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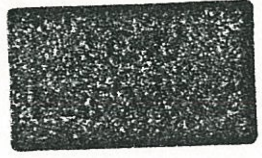
11/6/87

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CP.39/86

SET 2



(Doogue J)

Elders Pastoral v Tas Entprses Ltd

BETWEEN ELDERS PASTORAL LIMITED a duly incorporated company having its registered office at Auckland and carrying on business at Hamilton and elsewhere as a stock and station agent and general merchant

Plaintiff

AND TAS ENTERPRISES LIMITED a duly incorporated company having its registered office at 189 Collingwood Street, Hamilton and carrying on business as sales agents

Defendant

Hearing: 11 June 1987

Counsel: G.S. MacAskill for the Plaintiff
J.M. Priestley for P.H. Van den Brink Limited and Stephen Charles Grey and Martin Peel

Judgment: 11 June 1987

ORAL JUDGMENT OF DOOGUE J

There are two applications before the Court.

The first, in time, is an application by the Plaintiff for an order that a charging order nisi in its favour

specific charge and as regards its other assets is a floating security but so that the Company may not create any mortgage or charge in priority to or pari passu with this security without the prior written consent of the Lender.

PRIOR PAYMENT IN CERTAIN EVENTS

B. THE principal sum hereby secured or the balance thereof for the time being outstanding becomes payable and the security hereby created attaches becomes fixed and crystallises upon the happening of any of the following events:-

(a) If default is made for a period of fourteen days in the payment of any interest or any other moneys secured by this debenture.
(b) If a petition is presented or an effective resolution is passed for the winding up of the Company.
(c) If the Company suspends payment or ceases to carry on business.
(d) If any of the conditions necessary to render the Company liable to be wound up exists and continues for the space of fourteen days.
(e) If it appears from any balance sheet of the Company or by a certificate of the auditors of the Company that the liabilities for the Company (secured and unsecured) to its creditors exceeds its assets.
(f) If any distress is levied or execution is issued upon any assets of the Company for any debt or rent due or owing by the Company.
(g) If a receiver of the property and assets of the Company is appointed.
(h) If the Company by effective resolution alters amends or varies or adds to or purports to alter amend vary or add to its articles of association without the prior written consent of the Lender.
(i) If default is made in the observance or performance of any of the covenants conditions agreements or stipulations contained or implied in this debenture, and such default continues for a period of fourteen days after the Lender has served on the Company a notice specifying the particular default or breach complained of and requiring the Company to remedy such a default or breach."

Thirdly, clause 37 of the conditions of the debenture provided:-

"NO WAIVER
37. FAILURE by the Lender to enforce any of the provisions hereof or to take action in respect of any breach hereof is not a waiver of the provisions of this debenture notwithstanding that such breach is continuing and habitual or repeated from time to time and no estoppel may be pleaded against the Lender either at law or in equity in any circumstances whatsoever and no variation of this debenture is enforceable against the Lender at law or in equity unless a written memorandum of it is signed by the Lender."

2. The debenture was registered on 16 November 1983 in the appropriate Registry.

3. On 17 February 1984 the Defendant made a payment of $3,000 which was the only payment made by it in terms of the debenture to P.H. Van den Brink Limited, the debenture holder. Whilst I have not set out the provisions as to the payment of interest, it is common ground that apart from that payment, the Defendant was in breach of all provisions within the debenture as to payments of interest and capital, and whilst the matter was not argued in any detail before me, it would appear that the first breach was in 1983 and probably contemporaneously with the signing of the debenture itself.

4. On 20 March 1986 the Plaintiff obtained judgment in the Hamilton District Court against the Defendant for $10,763.74.

5. On 30 March 1986 the Defendant ceased to trade.

6. On 2 April 1986 the Plaintiff obtained its charging order nisi and served the same.

7. On 17 October 1986 the present application for the charging order nisi to be made absolute was filed for hearing on 20 November 1986.

8. On 30 March 1987 the debenture holder, P.H. Van den Brink Limited, appointed receivers, Messrs Stephen Charles Grey and Martin Peel, of the Defendant company.

Both parties to the present dispute, namely the Plaintiff and the debenture holder, made submissions to me in respect of the relevant law. It is unnecessary for me to set out all of those submissions as the issue before the Court is ultimately a narrow one.

Mr MacAskill, on behalf of the Plaintiff, argued that in terms of Paragraph A of the debenture, set out above, the debenture holder's floating security over the assets of the company, fixed and crystallized on the happening of the first of the events referred to in Paragraph B, set out above. He submitted that the money, the subject matter of the charging order nisi, was the proceeds of sale of certain chattels which had become the property of the company at an unknown date. He

submitted that the debenture, in so far as it was a floating charge, had crystallized in terms of paragraph (a) of Provision B, some time in 1983. If that was not the case, he submitted that the floating security had crystallized in terms of sub-paragraph (c) of Provision B on 30 March 1986, or alternatively, upon the Plaintiff executing its judgment in terms of paragraph (f) of Provision B, or alternatively, upon the appointment of the receiver in terms of paragraph (g) of Provision B. He submitted, in reliance upon the judgment of Speight J in Re Manurewa Transport Limited, [1971] NZLR 909, that the provisions of Provision B of the debenture, set out above, determined the date at which the floating security became fixed and crystallized. As already indicated, he submitted that as there was no evidence that the assets to which the charging order nisi relates were in being at whatever date the floating security became fixed and crystallized, the debenture holder was not entitled to the benefit of the debenture in respect of such assets. It was implicit in that submission, as already indicated, that the goods which were sold were not themselves property of the company at the time that the floating security became fixed and crystallized. It is quite unnecessary for me to determine in the course of this dispute whether the view taken by Speight J in the Re Manurewa Transport Case (Supra), as to the effect of a provision such as Provision B in the present debenture resulting in automatic fixing and crystallization of a floating security upon the happening of any of the events set out in the particular

provision is correct or not. I certainly see no reason to depart from his reasoning or judgment, but it is irrelevant for present purposes. The whole of Mr MacAskill's submission was based upon the proposition that the property, the subject matter of the charging order nisi, was an asset of the defendant company which was obtained by the Defendant company subsequent to the floating security under the debenture becoming fixed and cyrstallized and that, accordingly, the debenture had no application to it. This required a consideration of whether or not the floating security had become fixed and crystallized in the way contended for by Mr MacAskill, without reference to future property.

Mr Priestley, on behalf of the debenture holder, answered that submission in two ways. First, that the provision of the debenture numbered 3, set out above, specifically provides that the charge is of all the property of the Defendant company, both present and future. Secondly, Mr Priestley submitted that in terms of the decision of the English Court of Appeal in N.W. Robbie & Coy Ltd v Witney Warehouse Company Limited, [1963] 3 All ER 613 at 621, that even if the floating security fixes and crystallizes that merely has effect to fasten the charge on all assets of the company, whether in existence at that time or thereafter.

In terms of the reasons for judgment of Russell L.J.:-

> "There is under clause 3 a charge on all future assets of the plaintiffs without restriction: that amounts to an agreement for valuable consideration to charge all such future assets, which agreement enables equity to fasten a charge on those future assets when they arise: and every such equitable charge as it arises operates as an equitable assignment to the debenture-holder of that asset: see, for example, Durham Brothers v Robertson, (per Chitty, L.J.) [1898] 1 Q.B . 765 at 769, and the references to assignment in Biggerstaff v Rowatt's Wharf, Ltd [1896] 2 Ch.93. The fact that this charge is a floating charge cannot, so it seems to me, operate to exclude assets from the agreement to charge. That particular quality of the charge (or agreement to charge) only means that its full operation is so to speak in suspense until certain events occur, and when such an event occurs the charge (or agreement to charge) loses that suspended quality. That in no way justifies the conclusion that the field of the charge is in any way restricted: it only means that after this particular quality disappears equity will fasten the charge directly on all assets thereafter coming into existence as soon as they do so."

That decision has been followed, but, as I understood Mr Priestley, for different purposes, in decisions of this Court in Felt and Textiles New Zealand Ltd v R.H. Hubrich (In Receivership), [1968] NZLR 716 and Rendell v Doors and Doors Ltd (In Liquidation), [1975] 2 NZLR 191. I did not understand either of those decisions to touch upon the point at present in dispute between the parties.

Mr MacAskill had, however, referred me to dicta in a decision of this Court in Wellington Woollen Manufacturing Company Limited v Patrick And Anor, [1935] NZLR 23 at 26. There Ostler J said:-

> "The third contention is that the goods supplied by plaintiff company never became part of the property charged by the debenture, and therefore c.4(a) of the conditions has no application. On this point no authority was cited, nor can I find any one way or the other. It was contended that the charge became fixed or cyrstallized upon the appointment of the receiver; that at that moment all the then assets of the company became subject to the charge, but that all subsequently-acquired assets were free or at most subject to a floating charge. In my opinion that contention is not valid."

Mr MacAskill properly submitted that that particular statement was obiter.

Mr MacAskill also referred me to a decision of the High Court of Australia in Ferrier And Anor v Bottomer, [1971-1972] 126 CLR 597. In that case, as in this, there was a reference in the debenture to future property. Because of that the issue was determined without the necessity for consideration of whether the reasoning of the majority in Robbie's Case (Supra) was correct or not. While the Chief Justice, Barwick CJ, acknowledged that much of the reasoning of the majority in Robbie's Case (Supra), supported the conclusion reached by him, stated:-

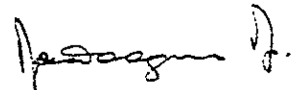
> "I would not wish to be taken as accepting the decision of the majority of the members of the Court of Appeal in that case. I see a significant difference between the facts of that case and this in that the moneys in question here were derived from debts due to the company itself. The precise matter decided in [Robbie's Case (Supra)] remains for me an open question."

The only other of the Judges in Ferrier v Bottomer (Supra) that referred to Robbie's Case (Supra) is Menzies J. His judgment appears to indicate that he was happy to adopt the reasoning of the majority in Robbie's Case (Supra), and he quotes with approval a passage from the third edition of Gower Principle of Modern Company Law, which contains a statement similar to that already referred to from Robbie's Case (Supra). The same Judge also cited Wellington Woollen Manufacturing Co v Patrick And Anor (Supra) and a West Australian case In re MacKenzie Grant & Co, [1899] on WALR 116 in support. He stated at page 610:-

> "Neither decision seems to me to take the matter much further, but, so far as they go, each case supports the basic contention of counsel for the respondent that a deed creating a floating charge upon present and future assets does operate to charge assets coming to the company after the debenture has crystallized."

Having regard to the terms of this debenture and the authorities already referred to, I find that the debenture applied to future property, as well as to the property of the company in existence at the date that the floating security fixed and crystallized, whatever date that was. I therefore find against Mr MacAskill's argument that future property was excluded. The result must be that the Plaintiff's application for its charging order nisi to be made absolute must be refused and the debenture holder's application to rescind the charging order nisi must be upheld.

The debenture holder will have costs. Having regard to the history of events I think the appropriate course is to make a modest order. I fix the costs of P.H. Van den Brink Limited at $300 together with disbursements and witnesses expenses, if any, as fixed by the Registrar.



Solicitors for the Plaintiff: Tompkins Wake & Co
Hamilton

Solicitors for the Stephen Charles Grey and Martin Peel:-
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Papatoetoe