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N.Z.L.R

IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

M. No. 12/87

LR 340

[redacted]

IN THE MATTER of the Companies Act 1955

A N D

IN THE MATTER of THE FARMERS' CO-OPERATIVE ORGANISATION SOCIETY OF NEW ZEALAND LIMITED a duly incorporated company having its registered office at Hawera

Hearing: 24 July 1987 (at Wellington)

Counsel: W.G. Clayton for Applicant company
J.J. Cleary for A.M. Illston a creditor

Judgment: 29 July 1987

Reasons for Judgment: 4th August 1987

REASONS FOR JUDGMENT OF QUILLIAM J

This was an application under s 205 (2) of the Companies Act 1955 for an order sanctioning a Scheme of Arrangement between the applicant company and its members, secured creditors, and three classes of unsecured creditors. As the matter was one of urgency I have already made an order approving the Scheme and I now set out my reasons for doing so.

No question arose as to the procedural steps which were required to be taken before the meetings of the different classes were held, nor as to the actual conduct of the meetings themselves. It is also unnecessary to explain

how the different classes were defined. It is sufficient to say that there were separate meetings for -

1. members;
2. client creditors;
3. secured creditors;
4. other unsecured creditors;
5. trade creditors paid interest.

The Chairman of the meetings was Mr N.O. Cave and in his affidavit reporting as to the holding and result of the meetings he has set out the details of the voting. In summary the position was:

1. Members
   99% in numbers and 98% in value voted for the resolution to affirm the Scheme of Arrangement.

2. Client Creditors
   100% in numbers and value voted for the resolution.

3. Secured Creditors
   100% in numbers and value voted for the resolution.

4. Other Secured Creditors
   97% in numbers and 58% in value voted for the resolution.

5. Trade Creditors Paid Interest
   90% in numbers and 70% in value voted for the resolution.

On the basis of these figures the Chairman was unable to say that the necessary 75% majority in value had been achieved at all meetings as required by s 205 (2). He

was, however, also unable to give a final decision on the voting because there were matters which he could not resolve. Some of the votes against the resolution were by creditors whose right to vote or the amount of whose debts were in dispute. Accordingly the company's application to the Court for an order sanctioning the Scheme was not made ex parte, as is the usual practice, but was made on notice to those creditors who had opposed the resolution. There was an interlocutory application for directions as to the place, time and mode of trial. That application came before me on 29 June 1987 when I made an order (inter alia) that affidavits in opposition to the sanctioning of the Scheme were to be filed and served by 8 July 1987. In the result no such affidavits were filed and only one creditor, Mr Illston, was represented at the hearing.

At the meeting of Other Unsecured Creditors the position regarding those who voted against the resolution was as follows:

Creditor	Amount of Debt
Mount Stewart Grain Co. Ltd	$ 2,500.00
Agrisales (a division of Wrightson NMA Ltd)	22,675.95
Agri-Feeds	3,165.00
Wrightson NMA Ltd	14,035.35
Elders Pastoral Ltd	403,982.42
T.G. Healy Ltd	50,000.00
T.J. Jamieson	546.00

A.M. Illston	664,951.06
	$1,161,855.78

These debts are all disputed by the company on one basis or another.

At the meeting of Trade Creditors Paid Interest there was a single vote against the resolution, namely, that of Elders Pastoral Ltd claiming a debt of $1,132,220.09, but that debt is also disputed by the company.

Prior to the hearing of the present application it was conceded in a memorandum of counsel on behalf of Elders Pastoral Ltd and Mount Stewart Grain Co. Ltd. that neither company was a disinterested party and it was agreed that the adverse votes of those companies should not be counted for the purpose of determining whether the necessary majorities were attained. If that concession can be accepted then the result of the Trade Creditors Paid Interest meeting would be 100% in numbers and value for the resolution.

Section 205 (2) of the Companies Act provides:

> " If a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members, as the case may be, voting in person or, where proxies are allowed, by proxy at the meeting agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company, or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company. "

Before the compromise or arrangement can become binding it is accordingly necessary that the required three-fourths majorities shall have been achieved. It is therefore necessary to determine the principles which must be applied in deciding whether those majorities were obtained. The matters of dispute in respect of the debts referred to fall under three heads -

1. Whether direct competitors should be entitled to vote.

2. How the values of disputed debts are to be ascertained.

3. Whether amounts owing to the company by way of set-off should be taken into account in determining the value of a vote.

I deal with these in turn.

1. Competitors

The submission made with regard to the votes of creditors who were in direct commercial competition with the company was that their votes were cast out of self-interest and not in the interests of the class of creditors or of the company and should accordingly be discounted. This is a principle which has, I think, emerged from the cases over the years, although there appears to be no case decided upon facts precisely the same as those here. It is helpful to trace the development of the principle.

British America Nickel Corporation Limited v M.J. O'Brien Limited [1927] AC 369 is a good example of the general statement of the principles involved. That was not a case under the Companies Act but concerned the need to obtain a three-fourths majority of bondholders in order to

sanction a modification of the rights of bondholders in respect of mortgage bonds secured by a trust deed. The proposed scheme was sanctioned by the necessary majority but that majority would not have been obtained except for the vote of a substantial bondholder whose support was obtained by the promise of a large block of ordinary stock. This had not been stated in the scheme. In delivering the judgment of the Privy Council, Viscount Haldane stated the principle at p 371:

> " To give a power to modify the terms on which debentures in a company are secured is not uncommon in practice. The business interests of the company may render such a power expedient, even in the interests of the class of debenture holders as a whole. The provision is usually made in the form of a power, conferred by the instrument constituting the debenture security, upon the majority of the class of holders. It often enables them to modify, by resolution properly passed, the security itself. The provision of such a power to a majority bears some analogy to such a power as that conferred by s 13 of the English Companies Act of 1908, which enables a majority of the shareholders by special resolution to alter the articles of association. There is, however, a restriction of such powers, when conferred on a majority of a special class in order to enable that majority to bind a minority. They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities; namely, that the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only. Subject to this, the power may be unrestricted. "

In re C.M. Banks Limited [1944] NZLR 248 was a case in which Smith J had to consider a situation more nearly related to the present one. It was a petition for

approval of a scheme of arrangement between a company and its preference shareholders under s 159 of the Companies Act 1933 (which was re-enacted virtually unchanged as the present s 205). The scheme received the approval of the necessary majority of preference shareholders but the question for determination was whether the arrangement had been fairly put as the circular sent to preference shareholders had not correctly stated the basis on which the scheme was being put forward. In stating the duty of the Court in dealing with such applications, Smith J said, at p 252:

> " The duty of the Court was summarized by Astbury, J., in In re Anglo-Continental Supply Co. Ltd., [1922] 2 Ch. 723, in these words: 'In exercising its power of sanction under s. 120 [our s. 159], the Court will see, first, that the provisions of the statute have been complied with; secondly, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and, thirdly, that the arrangement is such as a man of business would reasonably approve' (Ibid., 736). "

The matter is carried a stage further by an observation of Megarry J, as he then was, in Re Holders Investment Trust Ltd [1971] 2 All ER 289. That was a case of a special resolution authorising a reduction of capital. That required approval by an extraordinary resolution of a class meeting of preference shareholders. On the question of whether that extraordinary resolution had been passed by the necessary majority it was contended that the holders of a substantial number of preference shares, who were also the holders of over half the company's equity capital, had voted in support of the resolution from motives other than the interests of the general body of members of the class.

Megarry J, after considering the contents of some letters setting out what had prompted the holders of the shares to vote as they did, said at p 294:

> " That exchange of letters seems to me to make it perfectly clear that the advice sought, the advice given, and the advice acted on, was all on the basis of what was for the benefit of the trusts as a whole, having regard to their large holdings of the equity capital. From the point of view of equity, and disregarding company law, this is a perfectly proper basis: but that is not the question before me. I have to determine whether the supporting trustees voted for the reduction in the bona fide belief that they were acting in the interests of the general body of members of that class. From first to last I can see no evidence that the trustees ever applied their minds to what, under company law, was the right question, or that they ever had the bona fide belief that is requisite for an effectual sanction of the reduction. Accordingly, in my judgment there has been no effectual sanction for the modification of class rights. "

A similar view was expressed by Street J, as he then was, in Re Jax Marine Pty Ltd and Companies Act 1961 [1967] 1 NSWR 147. That was an application under s 181 of the Companies Act 1961 of New South Wales (which is the same as the New Zealand s 205) for the calling of a meeting of creditors to consider a scheme of arrangement. An unsecured creditor owned all the shares in the company. The application was opposed by another creditor. The argument turned on whether there should be a separate meeting for the class comprising the shareholder creditor and his associates and another meeting for the other creditors. In discussing the way in which s 181 was to be applied, Street J said, at p 150:

> " Quite frequently it is necessary to discount, even to the point of discarding from consideration, the vote of a creditor who, although a member of a class, may have such personal or special interest as to render his view a self-centred view rather than a class-promoting view. "

That observation was obiter, but it seems to me to encapsulate the principles appearing from the cases to which I have referred.

It is true that all of the cases cited are those in which votes in favour of the resolution were in question. The present case concerns votes against the resolution but I can see no basis upon which any different principle should apply. A vote cast on the basis of personal or special interest remains such whether cast for or against.

I accordingly conclude that, if it is shown that any of the votes in dispute were tainted by personal or special interest, then they ought to be discarded. Whether that will be the case or not will depend upon the circumstances relating to each of them.

2. Value of Disputed Debts

Apart from the provisions of ss 306 and 307 of the Companies Act, to which I will refer shortly, the way in which disputed debts should be treated is a matter which was considered in Re Telford Inns Pty Ltd (1985) 10 ACLR 312. That was an application for approval of a Scheme of Arrangement in which a number of matters arose for determination by the Court as the result of the meetings. Among them was the question of disputed debts. At p 314 Young J said:

> " ... I do not believe that the chairman's role goes quite as far as Mr Grieve of learned Queen's Counsel put, that is, that the chairman prima facie determines whether the motion has been passed in the same way as a chairman of a general meeting would under articles of association, which make his determination prima facie valid. To give him such a role would usurp the duty of the court as laid down in the Dorman Long case and others.
>
> I believe the real situation is as per Mr Grieve's alternative submission and that is that the court determines the matter on the balance of probabilities on the evidence put before it. It looks to the chairman of the meeting to provide the court with the material to make that determination and that if a creditor does not see fit to come to the court at the time when the scheme is being approved and put forward his view as to why the required majority has not been obtained then the court can act on the evidence that is put before it and determine that the prescribed majority is in favour of the motion. "

Once again I see no reason for not applying that principle to disputed debts where they are cast against the resolution rather than for it. I also accept the principle as stated by Young J. It is the Court which must in the end make the decision as to whether the necessary majorities were obtained or not, and that can only be done by a consideration of the debts claimed and by making an assessment of their value on the basis of the probabilities. That is the way I propose to proceed in this case.

3. Set-Off

The position regarding amounts claimed by way of set-off against debts said to be owing by those entitled to vote is clearer because it is determined by statute.

The relevant provisions of the Companies Act are:

" 205. (5) In this section and section 206 of this Act the expression 'company' means any company liable to be wound up under this Act, the expression 'creditor' includes every person who has a claim that upon the winding up of the company would be admissible to proof in accordance with section 306 of this Act, and the expression 'arrangement' includes a reorganisation of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both those methods. "

" 306. In every winding up (subject, in the case of insolvent companies, to the application in accordance with the provisions of this Act of the law of bankruptcy) all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value. "

" 307. In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up, and make such claims against the company as they

> respectively are entitled to by virtue of this section. "

By reason of the provisions of s 307 regard must also be paid to s 93 of the Insolvency Act 1967:

> " 93. Where mutual credit has been given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, or where any person entitled to prove in respect of any debt or demand is indebted or liable to the bankrupt in respect of any debt or demand, the account between the bankrupt and that person shall be stated, and one debt or demand may be set against another, and no more than appears due on either side on the balance of account shall be claimed or paid on either side:
>
> Provided that a person shall not be entitled under this section to claim the benefit of any set-off against the property of a bankrupt where he had, at the time of giving credit to the bankrupt, notice of an available act of bankruptcy committed by the bankrupt; and a creditor claiming the benefit of a set-off shall, in his proof, declare that he had at the time of giving credit no notice of such an act of bankruptcy. "

The effect of these provisions is to require that the value of a debt is to be assessed with regard to any set-off claimed against the creditor. It will, of course, be a matter of fact as to whether there is a set-off and as to what the value of the debt in the light of that set-off is.

Having regard to the principles, as I have discussed them, I turn to consider the individual debts which have been disputed.

OTHER UNSECURED CREDITORS

Mount Stewart Grain Co. Ltd - $2,500.00

As previously indicated, this creditor has conceded that its vote ought not to be counted against the resolution on the ground that it was not a disinterested party. The affidavits filed in support of the application show that Mount Stewart Grain Co. Ltd is a subsidiary of Hodder and Tolley Ltd, which is in turn a wholly-owned subsidiary of Elders Pastoral Ltd. The latter company is a direct competitor of the applicant company. Although the memorandum of counsel filed on behalf of Elders and Mount Stewart Grain Co. Ltd stated that neither company cast its vote in anything other than good faith, it does not seem to me that either vote can be said to have been exercised for the purpose of benefiting the class as a whole and no doubt this is the reason for it having been conceded that this company was not a disinterested party. The adverse vote of this company must be discarded.

Elders Pastoral Ltd - $40,398.42

For the reasons already discussed in respect of Mount Stewart Grain Co. Ltd the adverse vote of Elders must also be discarded.

Wrightson NMA Ltd - $14,035.35 and
Agrisales - $22,675.95

The basis for disputing these debts is the same as for Elders. The affidavits show that Wrightson-Dalgety, of which Wrightston NMA Ltd is a part, is the applicant company's principal competitor in the Taranaki area. Agrisales is a division of Wrightson NMA and so is in the

same position. The result of the company going into receivership or liquidation must be to benefit the competitors which remain. It is on this basis (and also on the basis of set-off to which different considerations apply) that the votes in respect of these two debts have been challenged. Although a memorandum filed by counsel for these creditors states that the votes were not motivated by commercial interests in relation to a trade creditor, the creditors have chosen to file no affidavit in answer to those filed on behalf of the company, nor to appear on the hearing. I must accordingly act on the only evidence before me and on that basis I am satisfied that this vote must be discarded.

Agri-Feeds Ltd - $3,165.00

This company is a wholly-owned subsidiary of Wrightson-Dalgety and so is in the same position as those creditors just referred to. Again no opposing affidavit has been filed and so, for the same reasons, this vote must be discarded.

T.G. Healy Ltd - $50,000.00

According to the affidavit of Mr Harrop, the applicant's Company Secretary, the claim of T.G. Healy Ltd, which is a real estate agent, is for commission claimed to be due on the sale of the company's Londontown (Wanganui) land, building and business in October 1986. The company denies that T.G. Healy Ltd had any authority to sell and says that even if it did have authority that could not have extended to the company's business. An offer of $6,125 has been made to T.G. Healy Ltd and it therefore seems the debt should be allowed for voting purposes to that extent. T.G. Healy Ltd has not chosen to file any answering affidavit or

to appear at the hearing, and so the balance of the amount claimed as a debt, namely, $43,875 should not be counted.

T.J. Jamieson - $546

Mr Jamieson is a former Director of the company. His claim to $546 is acknowledged on behalf of the company but according to Mr Harrop's affidavit he owes the company $38,880.73 on his trading account. This is not disputed by Mr Jamieson and so the set-off available to the company means that his adverse vote cannot be counted.

A.M. Illston - $664,951.06

Mr Illston commenced a proceeding against the company in this Court in 1985. In his statement of claim he sets out four monetary claims which together total $275,510. In addition he has claimed general damages of $50,000 and exemplary damages of $30,000. The total claim for these items is $355,510. His claimed debt for voting purposes was made up to $664,951.06 by the addition of compound interest totalling $309,441.06. It was conceded on his behalf that he could not succeed on a claim for compound interest. Assuming he is successful in full for his four monetary claims (and in the absence of any evidence in respect of them I must for present purposes make that assumption) he may be entitled to simple interest which would total a maximum of $181,836. His debt must be valued on this reduced basis. It may well be that a further reduction should be made in respect of the claims for general and exemplary damages which, if allowed at all, are unlikely to be allowed for the full amounts claimed, but for the moment I pay no regard to that. The value of the debt must be reduced by a minimum of $127,605.06.

TRADE CREDITORS PAID INTEREST

The only adverse vote in this class was that of Elders in respect of a debt of $1,132,220.09. In view of the concession made and for the reasons already discussed that debt must be discarded.

SUMMARY

Other Secured Creditors

The total value of Other Secured Creditors who voted at the meeting was recorded by the Chairman as $2,798,188.90. The total value of votes which were cast in favour of the resolution as recorded by him was $1,636,333.12. Accordingly the maximum figure on that basis at which 75% is attained is -

$$\frac{\$1,636,333.12}{75} \times 100 = \$2,181,777.49$$

Thus the minimum number of votes which must be disallowed if there is to be a majority of 75% is -

$2,798,188.90 - $2,181,777.49 = $616,411.41

The following amounts must, in accordance with the findings I have made, be disallowed:

Mount Stewart Grain Co. Ltd	$ 2,500.00
Elders Pastoral Ltd	403,982.42
Wrightson NMA	14,035.35
Agrisales	22,675.95
Agri-Feeds Ltd	3,165.00
T.G. Healy Ltd	43,875.00

T.J. Jamieson	546.00
A.M. Illston	127,605.06
	$618,384.78

The result is that a majority in value of more than 75% was achieved.

TRADE CREDITORS PAID INTEREST

The only adverse vote was that of Elders Pastoral Ltd claiming a debt of $1,132,220.09. The disallowing of this vote means that there was a majority of 100% for the resolution.

I accordingly find that the necessary three-fourths majority was attained in all classes and, in the absence of any other challenge to the scheme, an order approving the arrangement has already been made.

Solicitors: Buddle Findlay, WELLINGTON, for Applicant

J.J. Cleary, WELLINGTON, for A.M. Illston