IN THE CAYMAN ISLANDS COURT OF APPEAL

CIVIL APPEAL 4/87

10-12-87
Reported

BETWEEN HANDLINGAIR DOUGLAS LTD APPELLANT

AND

AETNA CASUALTY AND SURETY CO. RESPONDENT

BEFORE: THE HON. PRESIDENT MR. JUSTICE ZACCA
THE HON. MR. JUSTICE GEORGES J.A.
THE HON. MR. JUSTICE K.C. HENRY J.A.

Mr. LaMontagne QC and Mr. QUIN for Appellant

Mr. Jones for Respondent

Heard August 28th, 1987

REASONS FOR JUDGMENT

On August 28, 1987 we dismissed this appeal and promised to put our reasons in writing. We now do so.

The Appellant is an exempt company incorporated in the Cayman Islands. The Respondent is a corporation organized under the laws of the state of Connecticut, U.S.A.

On March 23, 1984 the Appellant obtained from Respondent an indemnity bond in the sum of $16,350,000.00 to secure repayment of a loan obtained from Barclays American/Business Credit Inc., another Connecticut company. The Respondent, alleging that premiums in respect of that bond were unpaid, presented a creditor's winding up petition as a result of which the Chief Justice, on April 27, 1987, issued a winding up order. This is an appeal against that order.

The appeal was argued on two main grounds - firstly that the winding up petition was not properly verified because the affidavit in support of it did not comply with the relevant rules and secondly that there being no evidence that the Respondent was a creditor of the Appellant, the petition was defective.

The United Kingdom Insolvency Rules, 1986 are applicable in the Cayman Islands. They came into force on December 29, 1986 and were in operation on the date of presentation of the winding

up petition - February 27, 1987. The relevant portions of rule 4.12 are as follows:

> "(1) The petition shall be verified by an affidavit that the statements in the petition are true, or are true to the best of the deponent's knowledge, information and belief.
>
> (4) The affidavit shall be made -
>
> (a) by the petitioner (or if there are two or more petitioners, any one of them), or
>
> (b) by some person such as a director, company secretary or similar company officer, or a solicitor, who has been concerned in the matters giving rise to the presentation of the petition, or
>
> (c) by some responsible person who is duly authorised to make the affidavit and has the requisite knowledge of those matters."

Counsel for the Appellant submitted that Mr.Lavery who described himself as manager of the Respondent could not bring himself within the provisions of rule 4.12 (4) (b) or (c) because he had not in his affidavit disclosed the means whereby he had acquired the requisite knowledge of the matters set out in his affidavit. In this regard counsel pointed to the form of Affidavit set out in the rules, the relevant portion of which reads:

> "3 I have been concerned in the matters giving rise to the Petition and have the requisite knowledge of the matters referred to in the Petition because (f)"

and footnote (f) of which states

> "(f) State means of knowledge of matters sworn to in affidavit"

and also to rule 4.12 (5) which states

> "(5) Where the deponent is not the petitioner himself, or one of the petitioners, he must in the affidavit identify himself and state - ...
>
> (b) the means of his knowledge of the matters sworn to in the affidavit."

In any event, counsel submitted, Mr.Lavery could not bring hemself within the provisions of rule 4.12 ($) (b) because in cross-examination he had admitted that he was one of 200 managers and he reported to one of 100-200 vice-presidents of the Respondent company. He was not therefore one of the persons described in rule 4.12 (4)(b). In support of this submission counsel referred to Re Vic Groves & Co. Ltd. (1964) 2 All E.R. 839. In that case winding up petition was presented by a limited company. The affidavit in support of the petition was sworn by M., one of 32 divisional managers of the company. The company had given M a power of attorney empowering him inter alia to present winding up petitions and to swear affidavits on its behalf. Pennycuick J held that the affidavit did not comply with rule 30 of the Companies (Winding-up) Rules, 1949 which required the affidavit to be made "in case the petition is presented by a corporation by some director, secretary or other principal office thereof".

The wording of rule 30 is however more restrictive than that of rule 4.12 of the Insolvency Rules, 1986. In cross-examination Mr. Lavery indicated that he was the manager of the surety division, a separate division of the parent company. This would clearly be responsible for dealing with matters such as the indemnity bond. In the circumstances it seems to me that he would properly fall within one or other of the category of persons described

in rule 4.12 (4)(b) and (c). Although he has not, as required by the rules, stated in his affidavit the means of his knowledge of the matters sworn in the affidavit, in my view his position as manager of the surety division would prima facie indicate his means of knowledge. At worst the course adopted by Pennycuick J in Re Vic Groves could be adopted and the winding up could be made subject to a supplementary affidavit being filed by Mr. Lavery.

In so far as the second ground of appeal is concerned counsel submitted that the documents exhibited to Mr.Lavery's affidavit did not support the allegation in the petition that annual premiums were payable in respect of the indemnity bond. The form of bond attached as Exhibit C to the Loan Agreement between Barclays American/Business Credit and the Appellant contains the clause

> "IT IS FURTHER UNDERSTOOD AND AGREED
> that this Indemnity Bond shall
> remain in full force and effect
> pursuant to the terms thereof,
> notwithstanding any non payment of
> premiums therefor."

This clause is absent from the file copy of the bond executed by the Appellant and the Respondent, which in all other respects corresponds to Exhibit C. Furthermore, although the file copy of the printed form of application for the bond signed by the Appellant contains a clause relating to payment of premiums, no amount of any such premium has been inserted. This combination of circumstances, counsel submitted, leads to the conclusion that the omission of an annual premium was deliberate and that no such annual premium was payable on the bond. That being so, there was no foundation for the Respondent's petition as a creditor.

The possibility of an insurance company issuing an indemnity bond without providing for the payment of a premium of some kind by way of consideration must be remote. It may be, as counsel for the Appellant submitted, that there could be a single premium payable with the application rather than annual premiums but if so I would have expected that amount to be specified in the applicati As it is, both the amount of the initial payment and of the annual payments have been left blank although the clause providing for payment has not been struck out. It may be that the amounts were inserted in the original bond and have inadvertantly been omitted from the file copy, but it is idle to speculate as to this. The omission from the file copy of the bond of the clause contained in Exhibit C is equally consistent with an intention on the part of the Respondent to relieve itself of the responsibility for payment on the bond in the event of the premiums being unpaid. At all events it seems to us on a balance of probabilities that an annual premium was payable on the bond as the petition and Mr.Lavery's affidavit assert. No attempt was made in cross examination of Mr.Lavery to suggest otherwise or to suggest, if it were the case, that a single premium only was payable and had been paid.

For these reasons we were of the view that the appeal ought to be dismissed.

Delivered the 10th December 1987