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IN THE SUPREME COURT)
OF THE TERRITORY OF)
PAPUA AND NEW GUINEA)

CORAM : RAINE, J.
Tuesday,
2nd November, 1971

IN THE MATTER of THE COMPANIES ORDINANCE, 1963-1968
AND IN THE MATTER of CIVIC CONSTRUCTIONS PTY. LIMITED
(IN LIQUIDATION)

1971

Oct. 22,
Nov. 2

PORT
MORESBY

Raine, J.

This is a summons instituted on behalf of Mr. A. C. Pike, Official Liquidator of Civic Constructions Pty. Limited, (In Liquidation) an insolvent company (hereinafter called "Civic"). He was appointed on 2nd May, 1967. He seeks to ascertain whether by the lodging of a proof of debt dated 31st July, 1968, after the order winding up Civic, Alwin Finance (N.G.) Limited (In Liquidation) (hereinafter called "Alwin") has lost security as first mortgagee over certain lands owned by Civic at Boroko.

Mr. Wood appears for Mr. Pike and Mr. Pratt for Alwin. Mr. Pike has no axe to grind, but wishes to obtain judicial advice, and accordingly Mr. Wood put the competing views to me, referring me to authority that he felt might be of assistance. He did not urge a particular view on me, as he felt that the two competing views were more or less in balance, if anything his argument tended to support Mr. Pratt, but essentially he was quite neutral. Mr. Pratt submits that Alwin has not lost its security.

Civic is the lessee of the lands, and they are subject to a registered first mortgage to Alwin and a registered second mortgage to Burns Philp (New Guinea) Limited.

On 31st July, 1968 Alwin lodged a sworn proof of debt in the usual form. The consideration was stated to be:-

> "Balance outstanding on Loan made on Mortgage Security of Allot. 38 Section 42, Boroko, amount due under guarantee on Loan made to Territory Shipping Co. Ltd."

The amount was shown as $14,866.13 and in the end column, that following Consideration and Amount, under the heading "Remarks", appear the words:-

> "Includes additional charges properly payable under the Loan Agreement Documents."

It is the effect of this claim that I am asked to consider.

No contest arises as to the facts in this matter, which are contained in two affidavits sworn by Mr. Pike and one by Alwin's Official Liquidator, a Mr. K. G. Thomason. The latter sets out the position clearly in his said affidavit, in paragraphs 3 to 5 inclusive. They read as follows:-

> "3. I recall the circumstances surrounding my lodging on behalf of Alwin the proof of debt annexed to the Affidavit of the said Anthony Cathcart Pike sworn on the 9th day of September, 1971 and marked "A". At that time Mr. Pike, acting as liquidator of Civic, was anxious to sell to P.N.G. Motors Limited the subject property set out in the Summons herein and as I understood the matter, Mr. Pike had some difficulty in establishing the precise position both as to Civic's legal title to the said land referred to in the Summons herein and Civic's liability and legal position vis-a-vis Alwin. The position was at that time that the Crown Lease had not yet issued and the mortgage security of Alwin being filed in the Department of Lands meant that so far as the Department of Lands was concerned ownership of the land was actually in Alwin's name and in fact when the Crown Lease was issued on the 23rd July, 1963, which became Crown Lease Folio 1461 Volume 6, it showed Alwin as the legal owner of the subject land. This was, subsequently to the lodgement of proof of debt, corrected by simple Transfer and the simultaneous entry of the first mortgage interest of Alwin at the instance of Mr. C. P. McCubbery the Solicitor acting on

behalf of the liquidator in this matter. My purpose in filing the said proof was to clarify the position and inform the liquidator of Civic of the true position. At no time did I intend that the first mortgage security of Alwin should be in any way affected. I mentioned this at the time to the said Mr. Pike and the effect of this proof of debt as I intended was acknowledged. Furthermore I took the precaution of noting on the said proof of debt the mortgage interest of Alwin.

4. As to the question of my or any other officer or shareholder of Alwin acting in any way inconsistent with that Company's mortgage interest I would say this: At no time have I or any other officer or shareholder of Alwin ever acted inconsistently with the said mortgage interest and at no stage has any vote been exercised by or on behalf of Alwin at any meeting of creditors either secured or unsecured. At all times Alwin has been held out as the first mortgagee and in fact on the day of the auction in respect to the property set out in the Summons herein, conducted by Mr. N.F. Maloney auctioneer of Port Moresby, and attended by Mr. C.P. McCubbery, the Solicitor acting for the liquidator, Mr. McCubbery announced to all persons assembled at the auction before bidding commenced the first mortgage interest held by Alwin in respect to the subject property at 10 a.m. on Saturday the 6th day of February, 1971.

5. Furthermore I would add that in numerous dealings and conversations with the Liquidator of Civic, the said Anthony Cathcart Pike, since the lodging by myself of the said proof of debt dated the 31st day of July, 1968, the first mortgage interest of Alwin has been frequently acknowledged, and in fact the permission of Alwin was obtained by the liquidator before conducting the auction of the premises set out in the Summons referred to as having been conducted on the 6th day of February, 1971."

This is not denied, in fact it is almost completely supported in Mr. Pike's second affidavit.

The curious situation "qua" title referred to in paragraph 3 of Mr. Thomason's affidavit excited my interest. At one point of time one sees the land in a sort of Old System setting, then as if with the wave of a wand, it wears a Torrens hat. Counsel, both experienced Territory lawyers, assured me that the problem Mr. Thomason faced was a real one and stems from a difference in administrative approaches. Counsel assured me that quaint though they conceded it all was, I could accept everything Mr. Thomason said about the temporary title difficulties.

I should add that the auction sale referred to was held following an order for sale made by Minogue, J. (as he then was) on 17th March, 1970. There were good reasons for the delay thereafter, as explained in Mr. Pike's second affidavit. The delay was not caused by Alwin and has no bearing on the question I am asked to answer.

It is therefore perfectly clear that if Alwin, by lodging a claim, must be held to have lost its security, that this was the last thing it intended, in fact if the security is lost then this is "per incuriam", if I can apply that tag to Mr. Thomason, because he apparently saw the difficulty and was at pains to point out that Alwin still regarded the security as such, and not as mere dollars and cents in the claim, although, as I pointed out to Counsel, that is not the way the consideration is expressed in the proof of debt.

The principles involved in related situations seem well established. Both Counsel referred me to Re Plummer & Wilson, ex parte Shepherd (1), which I subsequently found was referred to in February of this year by Goff, J. in Re Rushston (2), although it is referred to there in a

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(1) (1841) 2 Mont. D. & De G. 204, 1 Ph.66, 41 E.R. 552
(2) (1971) 2 A.E.R. 937

different context. The principles stated by Lord Lyndhurst at page 59 in Phillips and page 553 in the English Reports were quoted and applied by Dixon, J., as he then was, in Harvey v. Commercial Bank of Australia Limited (3). The Lord Chancellor said "Now what are the principles applicable to cases of this kind? If a creditor of a bankrupt holds a security on part of the bankrupt's estate, he is not entitled to prove his debt under the commission without giving up or realising his security. For the principle of the bankrupt laws is, that all creditors are to be put on an equal footing, and, therefore, if a creditor chooses to prove under the commission, he must sell or surrender whatever property he holds belonging to the bankrupt; but, if he has a security on the estate of a third person, that principle does not apply: he is in that case entitled to prove for the whole amount of his debt, and also to realise the security, provided he does not altogether receive more than 20s. in the pound."

The reason for my reference to what Lord Lyndhurst called "the bankrupt laws" will soon become apparent.

These principles are embodied in many statutes dealing with insolvency, so that, as Sir George Jessell, M.R., said, "A man is not allowed to prove against a bankrupt's estate and to retain a security which, if given up, would go to augment the estate against which he proves." Re Turner, Ex parte West Riding Union Banking Co. (4).

Section 291 of the Companies Ordinance, 1964, which comes within the heading "Proof and Ranking of Claims," largely incorporates the law of the Territory relating to bankruptcy into the winding up of insolvent companies. The Insolvency Ordinance 1951 and the General Rules in Insolvency are therefore incorporated into the law relating to winding up. The Ordinance follows 38 Vic. No. 5, The Insolvency Act of 1874 (Queensland), although the numbering of sections is different. The Rules are the Queensland Rules.

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(3) (1937) 58 C.L.R. 382

(4) (1881) 19 Ch.105 at 112.

Section 137 of the Ordinance reads:-

"137 - (1.) A creditor holding a specific security on the property of the insolvent or on any part thereof may on giving up his security prove for his whole debt.

(2.) He shall also be entitled to a dividend in respect of the balance due to him after realising or giving credit for the value of his security in manner and at the time prescribed.

(3.) The trustee with the consent of the committee of inspection may at any time within thirty days after proof has been tendered by a secured creditor require such creditor to give up his security on payment of the specified value and the creditor shall on such payment give up his security accordingly and do make and execute all necessary acts conveyances and assurances for that purpose.

Provided that a secured creditor who has proved may at any time before he is so required to give up his security correct his valuation thereof by making fresh proof of his debt.

(4.) A creditor holding such security as aforesaid and not complying with the foregoing conditions shall be excluded from all share in any dividend."
(Q.Ib.s.151)

See also section 79 (4):

"A secured creditor shall for the purpose of voting be deemed to be a creditor only in respect of the balance (if any) due to him after deducting the value of his security and the amount of such balance shall until the security be realized be determined in the prescribed manner. He may however at or previously to the meeting of creditors give up the security to the trustee and thereupon he shall rank as a creditor in respect of the whole sum due to him."
(Q.Ib.s.93)

The following Rules are important:

"84. A secured creditor, unless he shall have realised his security, shall, previously to being allowed to prove or vote, state in his proof the particulars of his security and the value at which he assesses the same, and he shall be deemed to be a creditor only in respect of the balance due to him after deducting such assessed value of the security.

85. Any secured creditor so proving shall be bound to pay over to the trustee the amount which his security shall produce beyond the amount of such assessed value, and the trustee shall be entitled, at any time before realisation of such security by the creditor, to redeem the same upon payment of such assessed value.

86. The proof of any such creditor shall not be increased in the event of the security realising a less sum than the value at which he has so assessed the same."

"206. A secured creditor, unless he shall have realised his security, shall, previously to being allowed to prove or vote, state in his proof the particulars of his security and the value at which he assesses the same, and he shall be deemed to be a creditor only in respect of the balance due to him after deducting such assessed value of the security. In cases of liquidation by arrangement any secured creditor so proving shall be bound to pay over to the trustee the amount which his security shall produce beyond the amount of such assessed value, and the trustee shall be entitled, at any time before realisation of such security by the creditor, to redeem the same upon payment of such assessed value. The proof of any such creditor shall not be increased in the event of the security realising a less sum than the value at which he has so assessed the same."

See also Rule 119.

Mr. Pratt cited a number of authorities, most, if not all of which are referred to in the judgment of Paine, J. in Re Ferguson and another; ex parte Elder's Trustee and Executor Company Limited. (5). Paine, J. was considering statutory provisions very similar to those I have set out above, but, as His Honour points out at page 5 of the report, "The secured creditor may surrender his security and vote for his whole debt, or value his security and vote for the deficit. But it is specifically provided:-

> "If he votes in respect of his whole debt he shall be deemed to have surrendered his security, unless the Court on application is satisfied that the omission to value the security has arisen from inadvertance.'"

This provision does not appear in the Ordinance here nor in the General Rules and I must say it gives additional weight to His Honour's reasons. But in my opinion what Mr. Thomason did here was not what Paine, J., at page 6, described as "indicat(ing) a definite unequivocal procedure, whether the process of surrender is voluntary or involuntary." With respect, I must say that I believe it was a most unwise thing for Mr. Thomason to do. While Mr. Thomason informed Mr. Pike that he did not intend to give up the security, if, as he says in his affidavit, "My purpose in filing the said proof was to clarify the position and inform the liquidator of Civic of the true position", I really cannot see why this could not have all been done by a most explicit letter, giving the fullest particulars.

There could well be a case where the mere filing of a proof of debt, viewed in the light of all the circumstances, could cause the security to be given up.

However, looking at the circumstances here I believe that what was done was not unequivocal.

I would add that I have not been able to find any case which is support for the proposition that mere lodgment of a proof of debt without more effects a surrender of the

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(5) (1943) 13 A.B.C. 1.

security. In most of the cases the person holding the security went a step or steps too far, e.g. both proving and voting.

I answer the question asked in the negative.

Liquidator's costs of the summons as between solicitor and client to be paid out of the estate. Costs of Alwin, as between party and party, to be paid out of the proceeds of sale of the said Boroko property, the security. Liberty to apply.