

(1) Victor P. Herde and
(2) Christopher J. Kelshall

Appellants

v.

Courtney Mahabirsingh

Respondent

FROM

THE COURT OF APPEAL OF
TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
23RD JULY 1992

Present at the hearing:-

LORD TEMPLEMAN
LORD BRIDGE OF HARWICH
LORD ACKNER
LORD GOFF OF CHIEVELEY
LORD JAUNCEY OF TULLICHETTLE

[Delivered by Lord Jauncey of Tullichettle]

This appeal is about priorities and the respective ranking of claims by debenture holders and redundant workers on the assets vesting in receivers on their appointment. In September 1965 a company latterly known as Swan Hunter (Trinidad) Limited ("the company") granted in favour of a bank a debenture creating a fixed charge over certain specified assets and a floating charge over all its remaining assets. On 29th January 1985 the bank exercised its power under the debenture to appoint the appellants as receivers and managers of the property of the company. On 31st January 1985 the receivers terminated the employment of the company's 105 employees. Thereafter during 1985 they realised the assets of the company and distributed them to the bank subject only to those assets which were covered by the floating charge and the proceeds of which were placed in escrow. By 4th December 1985 all the assets of the company had been realised but these were insufficient to meet the claims both of the bank and of the redundant workers.

[24] In the meantime the House of Representatives had, on 15th February 1985, passed the Retrenchment and Severance Benefits Bill, which Bill ("the Act"), was

thereafter passed by the Senate on 5th November 1985. The Act came into force on 2nd January 1986.

Two sections of the Act are particularly relevant to this appeal, namely sections 18 and 24. Section 18 provides *inter alia*:-

" 18.(1) Where any part of the employer's retrenchment proposals is eventually put into effect, severance benefits shall be payable by the employer to the retrenched worker in accordance with this section.

(2) Where the retrenched worker is covered by a registered Collective Agreement, the terms of which with respect to severance benefits are no less favourable than those set out in this Act with respect to severance benefits, the provisions of the said Collective Agreements shall apply.

(3) Where the retrenched worker is not covered in the manner set out in subsection (2), the minimum severance benefits payable by the employer are as follows -

[there follow formulae for calculation of the severance benefits by reference to the period of service of the retrenched worker.]

(4) For each period of service amounting to less than a completed year of service and in respect of workers who qualify under section 3(1)(d), payment shall be calculated on a pro-rata basis.

(5) Every worker to whom this Act applies retrenched on or after 1st January, 1985, is entitled to the severance benefits contemplated by this section regardless of the number of workers in his employer's work force.

(6) This section shall not apply to a retrenched worker who is eligible to receive from his employer terminal benefits that are no less favourable than those set out in this section."

It was common ground that all the 105 employees of the company who had been retrenched were the subject of Collective Agreements which satisfied the requirement of sub-section (2).

Section 24 is in the following terms:-

" 24. In the event of a winding up or the appointment of a receiver all severance benefits, including terminal benefits referred to in section 18(6), due to a retrenched worker shall enjoy the same priority as wages or salary due to any clerk or servant in respect of services rendered to a company under sections 78 and 250 of the Companies Ordinance but without limitation."

Section 78(1) of the Companies Ordinance provides as follows:-

"Where either a receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge, or possession is taken by or on behalf of those debenture holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding up are under the provisions of Part V of this Ordinance relating to preferential payments to be paid in priority to all other debts, shall be paid out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures."

Section 250 of that Ordinance provides that wages or salaries shall be paid in priority to all debts other than those for rates, charges, taxes and assessments.

The receivers issued a construction summons in which they sought a declaration that the bank was entitled to be paid the monies due to it out of (a) the assets secured by the fixed charge, and (b) all other assets of the company (which, of course, consisted of those assets subject to the floating charge) in priority to the claims of the retrenched workers, all of whom were represented by the respondent. Permanand J. granted the declaration sought by the receivers, but the Court of Appeal allowed the appeal in part and declared that the retrenched workers were:-

"entitled to be paid the severance benefits due to them by the Company out of all the assets of the Company, except those assets over which a fixed charge had been created by the debenture dated 7th September, 1965, in priority to the claim for principal and interest due to the Bank under the said debenture."

Thus in effect the Court of Appeal held that the severance benefits were payable out of the assets which had been subject to the floating charge in priority to the claim of the bank. The reasoning of the Court of Appeal is not entirely easy to follow because Edoo J.A., having held that the floating charge on crystallisation would have priority over debts incurred subsequent to that date, later concluded that the entitlement of the retrenched workers to severance benefits had already been established by that date although he did not explain how this had come about.

Mr. de la Bastide, in an admirably succinct and lucid argument, submitted first that section 24 of the Act was prospective and not retrospective in effect and second that even if it was retrospective the retrenched workers' entitlement to terminal benefit, having arisen after the floating charge had crystallised, could not rank prior to

what had become a fixed charge. Mr. Newman countered this by maintaining that not only did section 24 of the Act have retrospective effect because of the retrospective effect of section 18 but that it conferred priority on terminal benefits over a charge which had become fixed, a priority which he conceded was not available to a claim for wages or salary.

The purpose of section 24 is plain, namely, to confer on severance and other terminal benefits referred to in section 18 the same priority in a winding up or upon appointment of a receiver as was enjoyed by wages and salaries under the Companies Ordinance. It contains within itself not a hint of retrospectivity. It is therefore necessary to look at section 18 to see whether it contains provisions which are capable of importing some retrospective effect into section 24. Once again the purpose of this section is plain, namely, to provide statutory minimum severance benefits for retrenched workers who are not otherwise as well provided for contractually. If they are adequately provided for whether by a registered Collective Agreement or by any other contractual provision conferring eligibility to terminal benefits, the section has no application to them (sub-section (6)). The only provision bearing to have retrospective effect is sub-section (5) which confers a right to statutory benefits on workers retrenched after 1st January 1985. The sub-section contains reference neither to priorities nor to section 24 which, of course, deals not only with statutory severance benefits but with those contractual provisions to which section 18(6) applies. Furthermore the practical difficulties of creating retrospective priority claims in liquidations which had been partially or even wholly completed would be huge and it is inconceivable that the legislature should have intended to create them. In their Lordships' view the sole retrospective effect of sub-section (5) is to confer a right to severance benefit on workers retrenched during the year preceding the coming into force of the Act but without according priority to such rights. It follows that their Lordships consider that section 24 was not intended to have retrospective effect.

That is sufficient for the disposal of the appeal and cross-appeal but there is a further reason why the appeal must succeed. On appointment of the receivers the floating charge over those assets of the company which were not subject to the fixed charge crystallised. Two days later all the workers were dismissed. The effect of crystallisation was that all existing claims having priority under section 250 of the Companies Ordinance ranked by virtue of section 78 thereof in priority to the claim of the holders of the floating charge. However priority debts incurred after the floating charge had become fixed no longer ranked prior to the claims of the debenture holder. This was the conclusion reached, correctly in the view of their Lordships, in *re. Griffin Hotel Company Limited* (1941) 1 Ch. 129 in which the relevant sections of the Companies Act 1929, sections 78 and 264(1), were for practical purposes in terms identical to those of section 78 and 250 of the Companies Ordinance.

Mr. Newman sought to distinguish that decision on the ground that the words "without limitation" at the end of section 24 of the Act had the effect of clothing severance and terminal benefits with priority even over fixed charges. This would necessarily involve giving claims for such benefits not the same but a much higher priority than claims for wages. That in itself would raise serious questions as to the validity of the argument. However the matter is put beyond doubt when regard is had to section 250(1)(b) of the Companies Ordinance which limits the wages to be paid in priority to the sum of \$240. It is clearly to this limitation that the words in section 24 refer.

Their Lordships are accordingly satisfied that not only did section 24 of the Act not have retrospective effect but that the respondent's entitlement to terminal benefits having arisen after the floating charge had become fixed could not rank in priority thereto. Accordingly the appeal will be allowed, the cross-appeal dismissed and the order of Permanand J. of 24th February 1988 restored.