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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.1089/95

LOW PRIORITY

IN THE MATTER OF BAY OF ISLANDS ENTERPRISES LTD (IN LIQUIDATION)

BETWEEN N WIJNSTOK

Applicant

AND G G McDONALD AND G S REA

Respondents

Hearing: 19 and 20 March 1997

Counsel: *David James* for Applicant
Greg Everard and Michael Robertson for Respondents

Judgment: 21 March 1997

ORAL JUDGMENT OF TOMPKINS J

Solicitors:
Law North, Kaikohe for Applicant
Kensington Swan, Auckland for Respondents

Bay of Islands Enterprises Ltd ("the company") was placed in liquidation on 22 March 1994. The respondents were appointed liquidators pursuant to a shareholders' resolution of the same date.

The liquidators have issued a notice to contributory to the applicant, Mr Wijnstok, that he is a contributor in respect of 147,935 $1 shares that were unpaid. The liquidator has made a call on the applicant, Mr Wijnstok, in the sum of $147,935. Mr Wijnstok has applied for an order that the list of contributories be amended by deleting him as a holder of uncalled shares in the company. Mr Wijnstok accepts that he has subscribed for and been allotted 151,135 shares that are wholly unpaid. But it is his contention that he is not liable to meet a call on the shares in respect of which the call is now made.

Background

The company was incorporated on 28 March 1973 as Lenny's Investments Ltd. On 7 December 1982 it changed its name to the present name. In April 1989 the nature of the company's business, which had been as a restaurant operator, changed. It purchased Fullers slipway in the Bay of Islands. At that stage the capital of the company was 51,000 shares of which 50,999 were held by Mr Wijnstok and one by Ms Hey. Later in that year there were further changes in the capital structure which I need not detail. By August 1989 Mr Tony Wong and Mrs Mary Wong had become shareholders in the company. They subscribed for 80,000 shares which were called and paid. At the same time Mr Wijnstok subscribed for 80,000 shares numbered 670,001 to 750,000 that were unpaid. Mr Wijnstok, in his affidavit in support of his application, claims that the issue of 80,000 new shares to him was an error on the part of Mr Poutsma, the accountant for the company. I do not accept that evidence. There is annexed to the affidavit filed on behalf of the liquidator, the subscription to increased share capital signed by Mr and Mrs Wong as to 80,000 shares and by Mr Wijnstok as to 80,000 shares. That notice of subscription was filed in the Companies Office. It is clear evidence that Mr Wijnstok intended to subscribe to those shares.

In January and February 1990 there were further changes to the shareholding including an increase in capital to one million shares of $1 each. As at 31 March 1990 Mr Wijnstok held 520,000 shares that had been called and paid and 165,000 shares uncalled.

On 23 March 1991, Mr Wijnstok subscribed to 300,000 shares numbered 1,200,001 to 1,500,000. It is common ground that of the 80,000 shares subscribed on 3 August 1989, and the 300,000 share subscribed on 23 March 1991, some were transferred by Mr Wijnstok to others, called, and paid up. This left 151,135 uncalled shares subscribed by him.

I do not detail the increases in share capital that occurred over the next two years. By 31 March 1992 the capital of the company was two million shares of $1. There were then 15 shareholders plus another group described as scheme participants. Of the 15 shareholders, all but Mr Wijnstok were ethnic Chinese. Several lived in Auckland, most in Hong Kong. The Hong Kong Chinese were apparently using the investment in the company as evidence in support of their applications for New Zealand residency. By that date Mr Wijnstok held 486,700 shares called and paid, and 151,135 shares uncalled.

On 30 May 1992 the capital of the company was increased to $2.25 million. Mr Wijnstok subscribed to the 250,000 new shares but they were shortly afterwards transferred to more Chinese shareholders and then called and paid.

The liquidator accepts that on or about 31 May 1993, 3200 shares of the uncalled shares held by Mr Wijnstok were transferred to Poutsma Arden and Partners, chartered accountants, in part payment of outstanding fees. As a consequence the number held by Mr Wijnstok was reduced from 151,135 to 147,935, being those in respect of which the call is made.

Was there an agreement relating to uncalled shares?

It was Mr Wijnstok's contention that there was an agreement between the company and Mr Wijnstok that Mr Wijnstok will not be liable for calls on uncalled capital for which he subscribed in anticipation of allocation to new members.

Mr Wijnstok said that he appreciated and told the other shareholders, that the Companies Act did not permit a private company to increase its share capital beyond the registered capital unless all the new shares are subscribed for in a memorandum of subscription: s 361(1) Companies Act 1955 ("the Act"). The shareholders at the time, Mr and Mrs Wong, Mr Chow and Mr Wijnstok, anticipated that the company would increase its capital and that this increased capital would be subscribed for by Hong Kong Chinese to be introduced by Mr Wong and Mr

Chow. Accordingly it was suggested, Mr Wijnstok says by Mr Francis Wong, that to overcome the provision in the Companies Act, the company should increase its capital, and to the extent that immediate subscribers for the increased capital were not found, that capital would be in Mr Wijnstok's name and remain unpaid. Mr Wijnstok said that it was the clear understanding at the time that the company would not call up that uncalled capital until new members had been located and had accepted the shares, which would then be called up.

In support of the existence of this agreement, Mr James referred to certain documents and evidence.

First, he referred to a letter written by Mr Poutsma to Mr Wijnstok and Ms Hey dated 9 August 1989 referring to the increase in capital of 160,000 effected on that day. Mr Poutsma in his letter said that 80,000 of these shares were issued to Mr and Mrs Wong and "80,000 shares (uncalled) to [Mr Wijnstok] for ultimate allocation to 'scheme participants'.".

Mr Wijnstok said that the reference to scheme participants was to an intention that capital was to be issued as paid up to certain persons who had undertaken work or performed services for the company. While this reference in Mr Poutsma's letter supports the view that there was an understanding that the unpaid share capital issued to Mr Wijnstok was going to be passed on ultimately to others, it is silent on the liability for those shares in the meantime. Although, as I have said, Mr Wijnstok claimed that the issue of these shares was a mistake, he did in his affidavit confirm that he accepted that they could eventually be allocated to persons providing services.

Next, Mr James relied on Mr Wijnstok's evidence concerning a meeting that occurred about May 1991. Mr Wijnstok had discussed with Mr McBrearty, the company's solicitor, what he referred to in his affidavit as the device employed of using his name to hold shares not intended to be called until new shareholders were found and allotted those shares. Mr McBrearty pointed out to him that once he subscribed to these shares, he could be held liable to be called on them. Mr Wijnstok said he told Mr McBrearty that the other shareholders had said they would not cause a call to be made until new shareholders were identified. Mr McBrearty suggested that he obtain a deed of trust from the remaining shareholders to the effect that the shares to which he had subscribed were held by him on behalf of all shareholders. Consistent with this, on 21 May 1991, Mr

McBrearty wrote to the company's accountants referring to the 300,000 shares that had been issued shortly before. He asked the accountants to record "that the 300,000 shares being subscribed for by Mr Wijnstok being held by him as a trustee for transfer to subsequent shareholders". The letter does not expressly refer to Mr Wijnstok's liability for calls while he was holding the shares.

Mr Wijnstok said that as a result of his discussions with Mr McBrearty he raised the matter at the next management meeting. Present were Ms Hey, possibly Mr Poutsma, Mr Gilkison, Mr S C W Chow, Mr Francis Wong and other Chinese shareholders who were either resident or present in Auckland. He said that he raised the suggestion of a deed of trust recording that there was no intention that the shares be called until new subscribers were found. He said either Mr Chow or Mr Wong, with the affirmation of the others, said that they were people of honour, their word was their deed, and they should not require anything to be signed. He carried the matter no further.

Mr Chow and Mr Wong have both filed affidavits. Mr Chow says that he does not recall attending any meeting where there was discussion about Mr Wijnstok holding shares in trust. He said if such an agreement had been reached, he would have wanted it recorded in writing. Mr Wong said he does not recall a management meeting at which Mr Wijnstok requested a trust deed be prepared, nor his explaining the mechanism for holding shares in his name. Nor does he recall saying anything to the effect that their word is their deed and he should not require them to sign anything. He goes on to observe that it was ridiculous to suggest that he would not have wanted something so fundamental as an arrangement that issued capital would not called, to be recorded in writing. He said he was always careful to ensure that the company's affairs were properly recorded.

In the absence of any further evidence, written or otherwise to confirm either account, I am unable to base any factual finding on anything that may have been said at the management meeting to which Mr Wijnstok refers.

Mr James relied particularly on the waiver of pre-emptive rights completed by shareholders. The waivers referred to the shareholders' resolution that directors "be authorised subject to pre-emptive rights, to increase the share capital to [the amount stated] when suitable subscribers are identified". Mr James submitted that this was consistent with the claimed agreement. It is consistent

with an understanding that Mr Wijnstok was to hold the shares and that when suitable subscribers were identified, they would be transferred to those subscribers and called up. It is silent on the liability for calls while Mr Wijnstok was holding the shares.

On 4 April 1993 an extraordinary shareholders' meeting was held. The company was suffering the effects of a low cash flow. It required further funds. Those present at the meeting resolved that the existing shareholders should each contribute to the company $15,000 to be secured by debenture notes. It is unnecessary to detail what occurred as a result of this proposal. For present purposes, Mr James relies upon it as evidence supporting Mr Wijnstok's contention that there was an agreement that he should not be liable to pay his uncalled capital. But for that agreement, he submitted, the obvious course for the company to adopt to resolve its cash flow problem was to call the uncalled capital.

On 25 June 1993 Mr Chan, on behalf of the Hong Kong shareholders, wrote to the board of directors of the company referring to an extraordinary meeting that had been held on 19 June 1993, and requesting the board immediately to call up any shares which had not yet been called and remained unpaid. Mr Wijnstok drafted a letter in reply which contained the following paragraph:

> "1. The number of shares unallotted as at the date of the last Shareholders meeting (20/6/93) is 148,135 1$ shares.
>
> These shares are held in trust by N. Wijnstok as nominee. A private company cannot hold unallocated shares. Over the past three years a system was adopted whereby, after an increase in share capital was approved by shareholders resolution, all such shares were taken up by N. Wijnstok. Upon requests by other parties willing to subscribe for shares, N. Wijnstok transfers the amount of share subscribed for to the parties concerned. This method was employed to facilitate allocation of shares to new shareholders without having to call a shareholders meeting every time such an event occurred.
> All shareholders have paid the amounts subscribed for in full."

When this draft was referred to Mr Wong and Mr Chow, they replied proposing that the item one which I have set out above should be deleted and instead the letter should simply state that the subject of shares unallotted would be tabled at the next board meeting. The letter Mr Wijnstok then sent to the Hong Kong shareholders was amended in accordance with this suggestion. The paragraph I have set out above was deleted.

Mr James submitted that this exchange provided evidence in support of the existence of the agreement. I consider it is equivocal. In the first place, the paragraph in Mr Wijnstok's draft says nothing about liability for calls on what are inaccurately described as unallocated shares that are held in trust. Further, his willingness to delete this paragraph does not support his present contention that a final and binding agreement had been reached with the company or the shareholders. Had there been such an agreement made between the New Zealand shareholders on behalf of the company, it is to be expected that Mr Wijnstok would have insisted on advising the Hong Kong shareholders of that agreement.

On 28 June 1993 Mr Chan, on behalf of the Hong Kong shareholders, again wrote to the directors requesting that all shares that had been issued and remained unpaid be called up.

The meeting of directors was held on 29 June 1993. The minutes of the meeting record that Mr Chow proposed that, as requested by the shareholders, the shares be called up. Mr Wong seconded the motion. Ms Hey is recorded as stating, "It was known that this parcel of shares was unsold as they were held in trust by [Mr Wijnstok] for transfer to new shareholders". Mr Wijnstok is recorded as stating that he is the interested party with regard to the shares being called up and under the circumstances he has no choice but to take private legal advice. He is recorded as saying that he was not prepared to carry on and he then wrote out a letter of resignation as a director.

I am unable to place any weight on this evidence. Mrs Hey did not swear an affidavit nor give evidence. What she is recorded in the minutes as saying at the meeting is therefore pure hearsay. No reliance can be placed on it.

Mr James finally submitted that the evidence shows a general pattern of conduct that accords with the agreement for which he contends. It is correct, as Mr Phillips on behalf of the liquidators says in his affidavit, that there is a pattern that shares were issued to Mr Wijnstok who subscribed to them, and that some of those shares were transferred to new shareholders at which time they were called up and the calls paid. Mr Phillips goes on to say that there is nothing that he has seen which indicates that Mr Wijnstok was not to remain personally liable for the shares issued to him.

Mr Everard referred to evidence that indicated that Mr Wijnstok subscribing to these uncalled shares were not subject to any conditions or agreement. In each case the memorandum of subscription recorded the subscription and nothing more. The notification of increase in share capital filed in the Companies Office recorded:

> "The condition subject to which the new shares have been or are to be issued are as follows:
>
> Nil"

The annual return shows the shareholding of each shareholder without any qualification. Similarly, the accounts of the company show the shareholders and list separately paid shares and unpaid shares. Beside Mr Wijnstok's name appears the appropriate figures for the paid shares and the unpaid shares, without qualification. Perhaps more significantly, the balance sheet shows the shareholders' funds reduced by the uncalled capital, which of course it would not be if there were no liability to meet the uncalled capital. Any person examining the public records of the company would have no reason to doubt that Mr Wijnstok had a liability to meet calls on the uncalled capital in his name.

I am satisfied that there was a general understanding between Mr Wijnstok and at least some of the directors and shareholders, that the shares to which Mr Wijnstok subscribed that remained unpaid, were held by him to be transferred to new members when they were located. Mr James accepted that they were not held in trust. Mr Wijnstok may have had a belief that he would not be liable for calls on those shares. I am not satisfied that this understanding was common to all the shareholders - indeed it is apparent from the correspondence from the Hong Kong shareholders to which I have referred, that they did not have any understanding relating to the liability for calls.

But even if there were such a general understanding between some of the shareholders, the evidence falls far short of establishing any concluded agreement intended to be binding between the company itself and Mr Wijnstok. Had there been such an agreement on what was a significant matter affecting the capital of the company, I would have expected it to be recorded in an appropriate form at least by a directors' resolution if not by a formal agreement. I accept that such an agreement could be entered into orally by the directors, but it would need

clear, unequivocal evidence to establish its existence and terms. The evidence in the this case does not do so.

This conclusion makes it unnecessary for me finally to decide what would have been a major issue had such an agreement been entered into, namely, whether it was binding on the liquidators. Suffice it to say that there is compelling authority for the proposition that a company cannot enter into an agreement with a shareholder, binding on a liquidator, that a shareholder shall not be liable to pay up uncalled capital: See *Muir v City of Glasgow Bank*[1], *re Slutzkin Pty Ltd*[2], *Woodgers and Calthorpe Ltd v Bowring*[3]. In *Woodgers* Jordan CJ said that an agreement that a person, if he becomes a shareholder, is not to be liable to pay calls in respect of contributing shares, is void as contravening the relevant section in the Companies Act. He also said that

> "... if there is a contract to take shares which has been followed by entry on the register and the contract contains a condition which the company is subsequently unable for legal or practical reasons to fulfil, the member cannot claim to rely on the breach of condition as a ground for entitling him to be relieved *ex post facto* from the obligation to pay in full the nominal amount of the share. ... To allow this would be inconsistent with the Companies Act."

In *Official Assignee and Romco Corporation Ltd (In Liquidation) v Walker*[4] the Court of Appeal considered a call made by liquidators of Romco on Mr Walker. In my judgment I said[5] that the only manner in which the liability on uncalled capital can be met is by money or monies worth. The liability of a shareholder to pay the company the amount of his shares is a statutory liability. It is beyond the power of a company to release the shareholder from his obligation without payment in money or monies worth.

Even if, as Mr James submitted, any agreement between Mr Wijnstok and the company or its shareholders may have provided some grounds to set aside the subscription for the uncalled shares, that would not avail Mr Wijnstok after the liquidation. *Coupe v J M Coupe Publishing Ltd* [6] and the cases referred to in it, are authority for the proposition that once a winding up intervenes, a registered

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1 (1879) 4 App Cas 337, Lord Penzance at 372.
2 [1932] VLR 229, MacFarlane at 235.
3 (1935) 35 NSW SR 483, Jordan CJ at 484 and 485.
4 [1995] 1 NZLR 652.
5 At 668.
6 [1981] 1 NZLR 275 (see A).

shareholder who has acquired his shares under a voidable contract can no longer rescind that contract. If he has not taken sufficient steps before the winding up to set the contract aside, it is too late because he is a member of the company at the date of the winding up and the creditors and the other contributories have accordingly obtained in effect crystallised rights against him[7]. Cooke J also said that by signing the memoranda of subscription the shareholder in fact agreed unconditionally to take up the shares.

Mr James referred to *Arnot's* case[8] as authority for the proposition that the court has a discretion whether to amend the list. He submitted the court should not allow a call that may be technically correct but would be unjust to enforce. *Arnot's* case is not an authority for this proposition. All that the Court of Appeal decided in that case was that the person sought to be placed on the list of contributories should not be, because the contract between him and the company was for him to be given and to accept fully paid shares, and that a contract to take unpaid shares could not be enforced against him by the liquidator. No question of any general discretion arose.

It is obvious that any agreement such as that alleged here would be directly contrary to the purpose and intent of s 361(1) of the Act prohibiting a private company increasing its share capital beyond the registered capital unless all the new shares are subscribed for in a memorandum of subscription. If a company could enter into an agreement with the subscriber that the subscriber should not be liable for calls on uncalled capital, the intention of the section would be defeated. For these reasons I would be unable, had it been necessary for me finally to determine it, to accept Mr James' submission that the court has a discretion not to require the uncalled capital to be paid if the court thinks it just to do so.

The conclusion that there was no binding agreement between the company and Mr Wijnstok in the terms alleged, makes it unnecessary for me to consider Mr James' submission under the Contractual Mistakes Act 1997.

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7 Cooke J at 222.

8 *In re Barangah Oil Refining Company. Arnot's case* 36 Ch D 207.

The Rea allegation

I have already referred to Mr Wijnstok's evidence that he signed the resolution for voluntary winding up on the basis of a representation by Mr Rea that the liquidators would not call upon the unpaid capital of the company which was made to appear to have been issued into his name. In his oral evidence, he said that he kept notes of this meeting and referred to an entry in it that reads:

"Uncalled capital NP"

He explained that "NP" meant no problem.

Mr Rea, in an affidavit he has sworn in other proceedings brought by Mr Wijnstok to which counsel referred in these proceedings, has said that he does not recall promising not to call up the unpaid capital of the company. Such a promise is not recorded in his notes. He is an experienced insolvency practitioner and says that in all cases where there is unpaid capital that ought to be called up, he has done so. He would not make such a promise without fully investigating the affairs of the company to ascertain whether or not it was appropriate to call up the unpaid capital. I find this explanation convincing. It is difficult to accept that any experienced liquidator would make what he intended to be a binding representation not to call up the capital of the company in the event of the liquidation proceeding. I do not find this representation to have been made out. Even if it had been, it is difficult to see how a statement made by a person who was intended to become, but had not yet become, the liquidator of the company, could bind the company in a manner that would prevent it recovering the statutory debt represented by the uncalled capital.

Conclusion

Mr Wijnstok has failed to make out any ground upon which he should be removed from the list of contributories. His application to vary the list is accordingly declined.

Mr James urged that any possible judgment against Mr Wijnstok should not be entered until other proceedings brought by Mr Wijnstok arising out of the liquidation of the company have been determined. The list of contributories having been affirmed, it will be for the liquidators to continue the procedure to

call up the uncalled capital. I do not propose to delay that process. Mr Wijnstok is able at an appropriate stage to apply for a stay of execution. It is at that time that consideration should be given to whether there is any justification for deferring execution until the other proceedings have been determined.

Costs

All issues of costs are reserved. If necessary, I will deal with them by memoranda to be filed by counsel.

Other proceedings

There are currently outstanding three actions initiated by Mr Wijnstok. He has brought a claim against the liquidators challenging the liquidators' rejection of his proof of debt for what he claims to be outstanding remuneration. He has also brought proceedings against Peat Marwick, two of whose partners are the liquidators, claiming damages based on the manner in which the liquidation has been carried out. Some or all of the shareholders are also defendants in that action. Thirdly, he has brought proceedings challenging the make up of the committee of inspection, as it is called under the legislation in force at the time of the liquidation.

In view of my pending retirement I will not be able dispose of all of these actions. But Mr Everard has suggested that I may be able to dispose of the proceedings relating to the composition of the committee of inspection and Mr Wijnstok's challenge to the rejection of the proof of debt. As I have pointed out to Mr Wijnstok, there are benefits in having these two issues resolved promptly to enable the liquidation to proceed. Two days should suffice. A two day fixture for the hearing of these two proceedings should now be made. In each case the plaintiff is to pay the setting down fees within seven days.

Any further affidavits that Mr Wijnstok wishes to file in respect of either or both proceedings are to be filed within 21 days of today. The defendants in the proceedings have a further 14 days in which to file the affidavits in reply. In the

past timetable orders have not been properly observed. I emphasise that these orders must be complied with in order to ensure that the fixture will proceed.