

35/1962

UNIVERSITY OF LONDON IN THE PRIVY COUNCIL

No. 15 of 1961

ADVANCED
FEES

O N A P P E A L

MAR 1963

FROM HER MAJESTY'S COURTS OF APPEAL FOR EAST AFRICA

2, RUSSELL SQUARE
LONDON, W.C.1.

B E T W E E N :-

68280 MUSABAHI NOORMOHAMED TEJANI
EBRAHIM NOORNOHAMED TEJANI
ALLIBHAI SULEMAN KABA

Appellants

- and -

THE OFFICIAL RECEIVER

Respondent

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C A S E ON BEHALF OF THE APPELLANTS

Record

1. This is an appeal from a judgment of the Court of Appeal for Eastern Africa (Gould A.G. V-P, O'Connor P. and Windham J.) dated 27th July 1960 dismissing an appeal by the Appellants from an order of the High Court of Uganda (Sheridan J.) given on 11th March 1960 by which the said Court dismissed an application by the Appellants to discharge an order of the said High Court (Bennett J.) dated 25th January 1960 by which the Appellants were ordered to attend before the said High Court to be publicly examined as to the conduct of the business of Industrial Oil Products Corporation Limited (in this case referred to as "the Company") and as to their conduct and dealings as directors. Final leave to bring this appeal was granted by order of the said Court of Appeal dated 4th May 1961.

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pp.35/36

p.16

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pp.58/59

2. The power to order a public examination as aforesaid is conferred by section 214 of the Companies Ordinance (Cap.212 of the Laws of Uganda), and such order is made pursuant to a Further Report of the Official Receiver made in accordance with section 182 of that Ordinance.

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3. The Official Receiver made a Further Report dated 22nd October 1959. In the Further Report the Official Receiver stated that in her opinion (such Official Receiver being a woman) a fraud had been committed by four Directors

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(including the Appellants) since the formation of the Company.

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pp.8/15

4. The Further Report set out as facts allegations by the Official Receiver relating to the Company and the conduct of its business. For the purpose of this appeal the material allegations are in paragraphs 10 to 12 inclusive of the Further Report as supported by Annexures "A" to "E" thereof.

5. The allegations made in such three paragraphs are under three heads. 10

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pp.8/15

6. The said paragraph 10 alleges that since the end of 1955 the directors of the Company appear to have been aware that the Company was insolvent. Minutes of certain Board meetings are annexed to the Further Report in support of this allegation.

7. In Paragraph 11 of the Further Report the Official Receiver alleges that the Directors of the Company appear to have carried on business with intent to defraud creditors and for fraudulent purposes. She then alleges that this fraudulent trading is evidenced in two ways, and she follows this allegation by two sub-paragraphs. 20

p.5 line 11
p.5 line 40
p.6 line 1

8. The first of such sub-paragraphs refers to a statement alleged to have been prepared by the Company in order to obtain an extension of credit from the Lint Marketing Board and to obtain a licence to bid at a certain auction. The second sub-paragraph states that the credit obtained from the Lint Marketing Board was misapplied and appears to attempt to support this statement by two examples. 30

9. Paragraph 12 of the Further Report alleges certain illegal payments.

p.6 line 26

(a) The illegality is in the first two cases (sub-paragraphs (i) and (ii)) alleged to be upon technical grounds that two dividends paid by the Directors were not permitted by the Articles of Association of the Company. 40

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(b) the alleged illegality in sub-paragraph (iii) concerns the manner in which certain items were dealt with in the Company's books.

10. The Official Receiver concludes by alleging that a fraud has been committed by the Appellants.

p.7

11. Nothing appears from the judgment of Mr. Justice Bennett ordering on the ex parte application the public examination of the Appellants to show the grounds upon which he made his decision.

10 12. Mr. Justice Sheridan in his judgment on the application to discharge the said order of Mr. Justice Bennett in effect declined to re-examine the evidence upon which Mr. Justice Bennett had made such order for reasons set out in the last paragraph of his judgment. He says that the question whether the applicants did take part, as reported by the Official Receiver, in the fraud is one of the every things which it is the object of the examination to ascertain, and relies upon a judgment of Mr. Justice Wright in In re National Stores Ltd. (1899) 2 Ch. D. 773, at page 776.

p.34

pp.34/35

p.34 line 42

20 13. The Court of Appeal considered that the approach of Mr. Justice Sheridan was not the right one. The first and only full judgment in the Court of Appeal was delivered by Gould AG. V-P, with which O'Connor P. and Windham J. agreed. This appeal is concerned with the part of the Learned Vice-President's judgment beginning at line 18 on page 52.

p.52, line 26

p.52, line 18

30 14. The Learned Vice-President found as follows:-

(i) that if an order for examination was oppressive, it would be discharged;

p.52 line 29

(ii) that an order would be oppressive if it was made upon a report which did not contain allegations which would amount to a prima facie case against the individual to be examined (citing In re Barnes 1896 A.C.146)

p.52 line 32

40 (iii) that an appellate court should consider whether the further report sufficiently supported the opinion of the Official Receiver (citing In re Civil, Naval and Military Outfitters Ltd. (1899) 1 Ch.D.215.

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15. The Learned Vice-President then said that without going into detail, he was of the opinion that the Further Report here in question clearly supported the opinion of the Official Receiver: he gave no reasons.

16. The Appellants submit that the findings of the Learned Vice-President set out in paragraph 14 of this case are correct findings of law: but they contend that the judgment of the said Court of Appeal was wrong on the following among other grounds:

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(1) The facts alleged in the Further Report do not establish a prima facie case against any one Appellant. Such facts as are alleged are alleged generally and do not show knowledge or awareness of or an act or omission of any individual Appellant. In the circumstances each order for examination of the individual Appellants was made on inadequate material and should be set aside.

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(2) The facts alleged in the Further Report do not support the opinion of the Official Receiver.

(3) Every alleged act of the Appellants referred to in the Further Report is prima facie proper and justifiable whether such act is looked at by itself or in the context of the whole of the Further Report.

(4) The facts alleged in the Further Report do not establish a prima facie case of fraudulent trading, or of a carrying on of the business of the Company with intent to defraud creditors or for any fraudulent purpose by any person, still less by any individual Appellant.

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In particular

(a) there is no allegation that the Appellants or any of them were aware before the end of 1955 that the Company was insolvent and there is no evidence to suggest

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(i) that before such date any act of any of the Appellants was in any fraudulent,

or

(ii) that after such date any act of any of the Appellants was not an act in good faith with a view to ensuring the restoration of the Company's position

(b) there is no sufficient evidence that the Company was at the end of 1955 or at any time insolvent

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(c) the Further Report neither alleges nor shows that the Appellants, and still less any individual Appellant, were responsible for the preparation of the Statement referred to in paragraph 11 of the Further Report

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(d) there is no evidence other than a bare statement by the Official Receiver (which is insufficient for the purpose of seeking orders for examination of the Appellants) that the Statement referred to in such paragraph 11 was wrong or unjustified.

(e) The evidence in paragraph 11(ii) of the Further Report purporting to support the allegation that credit obtained from the Lint Marketing Board was misapplied is inconsistent and unintelligible in the context and, in so far as it is grammatically intelligible, it does not support the said allegation

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(f) In so far as the Further Report refers to alleged illegal payments no fact is alleged to show and no allegation is made that any such payment contained an element of fraud

(g) None of the payments referred to in paragraph 12 of the Further Report and alleged to be illegal was, as the facts there set out show, illegal.

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(h) There is no evidence that the Appellants or, still less, any particular Appellant, were parties to the payments and entries in the books referred to in the said paragraph 12.

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(i) There is no evidence to show that any payment of dividend was made out of capital.

PETER CURRY