22/2 NZLR

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

C.P. No.21/90

IN THE MATTER of Section 345 of the Companies Act 1955

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A N D

IN THE MATTER of an application for directions by SPENCER WILLIAM BULLEN AS Receiver of SEW HOY & SONS LIMITED (IN RECEIVERSHIP)

Applicant

Hearing: 4 February 1991

Counsel: F.B. Barton for Receiver
M.G. Nidd for Union

Judgment: 15 February 1991

JUDGMENT OF TIPPING, J.

This is an application for directions by a Receiver pursuant to s.345(1) of the Companies Act 1955. The Company in question is Sew Hoy & Sons Ltd in respect of which the Applicant Mr S.W. Bullen was appointed Receiver on 12 December 1989. That appointment was made pursuant to a debenture given by the Company in favour of Westpac Banking Corporation on 21 April 1989. Mr Bullen was appointed both Receiver and Manager and pursuant to the

provisions of the debenture (Clause 37) he became the agent of the Company which alone was to be responsible for his acts and defaults. He had express power to carry on the business of the Company.

On his appointment Mr Bullen ascertained that the Company was in a very serious financial position and was suffering massive losses on a weekly basis. Mr Bullen has deposed, and I accept, that in a major receivership of this kind it is important for the receiver to continue the company's operations briefly to give reasonable time to enable a full assessment to be made and informed decisions taken. For this reason Mr Bullen informed the directors and staff of the Company on his appointment that he proposed to continue trading until such assessment had been made.

An immediate problem was the raising of sufficient funds to pay for wages and holiday pay due on 21 December 1989. Sufficient assets were realised and debts collected to make these payments. On 20 December 1989 it became clear that this would be possible. Mr Bullen by then had decided that it would be necessary for him to close down substantial parts of the Company's business and on 21 December 1989 he announced the closure of several factories. This involved the termination of the employment of about 155 employees, most if not all of whom were members of the South Island Clothing and Related Trades Industrial Union of Workers, to which I shall henceforth refer simply as the Union.

The essential questions in this case are first what, if any, protection the employees have for certain payments to which they are entitled under their Award and secondly whether the Receiver is personally liable for those payments. As originally framed the application sought directions from the Court as follows:-

> "(a) Whether payment in lieu of notice pursuant to Awards attracts priority pursuant to s.308 of the Companies Act 1955; and
> (b) Whether four weeks payment either in lieu of notice or as wages for the purpose of redundancy negotiations pursuant to Awards attracts priority in terms of s.308."

When the case was opened it appeared to me that these questions did not encapsulate one essential point which the Union at least wanted resolved. I should interpolate here that on an earlier application for directions as to service the papers were directed to be served upon the Union as representing the employees covered by the relevant Award. By consent at the hearing a third question was added to the directions sought by the Receiver, namely whether the Receiver was personally liable to make the payments referred to in the first two questions. Both counsel agreed that the Court could and should determine that question as well as the first two upon the affidavits filed without cross-examination.

Matters of a similar kind have recently been before the Court of Appeal: see Quik Bake Products Ltd v. Cormack C.A. 46/90 (judgment 16/8/90): Transpac Holdings Ltd v. New Zealand Timber Industry Employees Industrial

Union of Workers C.A. 214/89 (judgment 16/8/90) and Peacock v. New Zealand Performance & Entertainment Workers Union C.A. 293/89 (judgment 29/6/90). As stated by the Court of Appeal in the Quik Bake case the appointment of a receiver under a debenture does not generally bring the company's existing contracts to an end. They continue unless the receiver expressly abandons them and any liability which the company has under such contracts yields priority to the charge secured by the debenture unless protected by a higher security: see also In Re Mack Trucks Ltd [1967] 1 W.L.R. 780 and Griffiths v. Secretary of State for Social Services [1974] 1 Q.B. 468 as to the situations in which the general rule does not apply. Reference should also be made to the recent judgment of the Court of Appeal in England in Nicoll v. Cutts [1985] B.C.L.C. 322. At page 325 Dillon, L.J. giving the leading judgment said:-

> Where, however, the receiver is appointed out of court under a power in a debenture and the debenture provides that the receiver is to be the agent of the company, there is no change in the personality of the employer. The directors' powers to manage the company's business are displaced in favour of the receiver, but the business is still the company's business carried on by the company's agent. See the classic exposition of the receiver's position in the judgment of Rigby, L.J. in Gaskell v. Gosling [1896] 1 Q.B. 669. Therefore, as is, in my judgment, correctly stated in 7 Halsbury's Laws (4th edn) para 880, the appointment out of court under powers in a debenture of a receiver, who is to be the agent of the company, normally has no effect on the company's contracts, and ordinary contracts of service will not be affected. The company remains the employer. I approve the reasoning in the judgments in the cases cited in the footnote to that passage in Halsbury: Re Mack Trucks (Britain) Ltd [1967] 1 All E.R. 977, [1967] 1 W.L.R. 780; Re Foster Clark Ltd Indenture Trusts [1966] 1 All E.R.

> 43, [1966] 1 W.L.R. 125 and Griffiths v. Secretary of State for Social Services [1973] 3 All E.R. 1184, [1974] Q.B. 468."

A little earlier in his judgment Dillon, L.J. had said at p.324h, referring to the U.K. equivalent of our s.345(2) and emphasising the words "entered into":-

> "It is impossible in my judgment to construe the subsection as meaning that a receiver is personally liable on any contract which in the performance of his functions he allows to continue after his appointment."

Against that background there are conventionally three ways in which a receiver and manager can become personally liable for transactions entered into after his appointment. First he may himself enter into his own new contracts, the obligations under which are then obviously a receivership expense; second he may adopt existing contracts as his own by making it clear that he undertakes personal liability for the obligations thereby created; third he may be estopped from denying personal liability if the facts warrant such a conclusion.

I mention immediately that there is no question of estoppel in the present case. Mr Nidd on behalf of the Union expressly conceded as much. I am also satisfied on the evidence that there can be no finding that Mr Bullen entered into new contracts with the relevant employees. It is suggested that he adopted the existing contracts so as to make them his own. Mr Nidd prayed in aid the evidence that Mr Bullen had taken steps to make arrangements for the payment of wages and holiday pay due

on 21 December. I do not construe that conduct as in any way amounting to an adoption by the Receiver of the Company's contracts of employment as his own personal contracts.

In addition to the three conventional ways in which a receiver may be personally liable for post receivership obligations, Mr Nidd suggested a fourth to which I shall make more detailed reference below. Before doing so however I must deal with the first two questions upon which the Receiver seeks the Court's directions.

Clause 28 of the award under which the relevant employees were working, provides the basis upon which the Company was entitled to terminate their employment, except in the case of employees in their first week. One week's notice of termination is required on either side. Failing that one week's wages must be paid. Those provisions are without prejudice to the position where the employment is terminated for misconduct but that does not apply in the present case. Clause 30 of the award provides for redundancy. It reads:-

> "The employer shall advise the Union of any impending redundancy situation prior to issuing notice of termination to the affected employee. Such notice to the Union and the worker to be not less than four weeks prior to the actual date of termination to enable discussion to take place regarding a redundancy agreement."

While not directly relevant to the present case I observe in passing that this combination of provisions raises the curious consequence that a general

notice of termination need be of only one week's duration but in a "redundancy situation" four week's notice is necessary. It was common ground between the parties that when Mr Bullen gave notice to the relevant employees on 21 December 1989 a "redundancy situation" had arisen and of course there had not been four weeks prior notice. Equally there had been, as I understand the evidence, no period of one week's notice within the provisions of Clause 28 of the Award. Questions of quantum was reserved and thus the Court is not concerned at the moment with whether or not the four week period is cumulative upon the one week period or the two are effectively concurrent.

The initial suggestion on behalf of the Union was that the payments due to the workers under Clauses 28 and 30 of the award were entitled to priority in terms of the Companies Act 1955. The relevant sections are Sections 101 and 308. Section 101 incorporates into a receivership of the present kind the provisions of s.308 and requires a receiver to pay in priority to all other debts all wages or salary of any employee in respect of services rendered to the company during the prescribed period before the relevant date. In a receivership the relevant date is the date upon which the receiver is appointed. As was pointed out by Hardie Boys, J., giving the judgment of the Court of Appeal in the Quik Bake case, the combination of ss.101 and 308 of the Companies Act 1955 gives priority in respect of wages, salary and indeed holiday pay but only in respect of amounts which have

accrued at the date upon which the receiver is appointed. Thus in the present case for that reason alone (leaving aside whether they were otherwise eligible) there can be no priority under s.101 in respect of any amounts due by the Company to the employees pursuant to Clauses 28 and 30 of the Award (wages in lieu of notice and redundancy). These amounts became due, if at all, after the date upon which the Receiver was appointed.

The point is put very succinctly in the Transpac judgment, again by Hardie Boys, J. for the Court of Appeal, when His Honour said:-

> "Payments falling due after the commencement of the receivership do not have priority except in so far as s.345(2) [Receiver's personal contracts] provides, or if there is an estoppel."

Mr Nidd was rightly constrained to agree that in the light of the Quik Bake and Transpac Holdings judgments in the Court of Appeal the only way in which he could achieve effective priority for the payments in question was by showing that the Receiver had become personally liable. That is undoubtedly the correct position for the reasons which I have indicated. I return then to the question of the Receiver's personal liability.

As I have indicated there is no factual basis for holding the Receiver personally liable on any of the three conventional bases earlier set out, namely new personal contract, personal adoption of existing contracts and estoppel. Mr Nidd suggested there was another basis upon which the Receiver in the present case was personally

liable for the termination and redundancy payments. In the Peacock case the Court of Appeal (Somers, Casey and Hardie Boys, JJ., the judgment being delivered by Somers, J.) ruled that a person whose mind is the mind of a company may be found guilty of aiding and abetting the company in the commission of an offence constituted or brought about by the act or conduct of that person. In that case a company called Rainbows End (1986) Ltd, which operated an amusement park in Auckland, had been placed in receivership. Mr Peacock had been appointed one of the receivers and managers by the debentureholder. He was the agent of the company in the same way as Mr Bullen was constituted the agent of the Company in the present case.

On the same day as he was appointed he summarily dismissed all the employees of the company, some of whom were subsequently re-engaged. There was a provision in the relevant award in that case identical in substance to Clause 30 of the award in the present case. Under s.202 of the Labour Relations Act 1987 any person acting on behalf of an employer who aids or abets any breach of an Award is liable to a penalty. The union brought proceedings against Mr Peacock, amongst others, alleging that he as receiver had aided and abetted the company in a breach of the relevant Award by not giving four weeks prior notice of a "redundancy situation". It was held that Mr Peacock had indeed aided and abetted the company in its breach of the award, although it was his action as the agent of the company which had constituted the breach.

It had been argued that where one and the same mind was involved then that mind was the mind of the company alone and the same mind could not be used to create both the company's breach and the breach of an aider and abettor. However the Court rejected that view and held that a person in the position of a Receiver could be found liable to penalty pursuant to s.202 of the Labour Relations Act 1987 as being a person acting on behalf of an employer who had aided and abetted a breach of the Award.

Mr Nidd's submission was that if, as the Peacock case demonstrates, a Receiver who acts in breach of an Award is liable to penalty then it must follow that he is also liable personally for the discharge of the financial obligations created by the award, default in the payment of which has been the subject of the breach.

In their judgment in Quik Bake their Honours drew attention to certain submissions made by the Solicitor-General as amicus curiae. It had been suggested that there was a degree of inequity, indeed harshness, for employees where a Receiver allows existing contracts of employment to continue and is careful, as was Mr Bullen in the present case, to avoid entering into any new contracts with the employees or adopting existing contracts as his own or acting so as to create an estoppel. In such a situation, which is really the present, then subject to Mr Nidd's argument, the employees are simply unsecured creditors of the company for such amounts as they may be entitled to upon termination and they have no claim against

the receiver personally. They also have no priority under ss.101 and 308 because of course the relevant obligations of the company have accrued after the appointment of the receiver.

It was suggested by the Solicitor General that the unfairness of such a situation might be remedied to an extent by taking a liberal approach to the question whether the receiver had adopted existing employment contracts as his own. That I suppose would be one way of approaching the problem but, with respect, an unsound path to follow because it would involve imputing to receivers contractual intentions which ex hypothesi they had not formed. A much better way of dealing with such inequities as may arise in this field would be for some balanced legislative intervention, a point to which I make further reference below.

The essential point of my further reference to the Quik Bake case in relation to Mr Nidd's submission is that their Honours said towards the end of their judgment:-

> "As the Peacock case shows the receiver may render himself liable to penalties if award provisions are not observed. But without legislative intervention there will always be the risk that workers following a receivership may become unsecured creditors for wages just as they now are for redundancy compensation."

In Quik Bake the Court, which comprised Casey, Bisson and Hardie Boys, JJ., obviously had clearly in mind the recent decision of the Court in Peacock where

both Casey and Hardie Boys, JJ. also sat. It seems to me to be apparent from what their Honours said in the passage just cited from Quik Bake that although a receiver may in certain circumstances render himself liable to penalties if award provisions are not observed, it does not follow that he also becomes liable personally for the monies due. In other words, by dint of s.202 of the Labour Relations Act 1987 the receiver may suffer penal consequences as an aider and abettor but this does not mean that he also becomes contractually liable or indeed liable in any other way for payment of the wages or redundancy pay, failure to pay which has been the subject of the breach of the award.

There may, as Mr Nidd suggested, be some distinct anomaly in this conclusion but I agree with Mr Barton's submission for the Receiver that it is a long and unsound step to hold that not only is a receiver who is party to a breach of an award liable to penalty but he is also liable as a contractual principal. Employees, their advisors and their Unions when faced with a receivership can negotiate with the receiver so as to ensure that they have personal rights against him. They need not continue working beyond the period of notice to their potential detriment unless the receiver is prepared to undertake personal liability for the future. This is simply to repeat what was stated by the Court of Appeal in Quik Bake.

The penal consequences for a receiver who becomes party to a breach of an award derive from s.202 of

the Labour Relations Act 1987. However in the absence of some clear legislative direction I am unwilling to hold that a receiver also becomes personally liable for the monies which are the subject of Clauses 28 and 30 of the present Award and which can be described for short as wages in lieu of notice and redundancy pay or compensation. The company, whose agent the receiver is, is of course liable for those monies. I appreciate that this will in almost all cases be cold comfort for the employees because the point will not arise if the company itself is able to pay.

In the absence of a new contract or personal adoption of a continuing contract there is no contractual nexus between the Receiver personally and the relevant employees and in my judgment I would be legislating by making a receiver liable in these circumstances in the absence of such contractual nexus or estoppel. That said I agree entirely with the submissions made to me by both counsel that there is an urgent need for some legislative intervention in this area. Obviously a balance must be struck between the position of employees and the position of those who provide finance for companies pursuant to debentures. Too strong a leaning in favour of employees may be commercially disadvantageous in the long term by making lenders more reluctant to lend, but on the other hand, as the submissions made by the Solicitor General in the Quik Bake case suggest, at the moment the position may well be thought to be somewhat too favourable for debentureholders, usually banks.

Some protection is already given in relation to pre-existing obligations by dint of ss.101 and 308 of the Companies Act 1955. The matter is no doubt one of some complexity and social policy. I venture the observation however that a reasonable balance to strike between employees and financiers might be to provide that in the absence of some other express agreement between all concerned, employees have priority, to the extent that the assets of the company extend, in respect of all payments due to them under any Award or employment contract but up to a specified level to be kept under review.

In the result I give directions to the Receiver in terms of the amended application as follows:-

(1) Payment in lieu of notice pursuant to s.28 of the relevant Award does not in the present case attract priority pursuant to s.308.

(2) Four weeks payment either in lieu of notice or as wages for the purpose of redundancy negotiations pursuant to Clause 30 of the Award in the present case does not attract priority in terms of s.308.

(3) The Receiver is not personally liable to make the payments referred to in directions (1) and (2) above.

It was agreed that all questions of costs should be reserved and they are reserved accordingly. I

will receive memoranda from counsel if agreement cannot be reached. The Union has essentially failed but in all the circumstances I would be reluctant to make an order for costs against it and suggest that costs should be left to lie where they fall. When these proceedings were commenced the law was by no means clear cut. It has subsequently been clarified in respect of ss.101 and 308 by the decisions of the Court of Appeal. The Receiver acted perfectly properly in bringing the matter to the Court but the Union also acted reasonably in advancing the argument which it did in the interests of its members.

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