

**Gas Supply (New Hebrides) Ltd v DJ Gubbay and
Company (New Hebrides) Pty Ltd [1975] FJHCWP 2;
Civil Case 173 of 1974; 24 of 1975 (20 August 1975)**

IN THE HIGH COURT OF THE WESTERN PACIFIC

NEW HEBRIDES REGISTRY

Civil Cases Nos. 173 of 1974 and 24 of 1975
BETWEEN

**GAS SUPPLY
(NEW HEBRIDES) LIMITED**
Plaintiff

AND

**D.J. GUBBAY AND COMPANY
(NEW HEBRIDES) PTY LIMITED**
Defendant

Civil Case No. 30 of 1975

BETWEEN

**LA SOCIETE DES COMPTOIRS FRANCAIS DES NOUVELLES
HEBRIDES**
Plaintiff

AND

**D.J. GUBBAY AND COMPANY
(NEW HEBRIDES) PTY LIMITED**
Defendant

IN CHAMBERS:

Vila, New Hebrides

Wednesday, 20 August 1975

JUDGMENT

This is an application by the Defendant Company's solicitors, made under section 257(a) of the Companies Regulation (Cap. 9 of the British Laws of the New Hebrides), for a stay of proceedings in Civil Cases Nos. 173 of 1974, 24 of 1975 and 30 of 1975 in this Court. Civil Cases Nos. 173 of 1974 and 24 of 1975 are both between Gas Supply (New Hebrides) Limited and the Defendant. Civil Case No. 30 of 1975 is between a French registered company, La Société des Comptoirs Français des Nouvelles-Hébrides (henceforth referred to as C.F.N.H.), and the Defendant. Both Gas Supply (New Hebrides) Limited and C.F.N.H. are represented by Mr. D.N. Hudson of Hudson & Co. and the Defendant is represented in each case by Mr M.R. Wynter of the firm of Sly and Russell. For the purpose of decision therefore Civil Cases Nos. 173 of 1974, 24 of 1975 and 30 of 1975 are consolidated.

The facts in relation to all three cases are as follows.

Civil Case No. 173 of 1974 was started by the Plaintiff Company's issuing a specially endorsed writ for \$6,059.50 against the Defendant on the 17th December 1974. The writ was served on the Defendant on the 19th December and on the 2nd January 1975 the Plaintiff's solicitors received a letter from the Defendant's solicitors (annexure "A" to Mr Hudson's affidavit in reply to the present application) offering to pay the amount claimed in three monthly instalments. This offer was accepted by the Plaintiff but not complied with. Accordingly judgment in

default of appearance was entered for the Plaintiff in the amount claimed on the 20th February 1975.

On the 24th February Civil Case No. 24 of 1975 was started by the issue of a specially indorsed writ against the Defendant for \$2,048.80.

On the 26th February the Plaintiff filed a praecipe for a writ of fieri facias in Civil Case No. 173 of 1974 which was issued the same day, and by letter of the 4th March the Plaintiff's solicitors suggested to the Sheriff that a generator and various tractor spare parts located in Santo should be seized in execution (see annexure "C" to Mr Hudson's affidavit).

On the 10th March Civil Case No. 30 of 1975 was started by the issue of a specially indorsed writ for FNH384,530.

On the 11th March Hudson & Co. received a letter from the Defendant's solicitors offering a generator in satisfaction of their claim (annexure "D" to Mr Hudson's affidavit). It is not clear from the papers to what claim this letter related, but it seems probable that it related to the claim the subject of Civil Case No. 173 of 1974. As a result of this offer Mr Hudson made enquiries in an effort to find a buyer for this generator.

On the 12th March Mr Hudson was informed by the Deputy Sheriff at Santo that he had seized a generator, tractor spare parts and two trucks in execution of the writ of fieri facias issued in Civil Case No. 173 of 1974. On the same day the Defendant's manager at Santo telephoned Mr Hudson to the effect that a sum of \$7,000 would be paid the next day towards the Defendant's debt. On the 20th March Hudson & Co. received from the Defendant's solicitors a letter enclosing a cheque for \$3,679.70 in part payment of the claim in Civil Case No. 173 of 1974. This letter (see annexure "E" to Mr Hudson's affidavit) stated that it was hoped to pay the balance within seven days and asked that the Sheriff be instructed to take no further action in execution of the Plaintiff's writ of fi. fa. Hudson & Co. acceded to this request.

On the 25th March judgment in default was entered for the Plaintiffs in Civil Cases Nos. 24 and 30 of 1975, and writs of fi. fa. were applied for and issued these two cases.

Meanwhile on the 24th March the Defendant had applied to the Court in Civil Case No. 58 of 1975 for an order under section 241(1) of the Companies Regulation that a meeting of the Defendant's creditors be held to consider a scheme of arrangement proposed between the Defendant and its creditors. From the affidavit and proposed scheme of arrangement lodged in support of this application it appeared that the Defendant's unsecured debts were estimated at \$215,000 but that it had realisable assets the value of which was estimated at \$283,000. It was proposed that these

assets should be transferred to the New Hebrides Trust Company and that these assets be sold by the Trust Company over a period of eighteen months, thus providing funds to satisfy the Defendant's creditors. The scheme proposed that during this period of eighteen months no action should be taken by the Defendant's creditors to enforce payment of their debts or for the winding up of the Defendant company. On the 27th March this Court made the order applied for under section 241(1) of the Companies Regulation. On the same day the Defendant's solicitors notified Hudson & Co. of the Court's order and on the 2nd April forwarded to Hudson & Co. a copy of the proposed scheme of arrangement. Hudson & Co. informed the Defendant's solicitors that their instructions were to proceed with the execution of their judgments against the Defendant and on the 7th April Hudson & Co. wrote to the Sheriff (see annexure "G" to Mr Hudson's affidavit) requesting an auction sale of the goods seized by the Deputy Sheriff in Santo in satisfaction of the amounts claimed in High Court Civil Cases Nos. 173 of 1974, 24 of 1975 and 30 of 1975, less the sum of \$3,679.70 paid by the Defendant on the 20th March.

During the remainder of April further correspondence took place between Hudson & Co., the Defendant's solicitors and the Deputy Sheriff at Santo the tenor of which gives a strong impression that the Defendant was attempting to stall execution proceedings (see the correspondence marked "I", "J" and "K" annexed to Mr Hudson's affidavit). Be that as it may, on the 6th May Hudson & Co. wrote to the Sheriff requesting information as to what progress was being made for the auction sale of the Defendants' goods asked for by them.

On the 2nd June the Defendant applied to the Court to substitute a new scheme of arrangement for that on which the Court's order of the 27th March had been based. The main reason for this application was that information had come to light since the making of the Court's order to the effect that the Defendant's known unsecured debts were in the region of \$295,000 and not \$215,000, as previously stated, and that it was possible that further substantial claims against the Defendant might yet be disclosed. Accordingly it was necessary to amend the scheme of arrangement to make further assets available for the benefit of the unsecured creditors and to make other desirable modifications. This application was granted on the 5th June; a new scheme of arrangement was substituted and minor amendments were made to the Court's order of the 27th March. Copies of the new scheme of arrangement were distributed to the Defendant's creditors by the Defendant's solicitors immediately after the 5th June.

On the 11th June Hudson & Co. were informed that the auction sale of the Defendant's goods seized in Santo was to be held on the 28th June and a copy of the public notice advertising the auction was forwarded to Hudson & Co. listing not only a generator, and two Peugeot motor vehicles, but also a pile-driving hammer, a mobile crane and a stone-crushing plant. The notice contains no reference to tractor spare parts previously mentioned by the Deputy Sheriff on the 12th March. It is to be observed that the Defendant's proposed scheme of

arrangement as modified after the Court's order of the 5th June contains a schedule of the company's realisable assets proposed to be transferred to the New Hebrides Trust Company Limited. This schedule includes two generating plants, two cranes and a stone-crushing plant, all located at Santo and it seems likely that the generating plant; mobile crane and stone-crushing plant seized by the Deputy Sheriff in execution of the Plaintiffs' judgments, and advertised for sale on the 28th June, were amongst the articles listed in the schedule of realisable assets. The auction sale fixed for the 28th June was advertised at the instance of the Sheriff with effect from the 16th June on public notice boards in Vila and Santo and on four separate occasions on each of the British and French programmes of Radio Vila.

The auction sale was held on the 28th June, and on the 4th July Hudson & Co. received returns from the Sheriff in relation to the sale from which it appeared that while the two Peugeot vehicles had been sold for a total sum of \$1,150, the other four items offered for auction remained unsold - in the case of the stone-crushing plant, for want of any bid, and in the case of the remaining three articles because the bids made failed to reach the reserved prices placed on these articles by the Deputy Sheriff.

On the 3rd July Mr Hudson received an offer of \$5,000 for the four pieces of equipment unsold at the auction the total reserved price of which had been fixed at \$10,000. The following day, the 4th July, Mr D.J. Gubbay of the Defendant company, offered Mr Hudson some equipment in place of that the subject of the recent auction. The equipment was examined on the 7th July and enquiries were set afoot for its sale.

On the same day, the 7th July, a petition to have the Defendant company wound up was presented to the Court in Civil Case No. 138 of 1975, on behalf of Marac International Limited, who claimed to be a creditor of the Defendant company to the extent of \$17,333.58, the grounds of this petition being that the Defendant was unable to pay its debts, and application was made to the Court by the petitioner for the immediate appointment of a provisional liquidator of the Defendants company under section 269 of the Companies Regulation. This application, heard on the 10th July was refused the winding-up petition being set down for hearing on the 13th August.

On the 18th July Mr Hudson tried to sue out writs of venditioni exponas in Civil Cases nos. 173 of 1974, 24 of 1975 and 30 of 1975 directing the Sheriff to sell, at the best price obtainable, the pieces of equipment remaining unsold from the auction sale at Santo of the 28th June. In the absence of the resident Judge these writs did not issue until the 6th August, and on that date notices for a further sale by auction of the four remaining pieces of seized equipment, fixed for the 13th September, issued from the Court registry for publication again on public notice

boards in Vila and Santo, on Radio Vila and in the French Residency newspaper "Nabanga".

On the 13th August, the date fixed for the hearing of the petition presented by Marac International Ltd for the winding up of the Defendant company, the Court was informed that the meetings of secured and unsecured creditors of the Defendant company to consider its proposed scheme of arrangement fixed for the 11th and 12th August respectively had been held but that in both cases it had been agreed to postpone the meetings to the 9th and 10th September respectively in order that a further transfer of assets might be arranged in the meanwhile. The Court was asked to adjourn the hearing of the winding-up petition to a date after the 10th September and the hearing was accordingly adjourned to the 22nd October.

On the same day (the 13th August) Hudson & Co. were served with summonses relating to the present application for a stay of all proceedings in Civil Cases Nos. 173 of 1974, 24 of 1975 and 30 of 1975.

Mr Wynter for the Defendant grounds his application under Section 257 of the Companies Regulation on the winding-up petition presented in Civil Case No. 138 of 1975 by Marac International Ltd on the 7th July 1975, the fact that a scheme of arrangement between the Defendant and its creditors is under consideration and that the hearing of the winding-up petition has been adjourned until the Defendant's creditors have reached a decision on the proposed scheme of arrangement. Mr Wynter has drawn my attention to the paragraph relating to the staying of proceedings in Palmer's Company Law (20th edition at page 723) Part VIII Winding up of the Company, Chapter 69 Winding-up by the Court, and to the case of *Bowkett v. Fuller's United Electric Works* [\[1923\] 1 KB 160](#), where reference is made to provisions of the English Companies Acts corresponding to section 257 of the Companies Regulation. In particular Mr Wynter draws my attention to the statement in Palmer: "Where the petitioner stands over with a view to the adoption of a scheme of arrangement, the court will restrain proceedings unless a good reason to the contrary is shown.", and to the following passage in the judgment of Bankes L.J. in *Bowkett v. Fuller's United Electric Works Ltd* (at pages 163 and 164):-

"The general policy of the Court in exercising this jurisdiction, when a petition has been presented which may result in a winding-up order or a scheme, is to secure that no creditor shall thenceforward gain priority over others of his class, and when an application is made to stay proceedings under s. 140 very exceptional circumstances must exist to justify the Court in refusing to accede to the application, because if the plaintiff's action is not stayed he will get payment in full while if his action is stayed he will take his place properly among other creditors of his class. I cannot see any exceptional circumstances in the present case. To allow the plaintiff to proceed would be in effect, during the interval between the

presentation of a petition and the working out of a scheme of arrangement, to allow certain creditors to help themselves out of the assets of the company in priority to some others in a less fortunate position. No doubt the Court has a discretion whether it will stay a plaintiff's action, but it is against the policy of the Court to exercise that discretion by allowing the plaintiff to proceed except in very special circumstances."

Mr Wynter contends that there are no exceptional circumstances in the present cases to justify the Court's exercising its discretion in favour of the judgment creditors and that as a winding-up petition has been presented and a scheme of arrangement is under consideration by the Defendant's creditors, Gas Supply (New Hebrides) Limited and C.F.N.H. should not be allowed the advantage over their fellow creditors that refusal of the present application would give them either under the proposed scheme of arrangement or if that is not finally approved, in a liquidation of the Defendant company.

Mr Hudson for the judgment creditors in these three cases opposes the application. He contends that had it not been for the Defendant's repeated delaying tactics over the last seven months, the judgment creditors would have levied execution against the Defendant's property long ago and certainly before the presentation of the winding-up petition on the 7th July. Mr Hudson has pointed out that the auction sale of the Defendant's property itself took place before the petition was presented and that the current writs of venditioni exponas under which the further sale on the 13th September is ordered are all part of the original writs of fi. fa. issued in as long ago as February and March this year. He maintains that it would be unfair on the judgment creditors at this late stage in the levy of execution against the Defendant by them to deprive them of the fruits of such execution. He points out that of all the Defendant's creditors his clients alone have proceeded against the Defendant to execution, that the June auction sale of the Defendant's property was advertised for nearly two weeks before it took place yet no action was taken by the Defendant's other creditors until after the sale to prevent execution being fully levied, which it would have been had the articles for sale all been sold. Mr Hudson asks that the current execution proceedings at least be allowed to continue, by which I understand him to mean the sale of the four articles of equipment remaining unsold from the sale of the 28th June which are due, subject to the result of this application, to be put up for sale again on the 13th September.

Mr Hudson has drawn my attention to the case of *Booth v. Walkden Spinning and Manufacturing Co. Ltd* [\[1909\] 2 KB 368](#), in which the Court refused an application for a stay of proceedings in a case somewhat similar to the present except that no winding-up petition had been presented in that case. But in my view it is the presentation of a winding-up petition that is vital in the present case one of the consequences of such presentation being that an application to stay proceedings made after presentation of a petition will only be refused in exceptional circumstances. In my view the case of *Booth v. Walkden Spinning and*

Manufacturing Co. Ltd is of little assistance to me in deciding on the exercise of my discretion in this case, and I prefer to turn to the somewhat analogous cases under section 325(1) of the English Companies Act 1948 which corresponds to section 347(1) of the Companies Regulation. This section provides, as far as is relevant, as follows:-

"Where a creditor has issued execution against the goods or lands of a company..... and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution..... against the liquidator in the winding up of the company unless he has completed the execution before the commencement of the winding up: Provided that..... (c) the rights conferred by this subsection on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court may think fit."

In my view the English cases cited in Halsbury's Laws of England (4th edition) Volume 7 - Companies under (27) Winding up by the Court - Execution and Attachment paragraph 1354, note 7 - are apposite: in particular *Re. Grosvenor Metal Co. Ltd* [\[1949\] 2 AER 948](#); *Re. Suidair International Airways Ltd* [\[1950\] 2 AER 920](#) and *Re. Redman (Builders) Ltd* [\[1964\] 1 AER 851](#), in which it was held that the English section 325(1) proviso (c) "gives the court a free hand to do what is right and fair according to the circumstances of each case" - see the judgment of Pennycuik J. in *Re. Redman (Builders) Ltd* [\[1964\] 1 AER 851](#) at p.860, letter A.

While it may be argued that the discretion given to a court under the English section 325(1) - the Companies Regulation section 347(1) - is considerably wider than that in respect of the staying of proceedings under section 257 of the Companies Regulation in the light of the judgment of Bankes L.J. in *Bowkett v. Fullers United Electric Works Ltd* quoted earlier in this judgment, I doubt whether in fact this is really so. In *Bowkett's* case the plaintiff had obtained final judgment against the defendant company after the petition to wind up the company had been presented; there was no question in that case of execution being levied and in my view the following remark appearing in the judgment of Scrutton L.J. (at page 165) is significant:-

"If there were special circumstances the Court of Appeal would be slow to interfere with the discretion of the judge in chambers, but something must be shown beyond a judgment and an impending execution to induce the Court to depart from what I understand to be the ordinary practice in the Chancery Division, which is to stay proceedings so that all creditors of the same class may be dealt with on equal terms."

In the present cases, not only had the Plaintiff companies obtained final judgments long before a winding up petition was presented but they had also proceeded far in the execution of those judgments before a petition was presented.

There is therefore, referring to the dictum of Scrutton L.J. quoted above, considerably more to be shown in the present cases than "a judgment and an impending execution", and it appears to me that there is a close analogy here to a creditor applying to retain the benefit of an execution as against a company liquidator under section 347(1) of the Companies Regulation.

In my view the circumstances in the present cases are such as in my opinion to justify my exercising my discretion in favour of the judgment creditors to the extent only that the writs of venditioni exponas issued on the 6th August in Civil Case Nos. 173 of 1974, 24 of 1975 and 30 of 1975 should take effect, even though this may result in depriving other unsecured creditors of the Defendant of assets at present available in satisfaction of their claims either under the proposed scheme of arrangement or, in the event of that not being approved, in the company's liquidation in the event of that being ordered. It was, in my view, quite plain to other unsecured creditors of the Defendant that the judgment creditors in the present three cases were levying execution of their judgments against goods of the Defendant some at least of which appeared to be included in the schedule of the Defendant's realisable assets appended to the proposed scheme of arrangement which has been in creditors' hands since early June. Advertisements for the auction sale of these goods were put out from June 16th onwards. Yet no other unsecured creditor took steps to prevent execution, being levied by filing a winding up petition against the Defendant and applying to the Court for a stay of proceedings, as is now being done. A winding up petition was only presented by one of the Defendant's other unsecured creditors, Marac International Ltd, nine days after the auction sale of the 28th June had taken place. And no application for stay of proceedings was made until the 13th August - over a month later, and a week after further advertisements had issued for a further auction sale for the 13th September of items of equipment remaining unsold from the sale at the end of June. Furthermore it is to be observed that the present application is made not by one of the Defendant's unsecured creditors but by the Defendant itself. In these circumstances it appears to me that it would be quite unjust, at this final stage of levy of execution of their judgments against the Defendant, to deprive the judgment creditors of the fruits of their judgments.

Accordingly, the sale fixed for the 13th September 1975 of the four items of equipment seized by the Deputy Sheriff in Santo in execution of the writs of fi. fa. issued in Civil Cases Nos. 173 of 1974, 24 of 1975 and 30 of 1975 and remaining unsold at the auction sale of the 28th June will be allowed to take place, and the judgment creditors will be allowed to retain the proceeds, subject to the payment of all fees incurred, in satisfaction of their judgment debts. Subject to this qualification the present application is granted and all further proceedings in execution of the judgments obtained in Civil Cases Nos. 173 of 1974, 24 of 1975 and 30 of 1975 will be stayed.

On the question of costs. In my view this application was made quite properly by the Defendant in the interests as a whole of its unsecured creditors. On the other hand, I see no reason why Gas Supply (New Hebrides) Limited and C.F.N.H. should not have their costs. I have decided therefore to direct that the Defendant pay the costs of the plaintiff companies in so far as this application is concerned.

DATED at Vila this third day of September 1975.

D.R. Davis
ACTING CHIEF JUSTICE.