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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.867-879/89

HIGH PRIORITY

IN THE MATTER of Section 311A of the Companies Act 1955

AND

IN THE MATTER of Section 55 of the Corporations (Investigations & Management) Act 1989

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AND

IN THE MATTER of EQUITICORP INDUSTRIES GROUP LIMITED and Others (In Statutory Management)

Hearing: 16 February 1990

Counsel: Mr H. C. Keyte and Mr S. P. Rennie for Plaintiffs
Mr D.A.R. Williams, Q.C. and Mr A.I.M. Tompkins for Defendants

Judgment: 15 March 1990

JUDGMENT No.1 OF WYLIE, J.
RULING ON APPLICATION FOR DIRECTIONS AS TO ONUS OF PROOF

Although the intitulment to these proceedings does not show them as such it will be convenient to adopt the nomenclature used by the parties to these proceedings as plaintiffs and defendants. The plaintiffs are the statutory managers of the Equiticorp Group of companies having been so appointed under the Corporations (Investigations and Management) Act 1989. The defendants are the liquidators of two Australian companies in the Equiticorp Group which are in

liquidation. By virtue of s.55 of the Act a number of the winding up provisions of the Companies Act 1955 and in particular s.309 to s.311C are made applicable to a company subject to statutory management as if it were being wound up and the statutory manager were the liquidator. It is ss.311 and 311A as enacted in the Companies Amendment Act 1980 which are particularly relevant to the present application.

In the interests of brevity I will not set out them in full, but will set out the relevant portions without, I hope, omitting anything material to the present application.

"311. Voidable securities -
(1) Subject to subsections (2) and (3) ..... every security ..... shall, ... be voidable as against the liquidator ..... if it was executed ..... within ..... 12 months immediately preceding the commencement of the winding up of the company.
(2) Subsection (1) of this section shall not apply to a security or charge -
(a) If it is proved that the company immediately after the creation of the security or charge was solvent; or
(b) That was given in substitution for an existing security or charge executed or given before the commencement of the period .....:
(3) Subsection (1) of this section shall not affect any security or charge insofar as it relates to -
(a) Money actually advanced or paid, or the actual price or value of property sold or supplied, or any other valuable consideration given in good faith, by the grantee ..... at the time of, or at any time after the execution thereof; .....

.....

311A. Procedures relating to voidable preference and voidable securities -
(1) Where, under section 309 or section 311 of this Act, a disposition is voidable against a liquidator and the liquidator wishes to set aside the disposition, he shall -
(a) File in Court a notice stating that he wishes to set aside the disposition .....
(b) .....
(2) Any person -
(a) Who would be affected by the setting aside of a

disposition; and
(b) Who considers that the disposition is not voidable
....
may apply to the Court for an order that the disposition is not so voidable.
(3) Where a liquidator wishes to set aside a disposition and complies with subsection (1) of this section -
(a) Unless a person has applied to the Court under subsection (2) the disposition shall be set aside as against the liquidator from the 21st day after the day the liquidator so complied:
(b) Where a person has applied to the Court under subsection (2) of this section then, unless the Court otherwise orders, the disposition shall be set aside as against the liquidator from the day the last such application to be determined is finally determined.
....."

In a series of proceedings the plaintiffs are seeking to set aside various securities given by members of the group to the two Australian companies relying on the provisions of s.311. It is alleged that all the securities were given within the period of 12 months immediately preceding the date on which the companies giving the securities became subject to statutory management. By appropriate notices given in terms of s.311A(1) the statutory managers gave notice of their wish to set aside all the securities. The defendants have applied to this Court in terms of s.311A(2) for orders that the securities are not voidable. In summary the defendants claim that the companies granting the securities were solvent: s.311(2)(a); that the securities were given in substitution for existing securities: s.311(2)(b); that the securities relate to money actually advanced or paid; or that the securities were given in relation to the price or value of property sold; or that the securities were given in exchange for valuable consideration given in good faith: s.311(3)(a).

The present application is by the plaintiffs for directions as to the burden of proof in respect of the various matters raised in opposition. They seek an order that the burden of proof of all matters contained in ss.311(2) & (3) lies on the defendants. The defendants accept that the burden of proving solvency in terms of s.311(2)(a) lies on them, but in respect of all other aspects they say it lies on the plaintiffs.

I intend to approach the problem posed by this application by attempting to construe the two sections as they stand without reference to authority and then to look at such case law as may be helpful to see if that construction is inconsistent with principles already established.

It was the plaintiff's case that s.311(1) creates a general premise that securities given within 12 months of commencement of winding up are voidable and that subs.(2) and (3) are to be seen as exceptions to or limitations on that general premise. The defendants adopt a different approach. Their counsel begins with the proposition that prima facie each of the securities is good no matter when given, like any other contract valid on its face. He invoked the maxim "omnia praesumuntur rite et solemniter esse acta" and cited Olds Discount Co. v Playfair Ltd [1938] 3 All ER 275 and Bateman Television Ltd v Coleridge Finance Co. Ltd & Another [1969] NZLR 794 as examples of the application of that maxim. I

doubt it is necessary to rely on the maxim. The plaintiffs are not relying, at least so far as their pleadings go, on any suggestion that the documents are shams or fraudulent (either as preferences or otherwise). The sole ground of attack is their execution within the statutory period. It is enough, I should have thought, that here are apparently valid and binding contractual documents by way of charge and that unless within the terms of the statute or by some other principle of common law they can be set aside, they must stand. On that first fundamental difference between the parties I have to favour the approach of the defendants. The plaintiff's submission gives no weight to the opening words of subs.(1) making the application of that subsection subject to the provisions of subss.(2) and (3). So rather than there being a general premise applying to all securities and charges given within 12 months the premise of voidability applies only to those charges not excluded by the succeeding subsections.

Looking first at subs.(2), that excludes from the operation of subs.(1) securities falling within the ambit of either paras. (a) or (b). As to paragraph (a) it is accepted by the defendants that the introductory words "If it is proved" impose an onus of proof on the defendants. On the authorities that concession is properly made: Re Patrick and Lyon Ltd [1933] Ch.786, 791, Re Australian Co-Operative Development Society Ltd (1976) 2 ACLR 207, 218. As to paragraph (b) it is significant that it is not prefaced by any reference to proof as is paragraph (a). That is a change of

structure to the drafting of the exceptions to which effect should be given if to do so is possible without frustrating the clear purpose of the section. The exceptions in paragraphs (a) and (b) are disjunctive. If, as I think can legitimately be done, one reads the introductory words of subsection (2), omits paragraph (a) and proceeds straight to paragraph (b), thus omitting the reference to proof in paragraph (a), I think the defendants' point becomes much clearer and the limited application of subsection (1) more apparent. Subsection (1) can be read as if there were inserted after "every security or charge" the words "other than one given in substitution for an existing security". So in the absence of any indicia to the contrary ordinary principle would suggest that if a liquidator wishes to avail himself of the exceptional statutory right given by s.311 he must first bring himself fairly and squarely within the confines of that section. Again in the absence of indicia to the contrary ordinary principle would lead one to conclude that the onus of proof that he comes within those confines must be on him as the one seeking to invoke the jurisdiction.

Counsel for the plaintiffs made much of s.311A which enables the liquidator simply by filing a notice of his wish to set aside not only to invoke the jurisdiction, but, by the passage of time, to secure the end result if the security holder fails to make application to arrest the process. But again I think that submission ignores the opening words of s.311A(1) "Where under section .... 311 of this Act a

disposition is voidable ....". Since voidability cannot arise under s.311(1) in relation to a security which comes within subs.(2)(b) I am satisfied that the onus is on the liquidator, if his notice is challenged, to satisfy the Court that the security in respect of which he has given notice is within s.311(1) and thus within the ambit of the described procedure. As counsel for the defendants described it, that is a jurisdictional condition precedent to the liquidator availing himself of the procedure. I do not think that the defendants, by giving notice of opposition, assume any onus to prove that the securities in respect of which the liquidator has given notice do not fall within s.311(1). They do no more than put the liquidator to proof of that issue.

Turning then to the authorities I think the conclusion I have just reached is entirely consistent with them. There is no authority directly in point on s.311. In Mike Hastie Handcraft Wools Limited (In Voluntary Liquidation) (Unreported, M.37/87, Napier Registry, 21 December 1988) Greig, J. considered a somewhat similar question in relation to s.309, which deals with voidable preferences. After referring to authorities which establish that in insolvency law the onus is on the Official Assignee to establish the voidability of the transaction: Re T. W. Cutts [1956] 2 All ER 537, Re Ciminiello [1981] 2 NZLR 495, and that prior to the amendment to the Companies Act in 1980 that onus applied equally in company law because the provisions of the insolvency act as to fraudulent preference were incorporated

into the companies legislation, he noted that the Court of Appeal in Westpac Banking Corporation v Nangeela Properties Ltd [1986] 2 NZLR 1 had accepted that the onus still lay on the liquidator under the new legislation in voidable preference cases: see McMullin, J. at p.7 and Somers, J. at p.10. In the case before him counsel had argued that the procedural provisions of s.311A, especially the automatic setting aside by effluxion of time without opposition, and the provision of s.311A(2) that the creditor's opposition is by way of application for an order that the disposition is not voidable, raise an initial onus on a creditor to provide some basic evidence justifying his opposition. Greig, J. rejected that submission. He said:

> "It still remains the position under the Act that the starting point of the procedure is the fact that the disposition is voidable under s.309 or s.311 of the Act. In the words of the Act, it is the wish of the liquidator to set aside which motivates the procedure but that depends upon the fact that the disposition is in truth voidable under the sections. That is a matter which the liquidator has to prove and so he must carry both the initial and the ultimate onus, the evidential and the substantive onus to show that this is a voidable transaction. It is the liquidator that makes the claim that it is voidable even though that is by notice which, if there is no opposition, will be sufficient in itself. But where there is opposition it must be, and it ought to be for the liquidator to adduce some evidence to justify that."

Mr Keyte sought to distinguish that case by pointing to what he claimed was the different structure of s.309. He was here contrasting what he submitted was the overall premise of voidability created by s.311(1). I have already rejected that

analysis. I have arrived at my construction of subs.(1) and subs.(2)(b) and its consequence on the procedural issue quite independently of s.309. I am satisfied however that the reasoning of Greig, J. is just as applicable to those subsections as it was to the issue which directly confronted him in relation to s.309.

So on my own construction of s.311, but fortified by the decision of Greig, J. in Hastie I hold that the onus of proving that the securities the subject of these proceedings do not fall within s.311(2)(b) lies on the plaintiffs, that being a necessary consequence of the necessity for the plaintiffs to bring the challenged securities within s.311(1).

I turn now to s.311(3)(a). The first point to be noted is that subs.(3) does not raise the same jurisdictional point as does subs.(2)(b). Nor does it provide for exceptions in the true sense. It does no more than to limit the effect of the setting aside of a voidable security. So in my view subs.(3) is to be approached afresh because the considerations applicable to both paragraphs (a) and (b) of subs.(2)have no relevance. I do not perceive any difficulty in holding, if a proper construction should require it, that a different onus should apply in relation to subs.(3) to that which applies to other separate provisions of s.311. Indeed, on the finding I have already made that is already the case as between paragraphs (a) and (b) of subs.(2), and in my view because of the reference to proof in paragraph (a) the distinction is

deliberate. For illustrations of the onus varying from one provision to another in insolvency law see Re Hardy (No.2) [1922] NZLR 613 at 620 and Meo and Another v Official Assignee [1987] 3 NZCLC 100280 at 100284. In the present instance there are three points in issue under subs.(3)(a) viz. that money was actually advanced or paid at the time the securities were given, that the securities were given in relation to the actual price or value of property sold, or otherwise for a valuable consideration given in good faith. I think all of those issues can be considered together. Although I am content if necessary to apply the onus differently to separate provisions of subs.(3) I can see no reason for applying it differently within subs.(3)(a) itself, all of the constituent parts of which seem to me to be in pari materia. Subsection (3) assumes two things. First that the security itself is prima facie valid and second that it is voidable under subs.(1). The effect of subs.(3) is to limit the extent of the avoidance to which the liquidator would otherwise be entitled. It seems logical to me that the creditor who seeks to avoid the consequence of the statutory avoidance, even if only to a limited extent, should bear the burden. Here I think the plaintiffs may gain assistance from the provision of s.311A(2) which requires the creditor to apply to the Court for an order that the disposition is not so voidable. In the ordinary course the onus is on any applicant to justify the order he seeks. That does not in any way derogate from my conclusion in respect of subs.(2)(b) which goes to the essential qualification for s.311A to have any application.

(I note, however, that it is perhaps curious that s.311A(2) refers to an application for an order that the disposition is not "so voidable" without expressly providing for an application to limit the extent of the avoidance which may well be the consequence of subs.(3) if the security secures a greater amount than the money actually advanced or the value of the consideration given. It may be enough to read "so" as importing the notion of voidable to the full extent.) A construction that the onus in relation to matters arising under subs.(3)(a) lies on the defendants is perhaps not so immediately apparent as I conceive the reverse to be the case in relation to subs.(2)(b). Nevertheless in the end I am satisfied that that is the proper construction in the absence of authority to the contrary.

What then of authority? I was referred to a number of cases in insolvency law and in relation to the former s.311 prior to the 1980 amendment. A convenient starting point, because it deals not only with the corresponding provisions of s.57(2) of the Insolvency Act 1967, but also highlights what I perceive to be the difference between subs.(2)(b) and (3)(a) of s.311 is the following passage from the judgment of Greig, J. in Meo (supra):

> "What is plain from the authorities on the various provisions in the bankruptcy Statutes is that the onus upon the issue of the avoidance of a disposition or a transaction varies from provision to provision and, if Salmond, J.* is correct, even within the provisions of one section. I think that what controls the position in each case is whether the issue is a matter of exception or relief on the one hand or, on the other hand, the very

> qualification or essentials of the avoidance of the disposition or transaction. ..... In sec.57 the essential qualification for avoidance is declared in the first subsection and it is there that the onus is on the Official Assignee. Subsection (2) provides the relief or exception and it is for the creditor to satisfy the Court upon that."
>
> (* a reference to Re Hardy (No.2) supra)

It is that distinction between exceptions and limitations on the one hand and "the very qualification or essentials of the avoidance" that distinguish cases such as Official Assignee v Khoo Saw Cheow [1931] AC 67 and Re Windle [1975] 3 All ER 987 both of which are referred to by Greig, J. and also by Hardie Boys, J. in Re Ciminiello.

There was some suggestion in the course of argument that there was some inconsistency between Meo and Hastie. I do not think so. In Hastie Greig, J. appears to me to have been dealing with the fundamental question of whether the disposition was voidable and he was dealing with s.309 which contains nothing by way of the limitations referred to in s.311(3)(a). For the latter subsection to come into consideration at all it must first be assumed that the security is voidable and that the liquidator has brought it within the ambit of s.311(1). In Hastie Greig, J. went on immediately after the passage I have earlier cited to say this:

> "It seems to me that in practice it is better for the liquidator, who is the representative of the company and its affairs, to produce the evidence, not only of the date of the liquidation and the date of the disposition, but also such other material from the records of the company

> which supports the liquidator's claim that this is a voidable disposition. Then it is for the creditor or disponee to furnish any defensive averment or to produce evidence in support of any positive claim by way of relief or excuse of the avoidance of the disposition."

That passage to me seems entirely consistent with the approach I have taken above.

In Re Holm [1974] 2 NZLR 455 there was a motion by the Official Assignee for an order that a mortgage given to a bank as security for an overdraft was void under s.57 of the Insolvency Act. The only issue between the parties was whether the bank as grantee having given valuable consideration was acting in good faith. Two passages from the judgment of Roper, J. are of interest in the present context. At page 456 he said:

> "Although the present motion was filed by the assignee, who might thereby be taken to have undertaken the onus of proving lack of good faith, Mr Panckhurst ..... submitted that in fact the application to the Court should have been made by the bank, which would then have cast on it the onus of proving "good faith"."

He then went on to make some comment on the inadequacy of the legislation as to the procedure to be adopted once a notice to set aside a transaction had been given and continued:

> "Although I think the present matter should more properly have come before the Court on the bank's application I indicated on the day that I would decide the matter on its merits and this I proceed to do. Before proceeding I think I should mention that even if the obligation had

> been on the assignee to initiate proceedings I would still have been of opinion that the onus of proving "good faith" would rest on the bank. I am aware that the 1967 Act has made sweeping changes in the law of bankruptcy but I think the proposition, established under the 1908 Act, that in circumstances such as the present the onus of establishing good faith rests on the creditor who asserts it, still applies: see Re Hardy (No.2) [1922] NZLR 613, and Re Hooper [1951] NZLR 704. If there is any onus on the assignee it is to establish merely that the transaction comes within subs.(1) of s.57."

In Re Mataura Motors Ltd, McCloy and Another v Carroll Autoway Limited (unreported, Invercargill Registry M.26/80, 3 July 1980) there was an application by liquidators for a declaration that a debenture was invalid in terms of s.311 as it stood before the substitution of the present section in 1980. There the argument for the debentureholder was that in the particular circumstances it had been given in exchange for an actual payment or advance of money (in fact it secured a balance of purchase money where no cash changed hands). It does not appear that the question of onus was the subject of argument, but Casey, J. said this:

> "The Respondent accepts that the debenture was given within twelve months of the Company's resolution to wind up on 29 March 1978, and that at the relevant time it was insolvent within the meaning of s.311. The onus is therefore on it to establish the exception."

All those citations, admittedly dealing with slightly different statutory provisions, but directed to exactly the same kinds of issues as arise under s.311(3)(a), support the construction which I give to that provision so far as onus of

proof is concerned. Counsel for the defendants submitted at one stage that it would be undesirable that a different onus should apply in relation to s.311 from that which applies under s.309, where the liquidator must prove an intention to prefer, since both sections are governed by the procedural provisions of s.311A. As I have already indicated I see no reason in principle why different onuses should not apply to different provisions even of the one section. In my view it would be much less desirable that a different onus should be held to apply in the winding up of a company (or in this case the statutory management thereof) to that which applies to the insolvency of an individual so far as the kinds of matters which arise in subs.(3)(a) are concerned. Accordingly I am satisfied that the onus of proving the matters raised in subs.(3)(a) lies on the defendants.

Summary

In accordance with those conclusions there will be orders as follows:

(a) The onus of proving that the securities subject to these proceedings come within the provisions of s.311(1) and are not excluded by the provisions of subs.(2)(b) thereof lies on the plaintiffs.

(b) The onus of proving matters raised by the defendants under s.311(3)(a) lies on the defendants.

(c) By consent the onus of proving solvency of the companies granting the securities in terms of s.311(2)(a) lies on the defendants.

Each party having been partially successful there will be no order as to costs.

Keith J.

Solicitors: Kensington Swan, Auckland for Plaintiffs
Glaister Ennor & Kiff, Auckland for Defendants

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