IN THE MATTER OF THE HOME ASSURANCE COMPANY OF CANADA (IN LIQUIDATION)

1950
May 3, 4
Jun. 23

ALFRED GORDON BURTON, AS LIQUIDATOR OF HOME ASSURANCE COMPANY OF CANADA — APPELLANT;

AND

CONTRIBUTORIES OF HOME ASSURANCE OF CANADA ..... — RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Companies—Incorporated in Alberta—Wound up under Dominion Winding Up Act—Whether liquidator can call on contributories for full amount owing on share—"Maturity of the debt" in s. 60(2) of Winding Up Act (Can.)—Alberta Insurance Act, R.S.A. 1942, c. 201, ss. 119, 135—Winding Up Act, R.S.C. 1927, c. 213, ss. 53, 55, 59, 60.

Held: (The Chief Justice and Taschereau J. dissenting): In the winding up under the Dominion Winding Up Act of a company incorporated by private Act of the Province of Alberta (s. 9 of which made the *Alberta Insurance Act* applicable to the company), the "maturity of the debt" referred to in s. 60(2) of the Dominion Winding Up Act is not determined by s. 119(9) of the *Alberta Insurance Act,* but by the Court. Therefore a call can be made on the contributories by the liquidator for the full balance still owing on each share.

Judgment appealed from (30 C.B.R. 234) reversed.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), reversing the decision of Macdonald J. authorizing the liquidator to make a call on the contributories of the Home Assurance Company of Canada for 100 per cent of the amount owed on each share.

W. A. McGillivray for the appellant.

H. S. Patterson K.C. and *Malcolm Millard K.C.* for the respondents.

The Chief Justice (dissenting):—I agree with Mr. Justice Taschereau, for the reasons he has given, and I would dismiss the appeal with costs to be paid to both parties out of the assets of the company.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand & Estey JJ.

(1) 30 C.B.R. 234.

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KERWIN J.:—Home Assurance Company of Canada is being wound up under the provisions of the *Dominion Winding-up Act*, R.S.C. 1927, c. 213. The liquidator moved for an order making a call on each of the shareholders of the company for one hundred per cent of the amount for which they are, or may be, respectively settled upon the list of contributors as being the amount unpaid on their shares. By its special Act, the company was subject to the *Insurance Act* of Alberta, c. 58 of the 1918 Statutes, s. 119(9) of which is as follows:—

119(9). The shares of the capital stock subscribed for shall be paid by such instalments and at such times and places as the directors appoint; the first instalment shall not exceed twenty-five per cent and no subsequent instalment shall exceed ten per cent and not less than thirty days' notice of any call shall be given, and no call shall be made at a less interval than thirty days from the last preceding call.

Sections 31, 53, 55 and 59 of the *Winding-up Act* provide:—

31. Upon the appointment of the liquidator all the powers of the directors shall cease, except in so far as the court or the liquidator sanctions the continuance of such powers.

53. Every shareholder or member of the company or his representative, shall be liable to contribute the amount unpaid on his shares of the capital, or on his liability to the company, or to its members or creditors, as the case may be, under the Act, charter or instrument of incorporation of the company, or otherwise.

2. The amount which he is liable to contribute shall be deemed an asset of the company, and a debt due to the company, payable as directed or appointed under this Act.

55. The liability of any person to contribute to the assets of a company under this Act, in the event of the business of the same being wound up, shall create a debt accruing due from such person at the time when his liabilities commenced, but payable at the time or respective times when calls are made, as hereinafter mentioned, for enforcing such liability.

59. The court may, at any time after making a winding-up order, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of contributories, to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves.

In view of these provisions there would be no question that the winding-up order overrides the contract between the company and the shareholder: In *re Cordova Union Gold Co.* (1); *London Provident Building Society* v. *Morgan* (2); *In Re Pyle Works* (3), per Lindley L.J.; *Re Wiarton Beet Sugar Co.* (*Jarvis'* case) (4). The respond-

(1) (1891) 2 Ch. 580.
(2) (1893) 2 Q.B. 266 at 272.
(3) (1890) 44 Ch. 534 at 583.
(4) (1905) 5 O.W.R. 542.

ent, however, relies upon subsection 2 of s. 60 of the *Winding-up Act*, both subsections of which read as follows:

60. The court may, in making a call, take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same.

2. No call shall compel payment of a debt before the maturity thereof, and that the extent of the liability of any contributory shall not be increased by anything in this section contained.

It is said that the maturity of the debt is governed by s. 119(9) of the *Alberta Insurance Act* and that in making calls the liquidator and the Court are bound by its provisions. It was so decided by Walsh J. in *Re the Alliance Investment Company (Canada) Limited* (1), and by the Appellate Division of the Supreme Court of Alberta in the present case. With respect, I am unable to agree, in view of the cessation of the directors' powers and the intervention of the winding-up order and the provisions of the Winding-up Act previously set out. The maturity of the debt is that set by the Court in making the calls.

After deciding to this effect, the judge of first instance, H. J. Macdonald, J., settled a list of contributories and ordered payment on or before March 15, 1950. The appeal should be allowed, the order of H. J. Macdonald, J. restored except that the time for payment should be extended to September 15, 1950. The costs of all parties throughout may be paid out of the assets of the company.

TASCHEREAU J. (dissenting):—This case is a counterpart of the case of *Patterson es-qual*, v. *Burton* (2), decided this same day, in which I came to the conclusion that the shareholders of the Home Assurance Company were liable to call as contributories to the extent of $85 per share.

Before the judgment of the Court of Appeal had been rendered, the liquidator applied to Mr. Justice Hugh J. Macdonald for an order making a call on each of the shareholders, for 100 per cent of the amount for which they were respectively settled upon the list of contributories. This application was allowed by Mr. Justice Macdonald, but the Court of Appeal held, reversing the trial judge,

(1) [1919] 1 W.W.R. 17.

(2) [1950] S.C.R. 578.

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that calls should be for the amounts and at the intervals specified by section 119(9) of *The Insurance Act*, which reads as follows:

s.s. (9). The shares of the capital stock subscribed for shall be paid by such instalments and at such times and places as the directors appoint; the first instalment shall not exceed twenty-five per cent and no subsequent instalment shall exceed ten per cent and not less than thirty days' notice of any call shall be given, and no call shall be made at a less interval than thirty days from the last preceding call.

This company is being wound-up under the provisions of the *Winding-up Act*, and the following sections of that statute are particularly relevant:—

53. Every shareholder or member of the company or his representative, shall be liable to contribute the amount unpaid on his shares of the capital, or on his liability to the company, or to its members or creditors, as the case may be, under the Act, Charter or instrument of incorporation of the company, or otherwise.

2. The amount which he is liable to contribute shall be deemed an asset of the company, and a debt due to the company, payable as directed or appointed under this Act.

55. The liability of any person to contribute to the assets of a company under this Act, in the event of the business of the same being wound up, shall create a debt accruing due from such person at the time when his liability commenced, but payable at the times or respective times when calls are made, as hereinafter mentioned, for enforcing such liability.

59. The court may, at any time after making a winding-up order, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of contributories, to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding-up, and for the adjustment of the rights of the contributories among themselves.

60. The court may, in making a call, take into consideration the probability that some of the contributories upon whom the same is made, may partly or wholly fail to pay their respective portions of the same.

2. No call shall compel payment of a debt before the maturity thereof, and that the extent of the liability of any contributory shall not be increased by anything in this section contained.

Pursuant to section 119(9) of *The Insurance Act*, which I have already cited, the company adopted a by-law relating to the payment of the shares. It reads as follows:—

The directors may exercise the power to make calls as conferred by Section 119 of the *Alberta Insurance Act* in the measure therein provided from time to time on the members in respect to all moneys unpaid on their shares, one tenth of the nominal amount of the share or be payable at a date less than one month from the date fixed for payment of the last call, and each shareholder shall be liable to pay the call.

Furthermore, the prospectus which was issued by the company, when the sales were offered to the public, provided as follows:—

> The company now proposes to offer for sale to the public 2,500 shares of its capital stock at $115 per share, subject to the right of the directors at any time to withdraw this offer.
>
> The full sum of $115 is to be paid by such instalments as the directors may see fit, subject to the provisions of *The Insurance Act*. The subscribers will require to pay on application $27.50 per share of which $15 is a premium. The premium will be used to cover the costs of procuring incorporation and of subscriptions for stock. $12.50 only will be marked on the stock certificate as paid up and the subscriber will be liable for an additional $87.50 per share which, however, can only be called in 10 per cent calls at thirty-day intervals.

The application for the purchase of shares was in the following terms:—

> Gentlemen: Having paid to Mr..... the sum of..... being a deposit of $22.50 per share on ..... shares in the above named company of which $10 is premium and $12.50 is the first call per share, I hereby request you to allot me..... shares in the above named company, upon the terms of the company's prospectus, dated the.....day of.....A.D. 1923, and I hereby agree to accept the same or any smaller number, which may be allotted to me, and covenant and agree to pay the balance of $..... per share on call as provided by the said prospectus and I hereby authorize you to register me the holder of the said shares.

It is submitted on behalf of the appellant that the provisions of the *Alberta Insurance Act*, the company's by-laws, and the prospectus which restrict the directors of the company from making a call except by instalments and after notice, as well as the form of application for shares, have no bearing on the right of the liquidator in a winding-up to call for full balance due on the shares.

This submission is based on a decision given by Mr. Justice Kekewich *In Re Cordova Union Gold Company* (1), where he held that the contract for payment by instalments was determined by the *Winding-Up Act* of England, and that the liquidator was entitled to make an immediate call for the amount remaining unpaid in respect of the shares.

The appellant also relies upon the case of *Irma Co-Operative Co. Ltd.* (2) in which it was decided that a contributory to an insolvent company is liable to pay the

(1) (1891) 2 Ch. 580.
(2) [1925] 1 D.L.R. 27.

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full balance owing on his shares, although under the subscription contract such balance is not due, being payable by instalments.

In 1919, the precise question came before Mr. Justice Walsh on appeal from the Master at Calgary, in *Re The Alliance Investment Company (Canada) Limited (In Liquidation)* (1). The head note reads:—

> Under the Winding-Up Act, R.S.C. 1906, Ch. 144, leave will not be granted to call up the whole amount remaining unpaid on shares, where the time fixed for payment by the terms of the shareholder's application has not arrived.

Mr. Justice Walsh based his judgment on section 58 of the *Winding-Up Act* which is now section 60, para. 2, and which says:—

> No call shall compel payment of a debt before the maturity thereof, and that the extent of the liability of any contributory shall not be increased by anything in this section contained.

Mr. Justice Walsh pointed out that section 102 in the English Companies Act, 1862, (206 of *The Companies Act, 1929*), is in almost the same language as section 57 (59 at present) of the Dominion Winding-Up Act, and as the first sentence of section 58 (at present 60(1)). These sections are the sections which empower the Court to make calls upon the contributories, but there is nothing in the English Act which corresponds with section 60(2), and which is clearly to the effect that under the *Winding-Up Act,* no call shall compel payment of a debt before its maturity. And it is also made very clear that the extent of the liability of a contributory cannot be increased by the mere fact of the winding-up.

The *Irma* case (*supra*) can easily be distinguished from the present case, as it appears from the reasons of Mr. Justice Tweedie, that he based his conclusions on the provisions of the *Bankruptcy Act* in which, section 60(2) of the *Winding-up Act* or its equivalent, is not found.

I have no hesitation to reach the conclusion that section 60, para. 2, of the *Winding-Up Act* clearly applies. The liability of the contributories must be determined by the provisions of section 119(9) of the *Alberta Insurance Act,* by the terms of the By-law of the company, as well as by the conditions mentioned in the prospectus. In view of

(1) [1919] 1 W.W.R. 117.

the opinion expressed in the case of *Patterson et al* v. *Burton,* that the contracts of sale are *void,* I attach no importance to the forms of application.

The appeal should be dismissed, with costs to be paid to both parties out of the assets of the company.

RAND J.:—The question here is whether, in making a call in the winding-up of this company for the sum of $85 unpaid on the issued shares, the liquidator is bound by section 119(9) of the *Insurance Act of Alberta,* in these words:—

(9) The shares of the capital stock subscribed for shall be paid by such instalments and at such times and places as the directors appoint; the first instalment shall not exceed 25 per cent and no subsequent instalment shall exceed 10 per cent and not less than 30 days' notice of any call shall be given, and no call shall be made at a less interval than 30 days from the last preceding call.

In addition to that provision, the Articles of Association contained a similar clause.

The controversy arises out of the application of section 60(2) of the *Winding-Up Act* which reads:—

(2) No call shall compel payment of a debt before the maturity thereof, and that the extent of the liability of any contributory shall not be increased by anything in this section contained.

If section 119(9) appeared alone in the *Insurance Act,* it would, I think, bring the case within the language of section 60(2); but section 135 of the *Insurance Act,* dealing with the liability of shareholders contains these provisions:—

(1) Every shareholder shall, until the whole amount of his stock has been paid up, be individually liable to any creditor of the company to an amount equal to that not paid up thereon; but shall not be liable to an action therefor by any creditor until an execution against the company at the suit of the creditor has been returned unsatisfied in whole or in part.

(2) The amount remaining unpaid by the shareholder on his stock shall be the maximum amount recoverable from him, but if action is brought against him he shall also be liable to pay such costs as may be awarded against him.

The question to be decided is this: What, for the purposes of the proceedings, is the maturity of the liability to pay the balance owing fixed by the *Insurance Act?* The presence of section 135 by which a creditor is entitled to sue a shareholder for that balance, indicates, I think, a

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Rand J.

limitation on section 119(9); obviously, the terms of call of the latter are there disregarded; and as the two provisions must be reconciled, on what can that be done except the assumption that section 119(9) is not intended to operate against creditors? As against them, the balance is due from the time of purchase. Since an order for liquidation is an execution for all creditors, the section is without application or effect vis a vis the liquidator: at the moment of liquidation it has lost the possibility of maturity beyond it. Viewed in another aspect, the terms apply only in the case of a call made by directors and while the company is carrying on business. Similarly the article to the same effect as section 119(9) is overridden by the effect of section 135. This is not, of course, the same thing as construing the rights of the liquidator under the *Winding-Up Act* to override the terms of section 119(9) or the article; it is simply finding that neither, in such a case, furnishes a continuing time or maturity to which section 60(2) could apply. This was in substance the ground on which Macdonald, J., on the application, proceeded, and I think he was right.

In ascertaining the intention of Parliament underlying section 60(2), it must be kept in mind that administering a bankrupt estate is a very practical matter in which delays produce general inconvenience. In subjecting it to contractual or statutory stipulations of this nature we ought not to exceed what is clearly indicated by the legislature, which is simply to respect the terms of the debt. To do otherwise would be to disregard the original basis of limited liability in joint stock companies. When members of such an association were individually liable for all debts, no agreement between them as to the amount of or the times for payment of their contributions could avail against creditors; and the application of such a restriction as that of section 60(2) would not be justified beyond the precise language, in this case, of the legislation dealing with terms of payment.

I would, therefore, allow the appeal and declare that the call may be made without relation to the terms of section 119(9).

ESTEY J.:—The appellant is the liquidator of The Home Assurance Company of Canada and the respondents are the contributories.

In this appeal, the appellant contends that a call may be made upon the contributories for any balance that may be owing under a contract for the purchase of shares, while the respondents submit it cannot be made except for amounts and within the periods permitted under sec. 119(9) of *The Alberta Insurance Act* (St. of Alta. 1915, c. 8, now R.S.A. 1942, c. 201, s. 119(9).

Mr. Justice Macdonald authorized "the liquidator to make a call on each of the contributories . . . for one hundred per cent of the amount for which they are or may be respectively settled upon the list of contributories." This judgment was reversed in the Appellate Division and a direction made that the calls should be made at amounts and intervals specified by section 119(9) of *The Alberta Insurance Act.*

Sec. 119(9) reads as follows:

(9) The shares of the capital stock subscribed for shall be paid by such instalments and at such times and places as the directors appoint; the first instalment shall not exceed 25 per cent and no subsequent instalment shall exceed 10 per cent, and not less than 30 days' notice of any call shall be given, and no call shall be made at a less interval than 30 days from the last preceding call.

The Home Assurance Company of Canada was incorporated by special statute enacted by the Legislature of Alberta (1918 St. Alta., Ch. 58). Section 9 of that Act directed that the provisions of the *Alberta Insurance Act* including the above sec. 119(9), should apply to the company.

The express language of this section including as it does the words "as the directors appoint", discloses that the legislature intended this section should apply only while the directors were directing the affairs of the company. This is emphasized by the fact that section 152 of *The Alberta Insurance Act* incorporates the Winding-Up provisions of the *Companies Act of Alberta* (R.S.A. 1942, c. 240).

Section 164 of the *Companies Act* reads as follows:

164. The liability of a contributory shall create a debt of the nature of a specialty, accruing due from him at the time when his liability commenced, but payable at the times when calls are made for enforcing the liability.

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Sec. 164 discloses that the legislature intended in the event of a winding-up the terms of the payment under a contract for the purchase of shares would be superseded by the provisions of that section. A reading of these two sections makes it clear that the legislature intended sec. 119(9) should apply prior to winding-up proceedings, but once they were commenced the provisions of sec. 164 should apply.

While this company is not being wound up under sec. 164 and, therefore, its provisions do not apply to these proceedings, they do, when read with sec. 119(9), indicate on the part of the legislature an intention that calls should be made once winding-up proceedings are commenced in accord with the statutory provisions under which those proceedings may be taken. This company is being wound up under *The Dominion Winding-Up Act* (1927 R.S.C., c. 213). The relevant provisions are sections 50, 53, 55, 59 and 60(2).

It is upon the provisions of section 60(2) that the Appellate Division founded its judgment and upon which the respondent bases its submission.

Section 60(2) reads as follows:

> 60 (2). No call shall compel payment of a debt before the maturity thereof, and that the extent of the liability of any contributory shall not be increased by anything in this section contained. R.S., c. 144, s. 58.

Sec. 50 provides that at the commencement of the winding-up, the list of contributories shall be settled and sec. 53 that "every shareholder . . . shall be liable to contribute the amount unpaid on his shares." Sec. 53(2) provides that the liability of the contributory shall be deemed "a debt due to the company payable as directed or appointed under this Act," and sec. 55, the liability of the contributory "shall create a debt accruing due from such person at the time when his liability commenced but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability." Sec. 59 provides that "the Court may at any time after making a winding-up order . . . make calls on and order payment thereof by all or any of the contributories . . . to the extent of their liability."

The foregoing provisions of sections 50 to 59 are in effect similar to those in the *Companies Act*, 1862 of Great

Britain (25 & 26 Vict., Ch. 89). Under that provision, it has been held that the terms of payment in the contract endured "only during the life of the company" and, therefore, the liquidator might call up the whole of the unpaid balance at any time after winding-up proceedings have been commenced. In *re Cordova Union Gold Company* (1).

The respondent, however, points out that sec. 60(2) in *The Dominion Winding-up Act* has no counterpart in the British Act, and that as it provides "no calls shall compel payment of a debt before the maturity thereof," the terms of the original contract must be adhered to in the making of calls. The sections 50 to 60(2) inclusive are all under the general heading "contributories" and when read together the debt referred to in sec. 60(2) is that created by sec. 53(2), and which under sec. 55 is "accruing due from such person at the time the liability commenced but payable at the time . . . when calls are made . . ." Then in sec. 59, it is already pointed out the Court may at any time make calls and order payment to the extent of the liability of the contributories.

Moreover, the foregoing is in accord with the intent and purpose of winding-up proceedings, which are designed to realize the assets of a company and to distribute them among the creditors as soon as circumstances may permit.

These sections, and particularly sec. 59, contemplate such an order as that made by Mr. Justice Macdonald. His order should be restored. The appeal allowed with the costs of the parties hereto payable out of the assets of the company.

Appeal allowed with costs.

Solicitors for the appellant: *Fenerty, Fenerty, McGillivray and Robertson.*

Solicitors for the respondents: *Patterson, Hobbs and Patterson.*

(1) (1891) 2 Ch. 580.