283

NZLR

MEDIUM PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

30/7

M. NO. 35/93

UNDER the Companies Act 1955

1197

BETWEEN EURO SYSTEMS AND EQUIPMENT (NZ) LIMITED

Plaintiff

A N D BAINBRIDGE PANEL AND PAINT LIMITED

Defendant

Hearing: April 28, and June 11, 1993

Counsel: Mr. J.D. Atkinson for Plaintiff
Mr. R.H. Hansen for Defendant

Interim Judgment: April 30, 1993

Judgment: 16 July 1993

JUDGMENT OF MASTER ANNE GAMBRILL

The Plaintiff's Counsel appeared to make further submissions in respect of the Court's query as to the validity of a winding up proceeding commenced

by the parties who controlled 50% of the shareholding and Directorate of the company. Counsel for the Plaintiff stressed that it was not a usual requirement for a company to pass a formal resolution under seal before commencing debt collecting procedures through the Court. The Plaintiff said the Directors are the persons who have the authority to act for the company and in the absence of any contract to the contrary, the majority of the members are entitled to decide, even to the extent of overruling the Directors, whether an action in the company's name should be begun or allowed to proceed.

I am satisfied on the evidence Mr. Kidd gives that it is normal for companies to commence proceedings against debtors without formality. However, the normal business transactions of the day to day administration of a company must be regarded in a different light from those which exist in relation to this company where there is an equal division of shareholders and Directors opposing the application to wind up the Defendant. The affidavit evidence is placed before me that on 21st December last, Mr. and Mrs. Kidd resolved to commence these proceedings. Messrs. Hawkins and Shirtcliff were not present at or properly advised of the meeting but as Counsel for the Plaintiff says, even if they were present they could not have voted because of a conflict of interest, and referred to Article 84(2) of the company's Articles. Counsel said that their sole interest was not as officers of Bainbridge or as the holders of shares in the company (even on a trustee basis for Bainbridge). They also have another interest in maintaining Bainbridge in that they have pledged their shares as security for Bainbridge to Westpac. The Plaintiff's Counsel urged that the interests of the Plaintiff would be advanced by the winding up of Bainbridge, not detracted from. Counsel said further they would in breach of their fiduciary obligations as Directors to use their powers to resist applications to compel the payment

of the Bainbridge debt. In effect, by resisting it, the Bainbridge Directors are attempting to gain for Bainbridge an interest free loan for an indefinite period at the expense of the Plaintiff. Counsel said further that even accepting that the application to wind up was beyond the authority of the Directors at this point in time, it could subsequently be ratified by an ordinary resolution of the company in general meeting, acting bona fide in the interests of a company as a whole. Because Messrs. Hawkins and Shirtcliff would be unable or may be unable to vote on such an issue, then the application could be ratified. Nevertheless, the Plaintiff says the preferable course would be to allow the winding up to continue as the debt was significant and undisputed. An indication was given to the Court that Mr. and Mrs. Kidd would, on certain conditions, recognise the agreement Messrs. Hawkins and Shirtcliff alleged existed for the purchase of the shares. This issue as to whether the company shares can be sold is beyond the jurisdiction of the Court on the application presently before it. Nor should the Court process be used for the collection of an outstanding debt although this effectively may be the final result of any application to wind up. The winding up application is a procedure to ensure that companies which are insolvent do not continue to trade because of the detriment to their creditors and to ultimately the general public at large.

Counsel for Bainbridge said that it was of crucial significance that it was now recognised a meeting had been held but that no notice was given. Even if Messrs. Hawkins and Shirtcliff could not vote, the Defendant says that Mr. and Mrs. Kidd as Directors, were not entitled to exercise their powers to authorise the winding up without giving notice of the existence of the meeting. Counsel said further that Article 84 did not apply and it was unjust and inequitable to allow the winding up when there was not a consensus between the parties who were the shareholders and Directors of

the Plaintiff. Without the authority of Messrs. Shirtcliff and Hawkins it was doubtful whether the Plaintiff's Counsel could truly represent the company especially as he acknowledged his instructions came from Mr. and Mrs. Kidd.

There were submissions made by the respective Counsel as to whether this issue as to the authority of the Plaintiff company to bring the proceedings should be addressed as it had not been identified specifically in the notice of opposition. In view of the fact that it was a procedural and technical matter, I consider that in the interests of the justice of the case the Court had the right both to intervene and to require that it be satisfied in the circumstances the company and Counsel representing it had the authority to so appear. Whilst it may not have appeared in the notice of opposition specifically, it was clear that the Defendant company and its shareholders (who own 50% of the Plaintiff company) opposed the winding up and the affidavit evidence placed before the Court showed the history of the involvement of the Bainbridge Directors as part-shareholders and Directors of the Plaintiff. The Court naturally queried how a locked company could bring a proceeding against an inter-related company and I am still of the view that the Plaintiff company does not have the necessary authority to commence the proceedings. If I am wrong in that view, I am of the view that it is unjust and inequitable that the winding up procedure should be invoked not only to wind up Bainbridge but to enforce a situation of dissolution of a company which would effectively pass the control of 50% of the Plaintiff's shareholding to the Official Assignee if Bainbridge is the ultimate owner of 50% of the Plaintiff's shares. The other remedies are still available.

At the hearing the Court had inquired of Counsel what was the position of the Commissioner of Inland Revenue. It was clear the Commissioner may have been unaware of the conflict and the issues that have subsequently arisen. The Court therefore requested the Commissioner to file a memorandum which was received on 1st July 1993. The Commissioner makes it clear that he no longer supports the application for winding up of the Defendant nor would he seek to be substituted if the present application was dismissed. Whilst the tax debt may be outstanding, an arrangement has been made for the compromise of that debt and the Court now must deal with the issue vis-a-vis, Euro Systems and Bainbridge.

I accept that generally the Court will not interfere where it is in the power of the persons who have committed any irregularity to correct it by taking de novo the necessary steps with due formalities. However, there is a much more fundamental issue before the Court in this case. Whilst technically it may be possible for the Directors of the Plaintiff to achieve the resolution that it can bring a winding up proceeding (because of the possible unavailability of two Directors to vote on the matter), the Court then exercises a just and equitable jurisdiction in deciding whether to make the order. I believe it would be unjust and inequitable to recognise the potential validation of an irregularity in the proceeding knowing that it is not validated with the consent of more than 50% of the shareholders and Directors. The Court has always recognised that the justification of the right to correct if a proceeding is incorrectly commenced, is to avoid futility of litigation where the majority can circumvent any decision of the Court nullifying, dismissing or staying the initial proceeding because of irregularities.

Counsel referred me to Danish Mercantile Co. Limited & Ors v. Beaumont & Ors [1951] 1 All ER, 925. The headnote reads:

> "A solicitor who starts proceedings in the name of a company without verifying whether he has proper authority to do so, or under an erroneous assumption as to the authority, does so at his peril, and, so long as the matter rests there, the action is not properly constituted. In that sense it is a nullity and can be stayed at any time, providing the aggrieved defendant does not unduly delay his application, but it is open at any time to the purported plaintiff to ratify the act of the solicitor who started the action, to adopt the proceedings, and to instruct him to continue them. When that has been done, then, in accordance with the ordinary law of principal and agent and the ordinary doctrine of ratification, the defect in the proceedings as originally constituted is cured, and it is no longer open to the defendant to object on the ground that the proceedings thus ratified and adopted were in the first instance brought without proper authority."

This case is of little assistance to the Court in the circumstances herein. Referring to Foss v. Harbuttle (1843) 2 Hare 461, the Court said that:

> "In an action so constituted the Court may give interlocutory relief taking care that a meeting be called at the earliest possible date to determine whether the action really has the support of the majority or not."

Those words appear to me to be crucial. Is the action of the company supported by the majority of shareholders and possibly the majority of Directors. It is not, it is a dead-locked company. Whether Messrs. Hawkins and Shirtcliff have the right to dead-lock the issue is another matter but that cannot be determined in the context of a winding up application and they do not support the winding up of Bainbridge.

It appears to me that Marshall's Value Gear Company, Limited v. Manning, Wardle & Co., Limited [1909] I Ch., 267 is more applicable to the situation herein. It was a very similar situation where

> ".....A. and three other persons were the four directors of the company and between them held substantially the whole of the subscribed share capital of the company. A. held a majority, but not a three-fourths majority, of the shares and votes. Disputes arose at the board between A. and the other three directors, who were interested in a patent vested in the N. Company, which, so A. was advised, infringed the M. Company's patent and was admittedly a competing patent. The three directors bona fide declining to sanction any proceedings against the N. Company, A. commenced an action against the N. Company in the name of the M. Company to restrain the alleged infringement. Thereupon the three directors moved in the name and on behalf of the M. Company to strike out the name of that company as plaintiff and to dismiss the action on the ground that the name of the M. Company has been used without authority.
>
> *Held,* on the construction of art. 55, that the majority of the shareholders had the right to control the action of the directors in the matter, and that the motion must be dismissed.....".

The circumstances of this case are also governed by the Articles of Association and the fact that A. held the majority of the shares. I believe the circumstances can be distinguished from the application before me in the case before the Court.

I am satisfied that the company lacks sufficient authorisation or authority to bring its proceeding in this Court. If I am wrong on the basis of the lack of authority of the company, I must turn to consider not only whether the debt is due and owing, which is acknowledged, but whether on the just and equitable principles the Defendant can persuade me that the application should be restrained.

The facts have previously been outlined. The Defendant has always maintained that the winding up application has been undertaken to receive a collateral advantage in a shareholders' dispute, i.e. the ability to buy the

balance of the Plaintiff's shares from the Official Assignee. The parties have come near a settlement and an agreement may or may not exist. What is disputed is whether Messrs. Hawkins and Shirtcliff would sell their shares without a goodwill value, Mr. and Mrs. Kidd maintaining they should be entitled to buy without paying goodwill at net book value because no contractual agency agreement is in place with the suppliers of Wattyl Paints which is the product the Plaintiff markets and distributes to the panelbeaters. Mr. and Mrs. Kidd maintain that although the company in which they are shareholders, Fuji Automotive (S.I.) Limited, was able to buy and have a large indebtedness to the Plaintiff company itself and buy at preferential rates, since 23rd December 1992 Fuji's substantial debt of $188,000 has been paid off between then and 23rd March 1993, whereas Bainbridge's debt of approximately $46,000 (although the figures are not clear) has not been reduced. The Bainbridge debt was in existence when Mr. and Mrs. Kidd bought shares in the company in 1991. Their evidence is that Bainbridge is a small purchaser and the quantum of debt should not have been allowed to accrue. Throughout 1992, Fuji (their company) ran its account with substantial debts and only after the s.218 notice was issued was that debt reduced.

I refer to Halsbury's Laws of England (4th ed) Vol. 7(2), paragraph 1447. The Court can exercise a just and equitable jurisdiction. Halsbury refers to the fact that words 'just and equitable' appear in the Partnership Act 1890. I quote from para. 1447:

> "These words are a recognition of the fact that a limited company is more than a mere judicial entity with a personality in law of its own; behind it or among it there are individuals with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. These words enable the court to subject the exercise of legal rights to equitable considerations, that is to say,

> considerations of a personal character arising between one individual and another which may render it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way."
>
> Ebrahimi v. Westbourne Galleries Ltd. [1973] AC 360 at 379, [1972] 2 All ER, 492 at 500.

From para. 1448:

> "Misconduct.....is not in itself a ground for winding up; nor is the fact that the company has acted dishonestly to outsiders, or that a majority of shareholders insufficient to pass a special resolution wish it. Nor will a winding-up order be made if there is an alternative effective remedy available, and the petitioners are acting unreasonably in seeking winding up. The circumstances relied on must exist at the date of the hearing of the petition."

It is clear that the injunction to restrain advertising will only be granted if there is evidence that the presentation of the proceeding herein would be an abuse of process because there are extant legal grounds for the winding up of Bainbridge because of the existence of the unpaid trade debt. Whether that debt is subject to any agreement to defer payment as alleged by Messrs. Hawkins and Shirtcliff is arguable.

The Defendant's case is that there was an agreement concluded between the Defendant as vendor and Mr. and Mrs. Kidd as purchaser and the Plaintiff as creditor whereby it was agreed the Defendant would sell the shares alleged to be owned by the Plaintiff to Mr. and Mrs. Kidd and the Defendant would use the purchase price to repay all moneys owed by it to the Plaintiff and all moneys owed by its shareholders to the Plaintiff. The Plaintiff's case is the evidence and the correspondence do not constitute a binding agreement.

I do not believe the Court in its jurisdiction on the evidence before it without hearing the witnesses can ascertain whether or not the binding agreement exists. Certainly there was negotiation; certainly it may be arguable an agreement was made. The Plaintiff's argument is that to grant any extension of restraint would create a sanction for the enforcement of what the Plaintiff alleges is a non-existent contract. The Plaintiff contends that if the proceedings were dismissed, it would be open to the Plaintiff immediately to commence fresh proceedings in relation to the same debt based on the same demand. The Plaintiff says there is no abuse of process, there is no discrimination against Bainbridge and the evidence does not support this allegation by the Defendant.

Clearly the parties do recognise the trust and confidence they had in each other in that the administration of the business has broken down. The Defendant's Counsel says it is an abuse of process to present a petition not bona fide for the legitimate purpose of obtaining a winding up order, but for the purposes of applying pressure on the company. Re Julius Harper [1983] NZLR, 215, 217 - 218. The Defendant says that the debt is not presently due, there was a pre-existing arrangement and agreement was reached in January. Whilst it is arguable whether there was an agreement reached as to payment of debt, there is evidence of the use of this procedure which could bring pressure on Bainbridge or its shareholders by the actions of shareholders and Directors in the Plaintiff company acting with insufficient authority. For these reasons I would stay the winding up proceeding.

In terms of s.221 the Defendant seeks an order that not only should the proceedings be stayed on terms, but to include a direction that final accounts be produced and the shares valued with a direction for the parties

to take steps to implement the order. The Court is prepared to order that the shares of Messrs. Hawkins and Shirtcliff be valued by an independent valuer. In the event of any dispute between the parties as to the settlement of the name of the valuer and the arrangements for payment of fees, the matter may be brought before the Court again. It is in everybody's interest that this impasse situation be resolved without further litigation if possible.

In view of the circumstances, the costs on the applications herein are specifically reserved. The hearing times encompassed two hours on each occasion. In the event of the parties reaching a settlement, I would be prepared to fix the costs and award them to the party entitled, but I believe it is inappropriate to deal with this matter finally until the issue as to whether further orders are necessary is settled.

MASTER ANNE GAMBRILL

Solicitors:

Atkinson Jackson, Auckland, for Plaintif
John Mansfield, Auckland, for Defendant
Meredith Connell & Co., for IRD

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M. NO. 35/93

UNDER the Companies Act 1955

BETWEEN	EURO SYSTEMS AND EQUIPMENT (NZ) LIMITED
	Plaintiff
A N D	BAINBRIDGE PANEL AND PAINT LIMITED
	Defendant

JUDGMENT OF MASTER
ANNE GAMBRILL
