IN THE FIJI COURT OF APPEAL
CIVIL JURISDICTION
CIVIL APPEAL NO. 54 OF 1987

Between:

DOMINION HARDWARD COMPANY LIMITED — Appellant

- and -

MASTER FOODS (FIJI) LIMITED — Respondent

Mr F S Lateef for Appellant
Mr P I Knight for Respondent

Date of Hearing: 14 September 1988
Date of Judgment: 19 May 1989

JUDGMENT OF THE COURT

This is an appeal from a decision of Justice Rooney dated 5th June 1987 whereby he sanctioned a scheme of arrangement (with some modifications) formulated by Master Foods (Fiji) Limited in order to stay the previous compulsory winding-up order and continue its existence as a company.

Master Foods (Fiji) Limited (which we shall hereinafter refer to as the company) was on 12th August 1983 ordered to be wound up by the Supreme Court on a petition by creditors.

The Official Receiver was appointed the Liquidator.

On 15th April 1987 the company filed a petition in the Supreme Court seeking the sanction of the Court to a scheme of arrangement under Section 208 of the Companies Act 1983 entered into between the Company and its unsecured creditors who were to receive 25c in the dollar in full satisfaction of their claim.

It is common ground that Project Funding Limited, which is a venture capital company, was the originator of this scheme of arrangement, the effect of which was to resurrect the company and enable it to continue in business.

It is also not in dispute that at a meeting of unsecured creditors held on 18th March 1987 and adjourned to 26th March 1987 the scheme of arrangement was approved by 10 voting for and 2 against - the share capital represented being $116,774.65 for and $6,173.96 against.

The appellant, Dominion Hardware Company Limited, which was one of the two opposing creditors has listed 7 grounds of appeal. In our view these grounds can be re-grouped under 4 convenient heads. They are:-

1. The failure to consider the feasibility of the sale of the premises and canning licence and rebate certificate as a going concern;

2. The trial judge's view that the objections of the opposing creditors were technical;

3. Non-disclosure of relevant information to the creditors' meeting; and

4. Misconduct of the former directors of the company.

In fact appellant's counsel, Mr F S Lateef also dealt with the seven grounds under four groups in his written submissions. All the arguments of the appellant which sometime overlap and recur over and over again, can conveniently be contained in the above four groups of heads.

Under the first head the appellant's complaint is that the trial judge did not consider the company's failure to pursue the feasibility of the sale of the premises along with the canning licence and rebate certificate the latter of which according to the appellant though intangible may have yielded sufficient to pay all unsecured creditors in full.

We think that the sale of the business including the canning licence and rebate certificate as a going concern would have been in the forefront of everyone's mind when liquidation was the only alternative available. The question of sale did exercise the mind of the liquidator who was perhaps the most important individual in the winding-up period before he rejected that alternative. In the penultimate paragraph of his report to court the liquidator stated "In view of the enormous liability of the company to the secured and unsecured creditors as outlined hereabove and bearing in mind that the assets of the company if sold will be far short to satisfy the creditors the unsecured creditors by overwhelming majority have in their wisdom agreed to accept 25 cents in the dollar". The underlining is ours. This is an unbiased objective opinion expressed by the liquidator who was in charge of the affairs of the company for over 3 years, i.e. ever since the order for winding-up was made. The liquidator had no personal stake in the matter. It may be that his attitude may have been lukewarm and lacked the enthusiasm of a partisan. It is for that very reason his opinion is entitled to considerable weight. It cannot in our view be also said that the liquidator did not set about his business with diligence. An official receiver has to perform other duties too as a public servant. He has to be in charge of other companies in liquidation. He had necessarily to take this liquidation too in his stride. He could not be expected to give the affairs of this company favoured treatment by devoting all his time to it to the neglect and detriment of his other duties. But we find he had kept himself informed about all vital and relevant matters.

The only point on which he might perhaps be faulted is when he backed out of his duty of signing certain documents. But he has given his reasons for it. He says that he may have become personally liable to pay certain indemnities if he signed those documents. This fear was no doubt due to a legal misapprehension. He would have been immune from any liability because he was signing them qua liquidator. Be that as it may, the liquidator had applied his mind to the question of a sale and had ruled it out.

It should also be realised that the canning licence and rebate certificate which undoubtedly carry a high premium would have been valueless to anyone except to one who was inclined to carry on canning of meat products as Master Foods did. In fact the liquidator in his report to court in paragraph 11 states "that the receiver Mr Sultan Ali (receiver/manager appointed by debenture holder, Midas Industries Limited) stated that he could not sell machinery etc. as they were of no use to anyone who was not in the same business.....".

The only other enterprise to which these assets would have been useful was the opposing creditor, Dominion Hardware, which was the only enterprise carrying on the same business. But no offer to purchase was ever made by Dominion Hardware. Instead Mr George Patel wanted settlement at 75 cents in the dollar. The canning licence and the rebate certificate were personal to the company, so to say. They could be used only by the company, Master Foods, and no one else. It is therefore important to note that the canning licence and rebate certificate cannot and should not be regarded as separate entities in themselves capable of attracting an independent value.

It should also be observed that Mr Cork, director of Project Funding Limited, was primarily a businessman and not a benefactor. He would not have been prepared to inject $60,000 into the Company unless he saw a profit in resurrecting the company. There are therefore

grounds to believe that the canning licence and rebate certificate would have served little purpose if the company itself did not resume business. There is also annexed to the record of the proceedings a certificate from the Customs authorities that the company would be entitled to the concessions if it resumed operations. The group of grounds under the first head therefore fails.

The grounds of appeal under the second head arise from the comment of the trial judge that the opposing creditors' objections were largely technical and that he proposed "to sweep aside all technical problems arising out of the present proceedings and take a broad view of the proposal made and decide the matter on that basis alone".

Although the learned trial judge had said this we find that he had in fact taken into consideration all vital and relevant matters before he made his decision. Some of the comments and dicta concerning the constraints of time and the exigencies of the then prevailing situation to which the learned judge gave expression were unnecessary so far as his decision itself was concerned. They were, however, a preface and prologue to the tense climate in which the court was functioning at that time. But in our view they do not detract from the merits of his decision as such. The learned judge did apply his mind to all relevant issues and aspects in the case before coming to his conclusion that the proposed scheme of arrangement was in the best interests of the unsecured creditors. The second grounds of appeal under the second head also fails.

As regards the third head the appellant's complaint is that the creditors were not properly or adequately briefed on the affairs of the company at their meetings.

We find that at the two meetings of unsecured creditors held on the 18th of March, 1987 and 26th of March, 1987 all relevant material and information was available to them. All avenues leading to such information too were open before them. Moreover they were

thrown on their guard by the barrage of questions that were levelled by Mr R Stanton at the first meeting and Mr F S Lateef at the second meeting. Even if, as the appellant argues, information on certain matters was not made available to the creditors at the meetings sufficient suspicion must have been aroused by the questioning of those present particularly Mr Stanton and Mr Lateef to have put the creditors on inquiry. Sufficient material was available to the creditors to put them on their guard regarding their own interests. But nevertheless the creditors by an overwhelming majority of 96% voted for the acceptance of the scheme. Very much more is needed to turn the tide against such a massive majority. The question of the extent to which a minority could hold up the wishes of the majority had engaged the mind of jurists and legislators in England over the years. It was finally decided that such majority should be represented by three-fourths of the value of the shares.

In England prior to the Joint Stock Companies Arrangement Act of 1870 (which subsequently became incorporated into the Companies Act) even one sole dissentient could effectively hold up the majority. Nourse J in Re Savoy Hotel Limited (1981) Ch 351 tracing the genesis of S.206 of the English Companies Act (S.208 of our Companies Act) states "But section 2 of the Joint Stock Companies Arrangement Act 1870 introduced for the first time a rudimentary ancestor of Section 206, limited to compromise or arrangements proposed between a company which was in the course of being wound up, either voluntarily or compulsorily or under supervision and its creditors or any class of them". Nourse J cites Chitty J who said in In Re Dominion of Canada Freehold Estate and Timber Company Limited (1886) 55 LT 347:

> "That is a difficulty which the legislature itself felt when it passed the Act of 1870, allowing a majority, and a sufficient majority - that is to say, not a mere absolute majority, but a majority much larger than that - to bind the minority. Then it was known that, before the legislation of 1870,

> any particular individual could hold out against a scheme, however meritorious and however beneficial it might be, in order that he might get, generally speaking, some special advantage for himself, or because he was a person who did not even take a fair view of the advantages to be gained. It was for the purpose of preventing that obstruction that the legislature passed the Joint Stock Companies Arrangement Act 1870;....."

The maximum necessary was therefore fixed after more than a century of experience and trial and error. In the instant case the majority exceeded by far the requisite "statutory majority".

In view of the convincing majority it is perhaps unnecessary for us to go into the motives of the two dissentient creditors. However, Mr. D.R. Cork, the progenitor of the scheme, states in his affidavit "on the basis of my enquiries, the information derived from the public records and in the light of discussions with the Fiji Development Bank (which is a shareholder in Foods Pacific Limited) I believe that the opposition of the two creditors voting against the Scheme of Arrangement is based on Foods Pacific Limited's anxiety to prevent Master Foods resuming its meat canning activities and thus becoming its only business competitor". Mr. Cork who was cross-examined on his affidavit was not shaken on this point. It should be noted that Foods Pacific Limited is operated by Mr. George Patel of Dominion Hardware.

We see no merit under this head too.

Under the fourth head the appellant submits that the conduct of the directors of the company, particularly Mr. Williams, which led to the parlous state of affairs in which the company found itself was highly reprehensible. The appellant's argument is that such reckless individuals and adventurers should not be permitted

to be at the helm of affairs again and foist the company over again on an unsuspecting public. It is further argued that public interest demands that such a company should not be resurrected under the aegis of the same set of people who are behind the present scheme.

It may be that the conduct and behaviour of some of the directors particularly Mr William left a lot to be desired. The dealings between the company and Midas, over which Mr William has a controlling interest, had roused the suspicions of the liquidator himself. Doubts had been expressed as to whether the farm run by Midas was so large and extensive as to be capable of supplying all the vegetables needed by the company. These transactions forced the company to incur such a liability to Midas as to cause the grant of a debenture of the company's assets in favour of Midas. But there was no constructive inquiry into this matter. It remained only in the realm of suspicion. However, on this matter Mr William agreed to rank as an unsecured creditor and later to abandon the debenture itself. In the result the company did not lose much on this score as at the date the scheme was finally put to the vote.

What is worthy of emphasis is that these transactions which the appellant characterises as shady were forcefully brought to the notice of the creditors at the meeting. Nevertheless, they decided to accept the scheme even if it contained faults and drawbacks.

Even on the question of rent for the premises occupied by Mr William and his wife he agreed to pay a sum of $4,000 which the Judge took into consideration when he ordered an increase from 25c to 27c in the dollar. Again the company did not lose much on this score at the time of reckoning. It is not unknown for company directors to enjoy certain fringe benefits which do not seriously touch profits and dividends - sometimes with the knowledge and acquiescence of members and shareholders. They can hardly be characterised as misconduct.

There were also allegations against Mr Cork for buying the mortgage from the Fiji Development Bank. But that was a dealing between third parties in which the company was not much concerned. This question too was put before the creditors at their meeting.

What is perhaps important to remember is that after all it is the creditors who should be basically and primarily judges and arbiters of what was good for them. The court's concern is to satisfy itself that the creditors at the meeting were given every chance to decide freely what they wanted.

There were also complaints against Mr William and Mr Cork that alterations to the building had already commenced without the knowledge of the liquidator even before the scheme had been accepted. It may be that they were confident about the decision on the scheme and were preparing in advance to recommence operating the company as soon as the scheme was given the green light. It was clearly a calculated risk on their part.

By the nature of their functions directors of a company are required to be circumspect. There are detailed provisions, particularly in the new 1983 Companies Act, designed to keep the directors within the bounds of their proper authority and make them answerable for their acts and omissions. But in so far as the delinquencies complained of are concerned they do not seem to us to be of so serious or fundamental a nature as to warrant a refusal to re-activate the company. It may well be asked as to what benefit would have accrued to the unsecured creditors had the court taken the high road of public interest and refused to re-activate the company. The court was concerned at that stage to see whether given the options open to them the creditors freely of their own volition accepted the scheme. For its part and before it investigated the scheme the court must be satisfied that the past record of the company is so bad as to be against public interest to permit the company to be re-activated. We do not think there was such a risk or danger in the instant case on the material before us.

We have considered the numerous authorities cited by learned counsel for the appellant, Mr Lateef. While the laborious research done by him is commendable we do not find any of them of any assistance to him in the instant case. Most of them refer to particular aspects of company law like duties of directors vis-a-vis the company and other refinements of company law. They border on, but do not involve, the issues in this case. The instant case is largely dependent on its own facts.

The following passage in the judgment of Astbury J in Re Anglo Continental Supply Company Limited (1922) 2 Ch 723 cited by Mr Knight for the respondent seems apposite:

> "In exercising its power of sanction under S.120 the Court will see: First, that the provisions of the statute have been complied with. Secondly, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represeny, and, Thirdly, that the arrangement is such as a man of business would reasonably approve."

The meeting represented wide and varied interests as its composition shows.

Counsel for the appellant also complained about the scantiness and shortcomings of the judges' notes, principally because of the difficulty in deciphering properly the judges' handwriting. This is a problem courts which lack mechanical or manual short-hand recording face. But the relevant material in the instant case is largely to be found in documents like reports, minutes, affidavits etc. which are annexures in the case. We are satisfied that they are evidentially comprehensive enough for the purpose of elucidating all relevant issues in the case.

It is admitted by both sides from the bar that the unsecured creditors have been already paid and settled in accordance with the scheme and the scheme administration is over and the company is back in business. It was suggested by respondents' counsel that if this court reverses the trial judge's decision at this stage there will be chaos and disorder. We are aware of the consequences that will flow from such a step. Public interest clearly demands that such a step should be avoided by all means. We are satisfied in the instant case that the paramount issue is whether the unsecured creditors considered the scheme satisfactory in the dire circumstances in which they all found themselves. We are satisfied that the scheme is fair and equitable in the circumstances.

In the result we find that this appeal has no merit and we therefore dismiss it with costs.

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PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL