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PRIORITY

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IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

M.34/88

IN THE MATTER of the Companies Act
1955

AND

IN THE MATTER of FERDINAND ORCHARDS
LIMITED

Debtor

EX PARTE LESLIE EDWARD NEWSON and
BARBARA DAWN NEWSON

Creditors

Hearing: 15 July 1988

Counsel: Mr Patel for the Company in support
R G Ronayne for the Creditors

ORAL JUDGMENT OF MASTER R P TOWLE

This was an application to stay a petition for the winding up of the company and it arose in the following circumstances. The petition was based upon non-compliance with a s.218 notice served upon a director of the company at the company's registered office on 29 April 1988 demanding payment of an amount of \$30,000.00 in respect of payments due under a mortgage given by the company to the petitioning

creditors which were overdue. When the notice was not complied with within the 21 days the petition was issued on 26 May and came after due service and advertisement for hearing in the Court on 13 July as part of the ordinary winding up list. The day before that hearing an affidavit in opposition was filed by Mr A B Wilson on behalf of the company together with two applications, the first of which was to seek an order transferring the proceedings to Auckland and the second of which was to seek an order transferring the proceedings for hearing before a Judge instead of before me as a Master.

After hearing counsel briefly on that day I refused both applications but because it was indicated that there might be a review sought on my decisions I adjourned the hearing of the petition until today to allow this to be done. In the event applications were made to Robertson J, to review the two decisions and these were refused this morning and the file remitted back to me for the hearing of the petition.

At the resumed hearing Mr Patel in support of the application to stay put forward two main submissions. The first related to the question of service of the s.218 notice and the second related to the question of whether the petitioning creditors had security for their debt. As to the first I am satisfied that the s.218 notice was served

on Mr. Wilson as director of his company at his home which was the registered office on the date deposed to by the process server on 29 April. Mr Wilson claims that at the same time and placed above it in three pages stapled together were two pages relating to a notice under s.92 of the Property Law Act served at the same time. He says he did not read and certainly did not appreciate that there was a separate demand being made and that he only became aware that his company was in peril after he had referred the matter to his own solicitors on 11 May. No steps were taken at that stage by the company or indeed at any stage until the day before the petition came up for hearing on 13 July. I have allowed to be filed a further affidavit on behalf of the petitioning creditor in opposition on this point and the process server has now deposed to having handed over the documents together but denying that they were stapled in the fashion claimed by Mr Wilson. I do not find it necessary to make a finding on this point as I am quite satisfied that service was regular. If Mr Wilson had chosen to read the documents which he knew related to his company he would have seen the s.218 notice at the time. Although I have been referred to an English authority in Re A Debtor reported in [1938] 4 All E.R. 92, on this point, the facts relating to the particular case are far removed from those in the present case and I have no doubt that Mr Wilson was properly served.

As to the second main reason advanced to stay the petition Mr Wilson's affidavit referred to the fact that a separate proceeding is current against the company in the Tauranga High Court, brought by the first mortgagee of the farm owned by the company. Part of the defence raised by the company to that claim is that the contract which related to an offshore loan of an amount somewhere in excess of US \$237,000 may be illegal. The particular creditor who is the mortgagee in those proceedings has filed notice of support of the present petition to wind up the company. Mr Patel submitted that there was a possibility that if the company successfully defended that claim, the first mortgagee's security would disappear and that the second mortgagee which is the petitioning creditor in these proceedings, would thereby obtain adequate security for the payment of its debt.

Mr Wilson's affidavit acknowledges that the \$30,000 claimed in the petition is due. It is equally clear that his company is unable to pay this sum now and the situation is that it must be seen to have neglected to pay the amount demanded when due. The Court must consider the position put before it at the time of hearing this petition and I am satisfied that the petitioning creditor has no adequate security for the sum that is being claimed which is clearly due. The application to stay accordingly is declined and I will now allow the petitioning creditor to call evidence.

(Formal evidence of Barbara Dawn Newson given at that point proving that the debt is still due).

I make an order for the winding up of Ferdinand Orchards Limited and the Official Assignee is appointed as provisional liquidator. I have already made an order relating to costs on the appearances on 13 July of \$400 in favour of the petitioning creditors and understand that a further order for costs was made on the unsuccessful application to review my decision. On the hearing of the petition today I make an order for costs to the petitioning creditor of \$750 plus disbursements on the issue of the proceedings.



MASTER R.P. TOWLE

Solicitors: