IN THE HIGH COURT OF THE COOK ISLANDS

HELD AT RAROTONGA

(CIVIL DIVISION) PLT 30/92 & OA 3/92

BETWEEN POLYNESIAN MOTOR HOLDINGS LTD

Judgment Creditor

AND JOHN DENIS TIERNEY

Judgment Debtor

Hearing: 26 June 1993

Counsel: Mr P E Lynch for Judgment Creditor

Mr M C Mitchell for Judgment Debtor

Judgment: 14th July 1993

JUDGMENT OF ROPER C J

In February 1987 a company, Automarine Ltd, gave debenture to one Bert E Anderson over its assets to secure past and future advances. (In the first instance the debenture was given to a solicitors nominee company but nothing turns on

that), Automarine failed to meet demands under the debenture and Mr Tierney was appointed receiver. Automarine challenged the validity of the debenture but in a judgment of the 22 November 1991 I held that the debenture was valid.

On the 6th December 1991 Dillon J granted leave to Automarine to appeal against my decision and purported to appoint Mr Tierney a receiver pursuant to S345 of the Companies Act. The effect of that was that pending the hearing of the appeal Mr Tierney continued to carry out his duties as receiver, and in particular entered into an agreement with Polynesian Motor Holdings for the purchase of Automarine's premises and plant for $60,105 of which $12,250 was paid to Mr Tierney as a deposit.

In June 1992 the Court of Appeal allowed Automarine's appeal and held that the debenture was unenforceable, it being in breach of the provisions of the Development Investment Act 1977.

In September 1992 Polynesian Motors applied for an order that the deposit of $12,250 be returned to it on the ground that the agreement for sale and purchase could not be fulfilled. The application came before me on the 25th September 1992 and in a judgment of the 6th October I held that if indeed there had been a Court appointment of

Mr Tierney as receiver it could not survive the Court of Appeal's decision that the debenture was unenforceable. (Although I did not say so in my judgment of the 6th October it appears to me now that the effect of Dillon J's order of the 6th December 1991 was really to refuse to stay the exercise of the receiver's powers pending the appeal). I then made an order that Dillon J's order of appointment of the 6th December be discharged and declared that Polynesian Motors was entitled to the return of the deposit.

What I am required to decide in this present application is - who is liable to repay the $12,250, or perhaps more correctly, from what source should it come?

Mr Mitchell has submitted that Mr Tierney was at all times acting as a Court appointed receiver and that consequently he should not be required to pay back the deposit which should go towards the very substantial fees and disbursements incurred by Mr Tierney. He further submitted that the refund of the deposit should come from Automarine but I do not accept that.

I accept Mr Lynch's argument that the deposit formed no part of the general property of the receivership and should have been retained separately in trust and only disbursed when the conditions on which it was paid over were satisfied. As

possession of the business could not be given to Polynesian Motors the deposit must be returned. $11,500 of the deposit has already been paid into Court by Mr Tierney. No part of the deposit is available to meet Mr Tierney's fees and expenses.

Mr Mitchell has sought a declaration as to whether Mr Tierney should seek to recover those fees and expenses from Mr Anderson the debenture holder, pursuant to a deed of indemnity signed by Anderson on the 5th April 1991, or from Automarine in reliance on his Court appointment as receiver. I am in no doubt as to the answer to that query. Mr Tierney's only remedy is against Mr Anderson and it is not for me at this stage to express any opinion as to the prospects of success for Mr Anderson (but already indicated that proceedings pursuant to the indemnity will be defended.

Counsel have indicated that they require guidance on another matter, although it appears that there is no real dispute between them as to what the answer should be, and that is the jurisdiction of a single Justice in judgment summons proceedings. My opinion can be stated very shortly.

S19(b) of the Judicature Act 1980-81 fixes the monetary limit of a single Justices jurisdiction in civil proceedings for the recovery of money or chattels; while S19(h) provides

that a single Justice shall have jurisdiction to hear an application for an order under S141 of the Cook Islands Act 1915 which relates to judgment summons proceedings).

Counsel have submitted that S19(h) is not restricted to the monetary limits prescribed by S19(b) and I am in no doubt that that is the correct view. A single Justice has jurisdiction to determine an application under S141 of the Cook Islands Act regardless of the amount of the judgment sought to be enforced.

I therefore declare that the deposit of $12,250 is repayable by the Judgment Debtor; and order that the sum of $11,500 paid into Court be paid out to the Judgment Creditor's solicitors.

The Judgment Creditor is to be paid interest at 8% on the sum of $12250 from 14 days after the date of the delivery of the Court of Appeal's decision.

I require memoranda from Counsel on the question of costs.