

IN THE MATTER OF
INVESTMENT CORPORATION OF FIJI LIMITED
(In Liquidation)

A

[SUPREME COURT—(Cullinan J.) 6 November 1985]

Civil Jurisdiction

(Company Law—Winding up order—application for stay no proceedings—interests not only of creditors but commercial morality to be considered—such application pursuant to S.252 can only be made by liquidator, official receiver or any creditor or contributory.)

B

D. C. Maharaj for the Applicant

A. P. Whitlam (of the New South Wales Bar) and F. G. Keil for the Respondent

D. Pathik for the Official Receiver

C

Application made on 6 November 1985 by Investment Corporation of Fiji Limited (in liquidation) (the Company) for a stay of the winding-order made that day.

Companies Act 1983 (Cap 247—1985 Edn.) (the Act) S.252 provided:—

D

“252—(1) The Court may at any time after an order for winding up, on the application either of the liquidator or the official receiver or any creditor or contributory, and on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the court thinks fit.

E

(2) On any application under this section the court may, before making an order, require the official receiver to furnish to the court a report with respect to any facts or matters which are in his opinion relevant to the application.

(3) A copy of every order made under this section shall forthwith be forwarded by the company, or otherwise as may be prescribed, to the registrar for registration.”

F

- A Authority referred to included *Telescriptor Syndicate Limited* (1903) 2 Ch. 174 which was concerned with a similar section i.e. (the English) Companies Act 1862 S.89. There the claims of the petitioning creditor and all other creditors had been satisfied: despite which the application was refused. The Judgment of Buckley J. there emphasised that in an application to rescind a receiving order or annul an adjudication the Court refused to act upon the mere assent of the creditors and considered also whether what was proposed was for the benefit not only of creditors
- B but also.....

"..... whether it is conductive or detrimental to commercial morality and to the interests of the public generally. The Court has a discretion It has a duty to the commercial morality of the country....."

- C Buckley J. stated that as far as possible the Court should not have or act upon a different principle in a winding up and a bankruptcy.

In other authority *In re Calgary and Edmonton Land Co. Ltd.* Megarry J. refused an application for stay in a voluntary winding up and stated that:—

- D "..... the applicant for a stay must make out a case that carries conviction."
His Lordship considered that a Court would be more disposed or ready to grant such a stay where the liquidation had proceeded for only a short period than where it had been proceeding for a considerable time and much had been done of the faith of it.....

- E In the instant case, Cullinan J. noted that the petition had been filed over a year ago i.e. on the 26 July 1984. Reference was also made to *In re A. & B. C. Chewing Gum Limited* (1975) 1 W.L.R. 579 where the learned Judge (Plowman J.) confirmed that he could grant a stay on proof that proceedings should be stayed. He added:—

"But then there is a question of practice and as a matter of practice a stay is never granted."

- F Plowman J. referred to what he described as "very good reasons" for such a practice.

Cullinan J. took into account that in view of the fact that the petition was presented more than a year earlier, the difficulties were compounded. The Court stated it had not discovered any authority in which a stay of a winding-up order in winding up by the Court had been granted.

- G Counsel for the Company indicated that it intended to appeal against (the Judgment on the application for a stay).

- H He was referred to Court of Appeal Rules (Cap. 12) rule 25 which in part read except in so far as the Court below or the Court of Appeal may otherwise direct:

- (a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the Court below;
- (b) no intermediate act or proceeding shall be invalidated by an appeal."

Held: The Court was not satisfied that the winding up ought to be stayed. A

Rule 23 indicated that an appeal did not operate as a stay except so far as the Court below or an appeal Court might otherwise direct. Further under S.252 (supra) the application for a stay of proceedings in relation to winding up can only be made on the application either of the liquidator or the official receiver or any creditor or contributory; whereas the instant application had been brought by the Company and not by any of the persons mentioned in that section. This must defeat the application. B

Application for stay dismissed.

Cases Referred to:

- (1) *Telescriptor Syndicate Limited* (1903) 2 Ch. 174. C
- (2) *In re Hester* 22 Q.B.D. 641.
- (3) *In re Flatau* (1893) 2 Q.B. 49.
- (4) *In re Taylor* (1901) 1 K.B. 744.
- (5) *In Re Calgary and Edmonton Land Co. Ltd.* (1975) 1 W.L.R. 355.
- (6) *In re A. & B. C. Chewing Gum Ltd.* (1975) 1 W.L.R. 579.

CULLINAN, J. D

ORDER

The learned counsel for the Company Mr Maharaj had made application for a stay of the winding-up order made this morning. E

Section 252 of the Companies Act, 1983 reads as follows:

"252.—(1) The Court may at any time after an order for winding-up, on the application either of the liquidator or the official receiver or any creditor or contributory, and on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the court thinks fit. F

(2) On any application under this section the court may, before making an order, require the official receiver to furnish to the court a report with respect to any facts or matters which are in his opinion relevant to the application.

(3) A copy of every order made under this section shall forthwith be forwarded by the company, or otherwise as may be prescribed, to the registrar for registration." G

In the case of *Telescriptor Syndicate Limited* (1) Buckley J. considered an application for stay under the provisions of section 89 of the Companies Act, 1862, which is in similar terms to the provisions before me. Apparently in that case the claims of the petitioning creditor and all the other creditors had been satisfied. Despite this, the application for stay was refused. Buckley J. observed at 180/181: H

"Where application is made in bankruptcy to rescind a receiving order or to annul an adjudication, the Court refuses to act upon the mere assent of the

- A creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large. The mere consent of the creditors is but an element in the case. In *In re Hester* (2) some trenchant observations of Fry L. J. will be found on the idle notion that the Court is bound by the consents of the creditors. The Court has to exercise a discretion. It is bound to regard not merely the interests of the creditors. It has a duty with regard to the commercial morality of the country: see *In re Hester* (2); *In re Flatau* (3); *In re Taylor* (4). I am here asked to exercise an analogous jurisdiction, and I may say that it is in my opinion desirable that so far as possible the Court should not assume a different attitude or act upon a different principle in the winding-up of a company and in the bankruptcy of an individual. I have here to say whether it is proved to my satisfaction that all proceedings in relation to this winding-up ought to be stayed. I decline to say that I am satisfied as to that by the mere fact that since the winding-up order was made the assent of all the creditors and of a large majority of shareholders has been obtained."
- B
- C

In the case of *In Re Calgary and Edmonton Land Co. Ltd.* (5), Megarry J. (as he then was) refused an application for a stay in a voluntary winding-up. Megarry J. quoted the authority of *Telescriptor Syndicate Ltd.* (1) with approval in that case. The words in section 252 "satisfaction of the court" and "ought to be stayed", as Megarry J. observed,

D

"... seem to me to indicate that the applicant for a stay must make out a case that carries conviction. It may be that where the liquidation has been proceeding for only a short while the court ought to be more ready to grant a stay than in cases where the liquidation has been proceeding for a considerable time and much has been done on the faith of it: but this point has not been argued and I decide nothing on it."

E

In the present case I observed that the petition in this matter was filed over a year ago on the 26th July 1984. In the case of *In re A. & B. C. Chewing Gum Limited* (6), to which the learned counsel for the Petitioner Mr Whitlam has referred, Plowman J. observed as follows at P.592/593:

"As I understand it, the position is this. First of all, as a matter of jurisdiction it is quite clear that I have jurisdiction to grant a stay, because the Act says so, it says I can grant a stay on proof to my satisfaction that the proceedings ought to be stayed. But then there is the question of practice, and as a matter of practice a stay is never granted. The only exception that I think is known to the department is where I myself once went wrong in *In re Westbourne Galleries Ltd.* [1970] 1 W.L.R. 1378, and not having been alerted to the position, and not knowing it before, I granted a stay, with precisely what consequences nobody has ever told me. But there are very good reasons for the practice of never ordering a stay, and they are these: as soon as a winding up order has been made the Official Receiver has to ascertain first of all the assets at the date of the order; secondly, the assets at the date of the presentation of the petition, having regard to the possible repercussions of section 227 of the Act of 1948; and thirdly, the liabilities of the Company at the date of the order, so that he can find out who the preferential creditors are, and also the unsecured creditors."

F

G

Supposing there is an appeal and the winding up order is ultimately affirmed by the Court of Appeal, and there has been a stay, his ability to discover all these things is very seriously hampered: it makes it very difficult for him, possibly a year later, to ascertain what the position was at times a year previously."

H

In the present case it seems to me that, in view of the fact that the petition was presented over a year ago, the latter difficulties are compounded. A

Plowman J. went on to observe at p.592,

“Those, I think, are really the reasons why, in practice, a stay is not granted—a profitable business can be carried on as it was before and handed back as a going concern if the appeal is allowed. If it is not allowed then, of course, cadit quaestio.” B

In the time available to me, I have not discovered any authority in which a stay of a winding-up order, in a winding-up by the Court was granted. No doubt that is because, as Plowman J. put it “a stay is never granted.”

I understand that the company wishes to appeal against the judgment just delivered. Mr Maharaj has referred me to the provisions of rule 25 of the Court of Appeal Rules, Cap. 12 which in part reads as follows: C

“25.—(1) Except so far as the Court below or the Court of Appeal may otherwise direct—

(a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the Court below;

(b) no intermediate act or proceeding shall be invalidated by an appeal.” D

The rule clearly indicates that an appeal does not operate as a stay of execution, “except in so far as the Court below or the Court of Appeal may otherwise direct”. As to this court’s jurisdiction in the matter it is, I consider, clearly contained in section 252 of the Companies Act. In this respect, I am guided by the authorities which I have just quoted and I am not satisfied that the winding-up ought to be stayed. E

I observe from section 252(2) that “the court may, before making an order require the official receiver to furnish to the court a report with respect to any facts or matters which are in his opinion relevant to the application.”

There are already before me two reports by the Official Receiver as interim liquidator. The least that can be said of them, that is, in respect of this application, is that they do not support the application. F

Finally, and this I consider must defeat the application, Mr Whitlam submits that under section 252 the application can only be made by “the liquidator or the official receiver or any creditor or contributory.” The application is however brought by the Company, and not by any of the persons mentioned in the section. I accordingly dismiss the application. G

Application dismissed.