7 ORIGINAL

IN THE HIGH COURT OF AUSTRALIA.

OF 1943. No 7

The English Scottish and Australian Bank Limited.

V.

Burns.

REASONS FOR JUDGMENT.

Writ issued 31/8/44 Full returned

Delivered at Sydney

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ORIGINAL

THE ENGLISH SCOTTISH AND AUSTRALIAN BANK LIMITED

v.

BURNS

ORDER

Appeal allowed. Order of Court of Bankruptcy set aside. In lieu thereof order that motion be dismissed and that appellant's costs of motion and of appeal to this Court be paid by respondent.

THE ENGLISH SCOTTISH AND AUSTRALIAN BANK LIMITED

v.

BURNS.

REASONS FOR JUDGMENT. LATHAM C.J.

THE ENGLISH SCOTTISH AND AUSTRALIAN BANK LIMITED

v.

BURNS.

REASONS FOR JUDGMENT. LATHAM C.J.

I agree with the judgment of my brother Williams and will state my reasons briefly. The company owed no debts. Its assets were valued in the balance sheet of 30th June 1942 at £12,000. Upon this basis the 2800 shares would be worth over £4 each. It was not shown that the assets were worth the amounts at which they were valued in the balance sheet. But monies in the bank belonging to the company represented 19/3 per share without taking any other assets into account. The evidence does not, in my opinion, justify the finding that the shares were worth only 10/- each. If the 93 shares owned by Bryan were worth only 13/- each their value would exceed the amount (£59:19;3) of Bryan's debt to the Bank at the relevant date, so that the payment then --- made would not have the effect of giving any preference priority or advantage to the guarantors. Upon the evidence it should have been found that the shares were worth at least 13/- each.

The appeal should be allowed with costs. As to the respondent trustee's liability in respect of costs see Ex parte Angerstein, L.R. 9 Ch. 479: Pitts v. La Fontaine, 6 A.C. 482: In re Mackenzie, 1899 2 Q.B. 566 at p. 578.

THE ENGLISH SCOTTISH AND AUSTRALIAN BANK LIMITED

v.

BURNS.

JUDGMENT. RICH J.

THE ENGLISH SCOTTISH AND AUSTRALIAN BANK LIMITED.

v.

BURNS.

JUDGMENT. RICH J.

I find it unnecessary to pass upon the questions dealt with in the trial Judge's careful judgment because my opinion upon the question which arose as to the appropriate valuation to be given on the evidence to the shares in the Alpha Silver Lead Mining Co. Ltd. is sufficient to dispose of this appeal. I venture to differ from the learned Judge's opinion on this question. No doubt interesting questions may from time to time arise as to the method of valuing shares in similar companies to the one now in question. But on the facts appearing in the learned Judge's judgment in which he fully discusses the two methods of valuation given in evidence I prefer that of Mr. Thompson to that of Mr. Hodgetts. The latter's valuation is based upon the opinion which he considered a reasonably prudent purchaser might pay for the shares in this company. This, as with all questions of value as to shares, is a variable and somewhat uncertain matter. On the other hand I think the valuation of Mr. Thompson has a concrete basis determined by the actual assets belonging to the company which are available for distribution amongst its shareholders. The company itself is not now carrying on any mining operations, perhaps owing to restrictions caused by the war, and although its future fortunes cannot be the subject of any reasonable forecast, I think we should be guided by the company's actual condition at the relevant date: that, in my opinion, is a safer test of the values than that underlying Mr. Hodgetts' valuation.

For the reasons I have stated the bank might be said to have had a security which would satisfy the debt due to it and this being so the Official Receiver's claim that there were preferences under sec. 95(1) of the Bankruptcy Act in favour of the bank cannot be sustained. Accordingly the construction of the unique section (sec. 97) of the Act and its application to the facts do not call for discussion.

The appeal should be allowed.

ENGLISH SCOTTISH & AUSTRALIAN BANK LTD.

V.

BURNS, OFFICIAL RECEIVER.

JUDGMENT STARKE J.

Appeal from a judgment of the Court of Bankruptcy, District of South Australia, which ordered the appellant Bank to pay to the respondent, the official receiver and trustee of the estate of Laurence Bryan, the sum of £733.5.6, being moneys paid by Bryan to the Bank on and after the 24th March 1941.

Bryan was a draper in a small way who carried on business in Broken Hill from about the year 1938. At first his business seems to have been a success, but it gradually became unprofitable and closed down about May 1941. Bryan had a current account with the Bank which he worked on overdraft. For some time the overdraft limit was £170, but that limit was gradually reduced and about February 1941 was fixed at £60. On the 25th March 1941 the overdraft stood at about £60, but the Bank held securities to cover it, namely, 150 shares in the Alpha Silver Lead Mining Development Co. Ltd., of which 93 belonged to Bryan and the balance apparently to his father-in-law, one Kearns, and also a guarantee by a solicitor limited to £100 in respect of principal moneys. On the 24th September 1941 Bryan's estate was sequestrated, and the respondent Burns, who was an official receiver, became his trustee. Six months before the presentation of the petition upon which the sequestration order was made, namely, on the 24th March 1941,

the bankrupt paid into his current account at the Bank two sums, one of £20 (Hamery's cheque) and the other of £20.5.0, and drew from the Bank on the same date two sums, one of £8.10.0 and the other of £11.11.0. The course of the business between the bankrupt and the Bank was not altered after the 24th March. Moneys were paid into and credited to the account and moneys were paid out and debited to it in the ordinary way of banking business.

An intention on the part of the debtor to prefer is not necessary under the Bankruptcy Act 1924-1933 in order that a transaction should have the effect of giving a creditor a preference over the other creditors of the debtor (S. Richards & Co. Ltd. v. Lloyd (1933) 49 C.L.R. 49). And it has been held that the payments into the Bank on the 24th March 1941 were acts of bankruptcy amounting to voidable preferences within the meaning of S. 52(c) of the Bankruptcy Act 1924-1933 and, being within six months of the presentation of the petition on which the sequestration order was made, were available acts of bankruptcy and that with regard to these and all subsequent payments to the credit of the Bank account S. 90 of the Bankruptcy Act applied and by virtue of that section the trustee's title to recover those payments as part of the bankrupt's estate was established. It was conceded that the Bank had not been preferred, but the judgment affirms that the payments into the Bank after the 24th March 1941 had the effect of giving the guarantor and the surety (Kearns) of the bankrupt a preference or an advantage over other creditors. The result was an order on the Bank to pay the sum of £733.5.6 already mentioned.

But had these payments of the bankrupt the effect of giving a preference or advantage to the guarantor and surety over other creditors? The bankrupt had been in financial difficulties for some time before the 24th March 1941 and was then unable to pay his debts as they became

due from his own moneys. The Bank knew this but was helping to keep him afloat and to carry on his business in the interest of all concerned, creditors as well as the bankrupt. It had granted him a small overdraft the limit of which was in February 1941 £60, as already mentioned. The bankrupt had deposited with the Bank 93 Alpha Co. shares which were his own property as security for his overdraft in addition to the other shares deposited by his surety and the guarantee already mentioned. If the Bank or the bankrupt realised or could realise his 93 Alpha Co. shares for more than the amount of the overdraft, the payment into and out of the bankrupt's account at the Bank in the ordinary course of business could not have the effect of giving the surety or the guarantor any preference or advantage. But the judge in bankruptcy assessed the value of these shares at 10/- each, and I notice that the Bank manager in his reports of October 1940 and February 1941 suggests a value (safely valued) at 12/- and his diary entries of February and April 1941 value the Bank's security at £100, which probably refers to the guarantee and treats the shares as valueless for the Bank's purposes. The Alpha Co. had nearly £3,000 on fixed deposit or at call in the years 1940-1942, but it was not carrying on operations and was steadily losing money and its shares were not saleable, or, at all events, could not be readily sold. There is evidence, I think, upon which it may reasonably be concluded that the 93 Alpha shares were not worth more than 10/- each whether the judge in bankruptcy did or did not give full weight to the fact that the company had considerable liquid assets. No shareholder of the company could claim a distribution of those assets until the company distributed them either as dividends or in a winding up. And mining shares are proverbially speculative and risky investments. But do these facts warrant the conclusion that any preference or advantage was given to the guarantor

and surety over other creditors? The transactions of 24th March 1941 should be viewed as a whole and not separately. The result of the operations of the day was to reduce the overdraft by £20, that is, to £40, against which the Bank held security over the bankrupt's Alpha shares valued at £46. It is said that this results in an advantage or preference to the surety of some £14. The liability, however, of the surety on his guarantee, which was limited to £100, remained/and the amount of that liability rose and fell according to the state of the bankrupt's account with his banker. The operations of the 24th March did not affect that liability and the amount for which the surety was liable might in the ordinary way of business as that account rose and fell involve him in liability greater than his potential liability of £14 on the 24th March. The mere fact that such a liability is or may for the time being be reduced in a fluctuating account does not necessarily establish as a matter of fact or of business that any preference or advantage has been given to a guarantor of such an account. The subsequent transactions between the bankrupt and the Bank have the same general characteristics and give similar results.

A finding that the payments to the Bank, in these circumstances, and in the ordinary course of business, worked a preference or advantage to the surety and guarantor over other creditors ought not, in my judgment, to be sustained. And, if it were, the Bank is protected under the Act as a payee in good faith for valuable consideration and in the ordinary course of business.

Good faith for the purposes of S. 95 of the Act is established, I think, if a payee is innocent of knowledge of a preference or advantage or of notice of facts that constitute a preference or advantage to other creditors. The facts of the present case establish satisfactorily, I think, that the Bank was innocent of any such knowledge or notice.

The Bank knew that the bankrupt was unable to pay his debts as they became due out of his own moneys, but it was financing and helping him to carry on his business so that he might meet his obligations to it and to other creditors. The facts before it did not suggest a preference or advantage to its surety and guarantor, for the bankrupt's account was running, rising and falling, though finally reduced, but all the while maintaining the liability of the surety and the guarantor for the amount of the overdraft within the limits agreed upon by them.

The appeal should be allowed.

THE ENGLISH SCOTTISH AND AUSTRALIAN BANK LIMITED

v.

BURNS.

JUDGMENT.

McTIERNAN J.

THE ENGLISH SCOTTISH AND AUSTRALIAN BANK LIMITED

v.

BURNS.

JUDGMENT. McTIERNAN J.

In my opinion the appeal should be allowed.

I agree with the views expressed by my brothers Rich and Williams as to what should be the proper conclusion upon the evidence as to the value of the shares.

In this view it follows that there is no ground for finding that the payments into the bankrupt's account which are in question were preferences.

THE ENGLISH SCOTTISH & AUSTRALIAN BANK LIMITED

V

BURNS

Judgment — Williams J.

The material facts shortly stated are that L Bryan filed a petition under the provisions of the Federal Bankruptcy Act 1924-1933 upon which an order was made on 24th. September 1941 sequestrating his estate.

The bankrupt who had been carrying on a small business as a clothier at Broken Hill in the State of New South Wales had a current account with the appellant Bank, which was first opened on 22nd August 1938. The Bank allowed the bankrupt a small overdraft the limits of which varied between £170 and £60. On 24th March 1941, that is six months before the filing of the petition, the limit of the overdraft was £60 and the amount in fact overdrawn about that sum.

The Bank held as security for the overdraft 93 shares in a local mining company called the Alpha Silver Lead Mining Development Co. Ltd. the property of the bankrupt, 50 shares in another local company, New Broken Hill Consolidated Ltd., lodged by J I Kearns, his father-in-law, and a guarantee with a limit of £100 given by E R Hudson, a local solicitor. On 24th March 1941 two payments totalling £40/5/- were made into the account by the bankrupt, and subsequently, between that date and 7th June 1941, other payments in were made from time to time, the whole of these payments totalling £733/5/6. At the same time the bankrupt was withdrawing small sums from time to time out of the account, the balance of payments in over withdrawals in the same period amounting to about £52.

The official receiver filed a motion under the provisions of the Bankruptcy Act claiming that the payments into the account on and after 24th March 1941 were acts of bankruptcy within the meaning of sec.52(c) of the Act,

so that under sec.90 the title of the official receiver related back to 24th March 1941, and asked for payment by the Bank to the estate of the whole of the above sum of £733/5/6. The learned Judge in Bankruptcy made an order for such payment and it is against his order that the Bank has appealed to this Court.

The first question that arises is whether the payments into the account on 24th March 1941 were acts of bankruptcy. Sec.52(c) of the Bankruptcy Act provides, so far as material, that a debtor commits an act of bankruptcy if within Australia he makes any conveyance or transfer of his property or any part thereof which would under this Act be void as a preference if he became bankrupt. Sec.95(1) provides, so far as material, that every payment made by any person unable to pay his debts as they become due from his own money, in favour of any creditor, having the effect of giving that creditor or any surety for the debt due to that creditor a preference over the other creditors shall, if the debtor becomes bankrupt on a bankruptcy petition presented within six months thereafter be void as against the trustee in bankruptcy. In order, therefore, to establish that the payments into the account on 24th March 1941 were acts of bankruptcy, it was necessary for the official receiver to prove the facts referred to in sec.95(1). There was evidence upon which His Honour could find that at that date Bryan was unable to pay his debts as they became due from his own money, so that the crucial question is whether the effect of these payments was to give the Bank as the creditor or Kearns and Hudson as sureties a preference over the other creditors. The learned Judge held that that was the effect.

The answer to the question depends upon whether or not at that date the 93 shares in the Alpha Silver Lead Mining Development Co Ltd were sufficient in value to repay the overdraft. If they were, then these payments could not be a preference, either to the Bank or to the guarantors, because if the Bank recouped itself out of these shares then well and good, while if it recouped itself out of the shares lodged by Kearns by way of guarantee

or by calling upon Hudson to pay under his personal guarantee, the guarantors would be entitled by subrogation to the benefit of the bankrupt's shares.

Two witnesses, both members of the Adelaide Stock Exchange, gave evidence before His Honour as to the value of the 93 shares on 24th March 1941. Mr Hodgetts valued the shares at 10/- while Mr Thompson valued them at 22/-. His Honour accepted Mr Hodgetts' valuation and found in consequence that on24th March 1941 the overdraft was not secured by the bankrupt's own property. He found, therefore, that the Bank, in order to recoup itself on that date, would have had to call on the guarantors, so that the payments into the account on 24th March 1941 had the effect of preferring the guarantors to the other creditors within the meaning of sec.95(1).

To this method of approach no objection can, in my opinion, be taken, but as nothing turned on the credibility of these witnesses it is quite open to this Court to reconsider whether His Honour was right in accepting Mr Hodgetts' valuation and rejecting that of Mr Thompson. The methods which the two valuers adopted are set out in His Honour's judgment and I need not repeat them.

Briefly stated, the facts are that in March 1941 the Alpha Silver Lead Mining Development Co Ltd was not engaged in any mining operation. It was what one of the witnesses called 'in recess' and whether it would wind up or engage in some further mining venture was problematical. But it was at the time incurring practically no expenses; its capital was £14,000 divided into 2,800 shares of £5 each; it had no debts; the value of its assets as stated in its balance sheet as at 30th June 1942 was approximately £12,000, but many of these assets were of doubtful value. They included, however, a bank deposit of £2,500 and a balance in the Bank of £198, these two sums totalling £2,698, so that, taking the cash resources of the company alone, the shares were worth approximately 19/3 per share.

Mr Hodgetts valued the shares by estimating what a prudent purchaser would be likely to pay for them on

the basis that the company would not go into liquidation but would engage in a fresh venture, while Mr Thompson considered that the only way to value them was on a liquidation basis. There are difficulties in the way of both these methods because the company was not doing any business and was not paying any dividends, but on the other hand it was probable that it would not wind up but would engage in some fresh venture. But the Court must assume that the directors would deal with the assets with due care for the interests of the shareholders, and that, unless they speedily found a means of embarking the assets in a fresh business and one that they considered would be profitable, they would take the proper course of winding up the company and distributing the assets amongst the shareholders. Where a bank holds security for an overdraft it cannot be said not to be fully secured because on a particular date the security, if it had to be realised on that date, would not repay the bank in full. It would be fully secured on that date if the reasonable probabilities were that within a reasonable time it would recover the full amount of the overdraft and interest out of the security. In the present case it appears to me that on 24th March 1941 the reasonable probabilities were that the Bank would recover 20/- in the £. of the amount of the Bankrupt's overdraft with interest within a reasonable time out of the 93 shares, either by the company going into liquidation or by the company embarking its assets in a fresh venture worth in security for capital and dividend prospects the amount of the capital so invested and therefore giving the shares a sale value of at least £1. I am therefore of opinion that His Honour should have found that the bankrupt's shares were adequate security for the amount of the overdraft, or at least should not have been satisfied that the shares were not worth that amount. In either case the result would have been that the official receiver would have failed to prove that the two payments into the account on 24th March 1941 were acts of bankruptcy. As the case sought to be made by the official

receiver fails on this ground, it is unnecessary to discuss the defences that were open to the Bank if the payments had been preferences.

For this reason I would allow the appeal.