However, I was never called upon to decide what the difference was and the question is now academic.

At the time of the announcement in Court of the settlement, the Court was not informed of the amount that the auditors had agreed to pay. In fact, elaborate secrecy agreements were extracted from all counsel involved, and the liquidator, by counsel for the auditors. However, it was recognised that sooner or later, the Court would have to be advised of the amount of the settlement; the Court considers itself under no such restriction as to secrecy; the amount of the settlement is information which ought to be made public in the interests of the numerous creditors. I add, for the sake of completeness, that the liquidator was not bound to obtain the approval of the Court to the settlement. He need only obtain the consent of the Committee of Inspection which he did

The attitude of the auditors in not wishing the amount of their settlement to be made public is to be contrasted with that of the shareholders who stated quite openly through counsel, at the same hearing, that the actions against them had been settled with payment of $1 million on a basis which did not acknowledge liability and purely on the action to recover dividends.

Because such was the basis of that settlement, which was accepted by the liquidator and approved by the committee of inspection, it is clear that the settlement moneys received from the shareholders must be credited to Securitibank Limited and not to any of the other companies in the Group.

The proceedings against the auditors under the Act were issued in respect of each of the 6 companies involved, namely, Securitibank Limited, Merbank Corporation Limited, Commercial Bills Limited, Secured Deposits Limited, Safe Custody Nominees Limited and Mortgage Management Limited (all in liquidation).

The claim was a global one; it alleged that the auditors were guilty of negligence, default, breach of duty or, alternatively, misfeasance in the conduct of the audit and in carrying out their duties and responsibilities in respect thereof. When originally filed, each notice of motion in respect of each company sought contribution of $14,037,914 or such other sum as the Court may think fit. The claim was not made 6 times because there was a previous order of amalgamation of proceedings in respect of the six companies; however, it is quite clear that the claim was a global one.

I should have thought it likely that, had the proceedings progressed to a hearing, I should have required the liquidator to have stated exactly how much he sought from the auditors in respect of each of the 6 companies; it was likely that the losses, if any, suffered by each company as a result of the alleged conduct of the auditors, would have differed from company to company.

Amended points of claim were filed, giving further particulars of the alleged negligence etc. of the auditors, and reducing the claim to $10,810,203.10. No further particulars were filed prior to the settlement.

It seems clear, from the amended points of claim, that many of the matters complained of against the auditors as constituting negligence, are matters which would have affected one or some of the companies in the Group and not all 6. Miss Elias has perused a brief of evidence from an expert witness which again views the claim in a global way, but also makes it clear that some of the alleged items of loss would not be common to all companies.

The expert evidence which would have been called against the auditors was directed to showing the various positions of each of the 6 companies from a date in early 1975 when it was alleged that the auditors should have disclosed the difficulties that the Group was in fact experiencing. It is alleged that they should have drawn attention to increasing operating expenses, payments to bill holders, guarantees to other parties, amongst other things.

The settlement paid by the auditors was $4.29 million on a basis of denial of liability. The liquidator's motion seeks that that amount, together with accrued interest thereon, be paid to the companies in the liquidation in such manner as to ensure that each of the external unsecured creditors and the companies benefits equally in proportion to his, her or its original debt.

The liquidator has suggested several methods in the distribution could be achieved. These have been analysed by Miss Elias who has very comprehensively dealt with all the possibilities and made helpful submissions as to the correct method of distribution. I deal with the possibilities raised.

First, the liquidator suggested that distribution be made for the "benefit of the unsecured creditors". Whilst this suggestion has an attraction of equity, the fact of the matter is that each company in the Group is a separate

entity. There is no basis for lifting the corporate veil; in fact such a suggestion was expressly disapproved of by the Court of Appeal in Re Securitibank Limited (No. 2), (1978) 2 NZLR 136. The Court held in that case that the Securitibank Group had operated with deliberate and careful segregation of functions and strict accounting in inter-company transactions.

There is no statutory justification for pooling the assets or the claims of creditors. Accordingly, each liquidation must be considered separately. It happens quite frequently that a company in a group is the creditor of another company in the liquidation. Although, eventually, all creditors may benefit from the receipt of those particular settlement moneys, it is not legally justifiable to pay the settlement moneys globally to the creditors as a whole. Accordingly, the first suggestion must be rejected. This proposal, which excludes inter-company debts, is, as Miss Elias points out in her submissions, is prejudicial to external creditors in the context of a liqudation where the legal entities have been taken into account for the purposes of distribution to date. Also, the proposal is totally inconsistent with a claim brought, not on the basis of the ultimate external debt of the group as a whole, but on the losses suffered by each company from alleged breaches of duty from a certain date arising not only from credit transactions, but as well from alleged excessive operating expenses and other trading losses of the particular companies.

The second suggestion of the liquidator's was an apportionment according to the costs of liquidation incurred on behalf of each company. This suggestion can be dismissed briefly. A proper basis has not been disclosed by the affidavits and I know of no legal basis for such an apportionment.

The third suggestion was an apportionment through the realisation of client bills. This again can be shortly rejected because the losses which were subject of a claim against the auditors arose not only from the default by the various Securitibank companies in payment of client bills, but from the continued operations of the company. Any proper enquiry must examine the legal and equitable interests of each of the companies and the asset which is to be distributed.

I have no doubt that the proper method of apportionment is that submitted by Miss Elias; namely, that the liquidator of each of the 6 companies holds the settlement moneys as an undivided sum for the benefit of each of the companies. In the absence of any agreement or of any statement of the basis of settlement, the funds must be held in a resulting trust in the proportions to which each of the companies has contributed to the asset represented by the fund, namely, in proportion to the claim that each company may have had against the auditors. Although, as I have emphasised, the claim against the auditors was expressed globally for all 6 companies, in reality, the global figure was the sum of the claims each of the companies had individually against the auditors.

The view that I have reached as to a resulting trust is in accordance with a long established principle of equity; i.e. that a person providing or contributing to the acquisition of property conveyed to a sole or joint interest in the name of the other, retains an equitable interest in that property to the extent of his contribution if there is nothing to indicate that he intended to confer beneficially the interest on the legal transferee. See Jacobs, Law of Trusts in Australia, (4th Edition) Para. 1212.

I agree with the amicus that this is a case for the application of the presumption of equality which is generally applied restrictively. In any event, the equality, in the sense in which it is used in the maxim, means proportionate equaltiy, not equitable equality.

In his most recent affidavit, the liquidator deposes as to the proportions attributable to each company in the original claim. However, the evidence is deficient for in setting out the basis for the liquidator's conclusion. The contribution of the parties must be looked at at the date of acquisition of the property. In this case, it is not clear whether the points of claim were current at the date of settlement or whether, for example, some of the losses originally claimed for were no longer in issue; (this may well be the case in relation to the claim against the auditors in respect of dividends for which there was a separate settlement with the shareholders).

Accordingly, I am prepared to give a direction that the liquidator should be directed to pay to each company such proportion of the $4.29 million settlement plus interest as may be attributed to the claim brought by that company as at the date of settlement. Before the order is sealed, I require the liquidator to file a further affidavit which details with reasonable particularity the exact amount of the claim against the auditors of each of the 6 companies as at the date of settlement.

Miss Elias has agreed to consider the information thus supplied in her role as amicus. I am grateful for her continued interest in so doing. I think that what I have indicated already will be sufficient to enable work to be commenced on calculating the distribution of the settlement moneys and interest. Before the order is sealed, I require this affidavit to be filed together with a memorandum from Miss Elias that she has satisfied herself as to the reasonableness of the apportionment.

Because Miss Elias will require an order of the Court for the payment of her costs, the same memorandum can make suggestions as to her costs, and also as to the funds out of which such costs are to be paid.

SOLICITORS:
Sturt & Harrison, Auckland, for Liquidator.

R. D. Barker J.

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