

ROYAL COURT
(Samedi Division)

165.

19th September, 1996

Before: Sir Philip Bailhache, Bailiff, and
Jurats Herbert and Vibert

**In the matter of the Representation of Richard Anthony Fontayne
England, Liquidator of Dolfinne Developments Pty Limited and J.N.
Taylor Finance Pty Limited.**

**In the matter of Fenbury Limited and an Application under Article
175(1) of the Companies (Jersey) Law 1991.**

Representation of Richard Anthony Fontayne England.

**Representation of Hongkong and Shanghai Banking Corporation and
Hongkongbank of Australia Limited.**

**Application of Michael Henry Richardson and Anthony James
Dessain for leave for them and Premier Circle Limited, Second Circle
Limited and Third Circle Limited to intervene.**

Advocate M.J. Thompson for R.A.F. England.
**Advocate T.J. Herbert for Hongkong and Shanghai
Banking Corporation and Hongkongbank of Australia Ltd.**
**Advocate M.P.G. Lewis for M.H. Richardson and
A.J. Dessain.**

**The Attorney General convened at the instance of the
Hongkong and Shanghai Banking Corporation and
Hongkongbank of Australia Ltd.**

JUDGMENT

THE BAILIFF: This is an application under Article 175(1) of the Companies
(Jersey) Law, 1991 (to which we shall refer as "the Companies Law") by
Richard Anthony Fontayne England ("Mr. England") seeking the appointment
of David Waters ("Mr. Waters") as liquidator of a company registered in
5 Jersey called Fenbury Limited ("Fenbury").

Fenbury is said to be owned by an Australian company called
Dolfinne Developments Pty Limited ("Dolfinne") which is in turn said
ultimately to be owned by another Australian company called J.N. Taylor
10 Holdings Limited ("JNTH"). Both Dolfinne and JNTH are in liquidation
and Mr. England is a duly appointed liquidator of both. JNTH is in turn
a partially owned subsidiary of a group of companies known as the Bond

Corporation Holdings Limited group ("BCHL"), which is now also in liquidation.

5 On 24th November, 1994, Fenbury was dissolved and struck off the register of companies for failure to comply with certain statutory requirements.

10 On 11th August, 1995, Mr. England received advice from Messrs. Bedell and Cristin as to the procedures to be followed in order to procure his appointment as liquidator of Fenbury in Jersey.

15 Following that advice Bedell and Cristin were instructed by Mr. England's Australian solicitors to place Fenbury in liquidation and to seek Mr. England's appointment as liquidator. As a first step an application was made to this Court by the registered shareholders on 1st September, 1995, and the Court duly declared the dissolution void pursuant to the provisions of Article 213 of the Companies (Jersey) Law 1991.

20 On 7th September, 1995, an Order for the winding up of Fenbury was made under Australian Law by the Supreme Court of South Australia and Mr. England was appointed liquidator.

25 Fenbury's only asset was a motor vessel from which it derived income through charter. In 1989 it was provided to The Hongkong and Shanghai Banking Corporation Limited ("HSBC") and its subsidiary, Hongkongbank of Australia Limited ("HKBA"), as part of a parcel of securities in consideration of the grant by HKBA to BCHL of an Aus\$50 million overdraft facility.

30 As has been mentioned Fenbury's holding company, JNTH, was only a partially owned subsidiary of BCHL.

35 On 7th and 8th December, 1995, in his capacity as liquidator in Australia of Fenbury, Dolfinne and JNTF, Mr. England instructed his solicitors to serve on HSBC in Hong Kong and on HKBA in Australia proceedings filed in the Supreme Court of South Australia, alleging *inter alia* knowing receipt of trust property and/or knowing participation in breaches of fiduciary duty by the directors of Fenbury by pledging the vessel owned by Fenbury as security for the overdraft facility.

45 Furthermore it was suggested that this facility was provided by HKBA to BCHL in circumstances where there was an absence of corporate benefit to Fenbury and consequently that HKBA and HSBC were liable for losses to the order of Aus\$10 million suffered by Fenbury, Dolfinne and JNTF. It appears that the interlocutory stage of the Australian litigation is well advanced. It also appears that third party notices have been instituted in the Australian proceedings against Bedell & Cristin, Advocate Richardson and Advocate Dessain in their capacity as directors of Fenbury for alleged breach of fiduciary duties.

55 In the meantime, on 28th December, 1995, the registered shareholders of Fenbury passed a special resolution pursuant to Article 157 of the Companies Law for a winding up under chapter 4 of the Law. The Extraordinary General Meeting was followed by a meeting of creditors at which Mr. England was appointed as liquidator of Fenbury in Jersey.

5 On 11th June, 1996, HKBA filed an application in the Australian winding up of Fenbury seeking to intervene to have that liquidation set aside or revoked on the ground *inter alia* that Fenbury was not carrying on business in Australia at the time it was purportedly placed in liquidation in that country. The application is now listed for hearing in Australia on Monday, 23rd September. The application is supported by an affidavit sworn by Mr. Ian Colin James, a Jersey solicitor, which 10 challenged the validity both of the creditors' winding up of Fenbury and of the appointment of Mr. England as liquidator. One of the grounds for challenging the validity of Mr. England's appointment - namely that he does not fall within the categories of qualified persons set out in the Companies (General Provisions) (Jersey) Order 1992 - is now accepted by Mr. Thompson acting for Mr. England. 15

It appears that Mr. England was wrongly advised in the letter from Bedell & Cristin of 11th August, 1995, to which we have referred that there were no specific qualifications for a liquidator of a private company in Jersey. 20

That is the background to the present application by Mr. England. Although formal notice of this application was not given to HSBC and HKBA their legal advisers came to hear of it. Copies of the relevant documentation were sent to their legal advisers and both companies now 25 seek by representation leave to intervene. That leave was given without objection from counsel for Mr. England on the basis that HSBC and HKBA are creditors of Fenbury in respect of a costs order made in their favour in the Australian proceedings.

30 The Court began hearing the summons on 16th September and argument resumed this afternoon. In the interim a number of further affidavits have been filed, including one affidavit sworn by Advocate Richardson as to the procedures followed at the Extraordinary General Meeting of Fenbury at which the company was placed in liquidation. In the light of 35 that affidavit Mr. Herbert, who appears for HSBC and HKBA withdrew the argument that the creditors' winding up was invalid. This was a wise decision; we see no force at all, on the affidavit evidence before us, in the argument that the creditors' winding up is void for procedural defect. It follows that the Court has the power pursuant to Article 175 of the Companies Law to appoint a liquidator because "*....there is, in a creditors' winding up, no liquidator acting*". 40

The next question is whether we should accede to the application of Mr. England that Mr. David Waters, a chartered accountant practising with Ernst and Young in Jersey, should be appointed as Fenbury's Jersey 45 liquidator. All counsel were agreed that Mr. Waters is a competent insolvency practitioner whose integrity is unquestioned. Three points were, however, raised by Mr. Herbert and by Mr. Lewis who was granted leave to intervene on behalf of the directors and registered 50 shareholders of Fenbury. These points were raised with some diffidence, Mr. Lewis in particular stressing that his clients did not wish to argue against the appointment of Mr. Waters but rested on the wisdom of the Court. The points were however relevant, counsel submitted, to the exercise of the Court's discretion. In essence it was suggested that 55 Mr. Waters' position as a partner of Ernst and Young in Jersey might prevent him from exercising the necessary independence of judgment *vis à vis* Mr. England who is a partner or associate of Ernst and Young in

Australia. It is not in issue however that the firms, though bearing the same name, are independent partnerships in law.

5 The first point developed by Mr. Herbert was that there might have
been procedural irregularities surrounding the placing of Fenbury in
liquidation which merited investigation even if they did not go to
invalidate the creditors' winding up. It was possible that infractions
of the Companies Law had been committed, particularly by the company and
its directors, but also possibly by Mr. England. We do not think that
10 these alleged irregularities tell against the appointment of Mr. Waters,
who will have no part to play in their investigation. We agree,
however, that they do merit investigation and we accordingly direct the
Greffier to refer the relevant papers to the Registrar of Companies so
that consideration can be given as to whether any further action should
15 be taken.

The second and third points were advanced by Mr. Lewis to whom
incidentally we are indebted for a most helpful outline submission.
Those points arise, counsel submitted, because Mr. England's
20 representation was made in his capacity as liquidator of Dolfinne and
JNTF and issues might arise between the new liquidator and Mr. England
acting in those capacities. The first was whether Dolfinne - of which
Mr. England is liquidator - is in fact the company's beneficial owner or
whether the beneficial ownership of Fenbury is vested in Thermo-Skyships
25 UK Ltd of which Mr. England is not the liquidator.

The second issue was said to be whether Fenbury has any creditor,
and, if it does, whether its creditor is JNTF of which Mr. England is
the liquidator or some other Bond Corporation company of which Mr.
30 England is not the liquidator.

For reasons which we think it is unnecessary to develop we do not
consider that the liquidator of Fenbury should have too much difficulty
in resolving these issues. What is important, in our judgment, is that
35 very little time remains before next Monday when, as we have stated, an
application is to be made to the Australian Court. If the interests of
Fenbury and its creditors or shareholders are to be protected there
needs to be a liquidator in office capable of giving instructions to his
legal advisers. We have been told that Mr. Waters has already been
40 apprised of the nature of the Australian proceedings and has had the
opportunity of considering some of the voluminous documentation. It
seems very unlikely - with only one working day left before the
commencement of the Australian hearing - that any other person could
appraise himself with the background in time.
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We have balanced all the matters laid before us by counsel but we
are entirely satisfied, in the exercise of our discretion, that Mr.
Waters will be able to exercise the necessary independence of judgment
and that it is accordingly right to appoint him as liquidator of
50 Fenbury. We order accordingly.

Authorities

Companies (Jersey) Law 1991: Articles 158-188.

Companies (General Provisions) (Jersey) Order 1992.

Insolvency Act 1986: ss 108, 165: schedule 4, Part II.

Fletcher: The Law of Insolvency (1990): pp.465-467.

Re A.J. Adams (Builders) Ltd & Ors: Re Autonational Extended Warranties Ltd (1991) BCLC 359.

Presentaciones Musicales SA -v- Secunda & Anor. (1994) 2 All ER 737 CA.

Danish Mercantile Co Ltd & Ors. -v- Beaumont & Anor. (1951) 1 All ER 925 CA.