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G. A. FALLIS AND D. M. DEACON .....APPELLANTS; *May 7 May 14

AND

UNITED FUEL INVESTMENTS LIMITED ..... } RESPONDENT.

MOTION TO QUASH

Appeals—Jurisdiction—Practice and procedure—Appeal to Supreme Court of Canada under s. 108 of the Winding-up Act—Motion to quash—Whether necessary amount involved—The Winding-up Act, R.S.C. 1952, c. 296.

*PRESENT: Kerwin C.J. and Locke, Cartwright, Martland and Ritchie JJ.

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FALLIS *et al.* *v.* UNITED FUEL INVESTMENTS LTD.

The petitioner company was incorporated under *The Companies Act,* R.S.C. 1927, c. 27. The capital of the company was declared to consist, *inter alia,* of a number of non-cumulative class "B" preference shares of a par value of $25 each, and which were not redeemable. It was provided that on the voluntary winding-up of the company, the holders of the class "B" shares would be entitled to the repayment of the amount paid up on such shares and an additional $5 per share. The company petitioned for a winding-up order under s. 10(*b*) of the *Winding-up Act,* R.S.C. 1952, c. 296. The trial judge dismissed the petition. The Court of Appeal reversed this judgment and ordered the winding-up of the company. The appellants, as owners of class "B" shares, were granted leave to appeal to this Court. The company moved to quash the appeal on the ground that there was no amount involved as required by s. 108 of the *Winding-up Act.*

Held: The motion to quash should be dismissed.

The test to be applied in determining whether there is an amount involved in a proposed appeal exceeding $2,000 as required by s. 108, is that set out in the case of *Orpen v. Roberts et al.,* [1925] S.C.R. 364. Applying that test to the present case, the evidence showed that if the winding-up proceeds, the loss for the appellants will be greatly in excess of $2,000. There was, therefore, involved in this appeal an amount exceeding $2,000.

MOTION to quash an appeal from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of McLennan J. and ordering the winding-up of the respondent company. Motion dismissed.

Hon. R. L. Kellock, Q.C., and *D. J. Wright,* for the motion.

J. T. Weir, Q.C., contra.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is a motion on behalf of United Fuel Investments Limited, hereinafter referred to as "the Company", to quash an appeal to this Court brought by George Arthur Fallis and Donald Mackay Deacon from an order of the Court of Appeal for Ontario[1], made on December 14, 1961, setting aside an order of McLennan J., made on July 31, 1961, and ordering that the Company be wound up under the provisions of the *Winding-up Act.* The appeal is brought pursuant to leave granted by my brother Judson on March 16, 1962.

The application before McLennan J. was made on the petition of the company pursuant to s. 10(*b*) of the *Winding-up Act* which reads:

10. The Court may make a winding-up order,

* * *

[1] [1962] O.R. 162, 31 D.L.R. (2d) 331.

(*b*) where the company at a special meeting of share-holders called for the purpose has passed a resolution requiring the company to be wound up;

McLennan J. ordered that the petition be dismissed with costs.

The order granting leave to appeal was made pursuant to s. 108 of the *Winding-up Act* which reads:

108. An appeal, if the amount involved therein exceeds two thousand dollars, lies by leave of a judge of the Supreme Court of Canada to that Court from the highest court of final resort in or for the province or territory in which the proceeding originated.

The sole ground on which the motion to quash is based is set out in the notice of motion as follows:

that the Court has no jurisdiction to hear the appeal because there is no amount involved therein as required by Section 108 of the Winding-up Act.

The company was incorporated by Letters Patent issued under the *Companies Act,* R.S.C. 1927, c. 27, on March 30, 1928. By Supplementary Letters Patent issued on February 7, 1939, an arrangement made between the company and the holders of its preferred shares and the holders of its common shares was confirmed and the capital of the company was declared to consist of 90,000 cumulative Redeemable Class "A" Preference shares of the par value of $50 each, 90,000 non-cumulative Class "B" Preference shares of the par value of $25 each and 90,000 common shares without nominal or par value. The class "B" shares are not redeemable.

It is provided that subject to the rights of the holders of Class "A" Preference shares, the moneys of the company properly applicable to the payment of dividends which the directors may determine to distribute in any fiscal year of the company by way of dividends shall be distributed among the holders of the Class "B" Preference shares and the Common shares pro rata according to the number of shares held.

It is further provided that on the liquidation, dissolution or winding-up of the company the holders of Class "B" shares shall be entitled to the repayment of the amount paid up on such shares and if the winding-up be voluntary to an adidtional $5 per share.

The appellant Fallis has made an affidavit shewing that he is the owner of more than 1200 of the Class "B" Preference shares and expressing the opinion that but for the

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order winding-up the company the market price of the Class "B" shares would now exceed $80 per share. There is no contradiction of this evidence.

If the winding-up is carried out the holders of Class "B" Preference shares will receive $30 per share, as the winding-up is voluntary.

In my opinion the test to be applied in determining whether there is an amount involved in the proposed appeal exceeding $2000 is that set out in the judgment of this Court in *Orpen v. Roberts et al.*[1], upholding the judgment of the Registrar affirming jurisdiction. The action was for an injunction to restrain the defendant from erecting a building nearer to the street line than 25 feet and to restrain the municipality from granting a permit for the erection of the proposed building. The report at page 367 reads as follows:

> The Court said the subject matter of the appeal is the right of the respondent to build on the street line on Carlton street in the city of Toronto. "The amount or value of the matter in controversy" (section 40) is the loss which the granting or refusal of that right would entail. The evidence sufficiently shows that the loss—and therefore the amount or value in controversy—exceeds $2,000.

Applying this test to the facts of the case at bar, the evidence shows that if the winding-up proceeds the appellant Fallis will suffer a loss greatly in excess of $2000. Indeed this would still be so if for Mr. Fallis' estimated figure of $80 were substituted that of $42 which was the lowest price at which the class "B" shares sold on the Toronto Stock Exchange during 1959, the year prior to the one in which the proceedings looking to the winding-up of the company were commenced.

Amongst other cases, counsel for the applicant relied on *Cushing Sulphite-Fibre Co. v. Cushing*[2], the head-note of which reads as follows:

> *Held,* that a judgment refusing to set aside a winding-up order does not involve any amount and leave to appeal therefrom cannot be granted.

As is pointed out in the judgment of the learned Registrar in *Orpen v. Roberts, supra,* cases on this point decided prior to the passing, in 1913, of 3-4 Geo. V., c. 51, s. 5, must be reconsidered in the light of that amendment, by which the predecessor of what is now s. 43 of the *Supreme Court Act* was first enacted.

[1] [1925] S.C.R. 364, 1 D.L.R. 1101. [2] (1906), 37 S.C.R. 427.

The head-note quoted above reads as if the judgment lays down a general rule applicable to all appeals from a winding-up order; on reading the judgment, which was delivered by Sedgewick J., it is not clear whether that was the intention of the Court. At page 428 Sedgewick J. says:

> We are, I think all of opinion that in the present case there is no *amount* involved.

The reasons are short; no mention is made of an affidavit made by Mr. Mariner Teed, of counsel for the appellant company, which is among the original papers on the files of the Court in which he deposes that the amount involved in the said winding-up order and in the appeal sought to be taken to the Supreme Court of Canada "exceeds two thousand dollars and exceeds one hundred thousand dollars".

This affidavit does not give any particulars or say who stands to gain or lose any monetary amount from the result of the appeal, although the material in the appeal case would suggest that it was argued that the making of the winding-up order would cause a loss to the company and therefore to its creditors.

This case was, of course, decided prior to the 1913 amendment and in so far as it appears to lay down any principle contrary to that enunciated in *Orpen v. Roberts, supra,* it ought not to be followed.

In my opinion the material in the case at bar establishes that there is involved in the appeal an amount exceeding $2000.

I would dismiss the motion with costs payable by the respondent to the appellants in any event of the appeal.

Motion dismissed with costs.

Solicitors for the appellants: Wright & McTaggart, Toronto.

Solicitors for the respondent: Blake, Cassels & Graydon, Toronto.