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AJUD00484

IN THE COURT OF APPEAL OF NEW ZEALAND

C.A.191/92

21 OCT 1992

IN THE MATTER of The Insolvency Act 1967

AND

IN THE MATTER of MILES EARLE MOSELEY
a bankrupt

BETWEEN

CAROL DAWN BULLED

AND

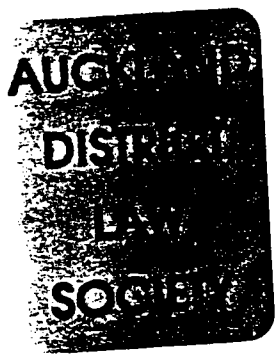
CECIL HENRY MOSELEY

Appellants

AND

OFFICIAL ASSIGNEE IN
BANKRUPTCY

Respondent



Coram: Hardie Boys J
Gault J
McKay J

Hearing: 23 September 1992

Counsel: D R James and B S King for Appellants
G A Rea for Respondent

Judgment: 13 October 1992

JUDGMENT OF THE COURT DELIVERED BY GAULT J

This appeal arises out of notices by the Official Assignee setting aside payments on the ground provided in s 56(2) of the Insolvency Act 1967.

Miles Earl Moseley was adjudicated bankrupt in the High Court at Napier on 2 September 1991. The payments the Official Assignee sought to avoid were of

sums of \$30,000 to the bankrupt's father and \$10,000 to the bankrupt's sister on 7 August 1991 and \$1,300 to the sister on 15 August 1991. Both the father and the sister who are the appellants claimed to be owed by the bankrupt sums equal to or exceeding the sums paid and the Official Assignee did not contest that indebtedness. He chose to exercise the power under s 58(1) to set aside the payments as being voidable under s 56(2) as payments to creditors made within one month preceding the adjudication.

The appellants applied to the High Court in accordance with s 86 to reverse the Official Assignee's decision. Gallen J in a judgment delivered on 29 May 1992 held that the dispositions were voidable and refused to deny the Official Assignee recovery of the moneys under the discretionary power conferred by s 58(6). The present appeal is against that decision.

Gallen J had before him affidavits sworn by each of the appellants and by the Official Assignee. Those witnesses were cross-examined and in addition, to overcome hearsay problems, he heard evidence from Ms Sinclair a clerk in the Official Assignee's office who had interviewed the appellant Mrs Bulled in the course of administering the bankrupt's estate. On the evidence Gallen J found the following facts:

In September 1990 Mr Moseley [the bankrupt] sold his house property and after the payment of all outstanding amounts, the sum of \$60,851.90 was held by his solicitors on his behalf. In the affidavit filed in support of her appeal, Mrs Bulled said that in October 1990, Mr Moseley had brought the cheque from his solicitors to her and asked her to place that sum in a bank account in her name, with the purpose of repaying her the amount which he owed her and with the requirement that some \$30,000 be paid to their father from whom Mr Moseley had borrowed that sum. The balance was to be held for Mr Moseley when he required it.

In her evidence given in this Court, Mrs Bulled says that she went to Mr Moseley's lawyer with him and the cheque was made out in her

name. She said she then went to her bank and the cheque was deposited in her bank account. A Post Office Savings Bank book in Mrs Bulled's name indicates that the sum of \$60,851.90 was paid into her account on 8 October 1990. On 15 October 1990, the sum of \$4,000 was withdrawn from the account and on 24 October, the sum of \$4,500 was withdrawn from the account. According to the affidavit of Mrs Bulled, both sums were given to her brother Mr Moseley at his request. Thereafter, certain small withdrawals and deposits were made into the account. The sum of \$1,000 was withdrawn by Mrs Bulled in March 1991 and was used by her for the purchase of linoleum. In evidence she indicated that other sums were withdrawn and paid to her father who had accepted the responsibility for looking after Mr Moseley's dogs. During this period Mr Moseley was absent and his whereabouts unknown. Mrs Bulled indicated that she felt an obligation to see that her father was paid when payments out were necessary in respect of the dogs.

On a day which is not entirely clear in August 1991, Mr Moseley returned and apparently went immediately to Court in respect of a civil matter in which he was involved. On 7 August 1991, Mrs Bulled withdrew \$40,000 from the account. She paid \$30,000 to her father, being the amount which she said was owing to him by her brother and \$10,000 she withdrew for herself which she says she paid to her father to purchase an interest in her father's boat named the "Chardonnay".

Up to this point, Mr Moseley Snr. was unaware of the sums of money in Mrs Bulled's account and the first he knew of the matter was when the money was paid to him by Mrs Bulled. He was unable to say whether this payment occurred before or after his son's return, but Mrs Bulled in evidence indicated that she thought her brother had returned home before she paid the money out. On 15 August 1991, she withdrew the sum of \$1,300 for her own purposes; on 11 September, she drew the sum of \$5,000 and on 18 September, the sum of \$4,950. She says that she regarded all those sums as moneys repaid to her in respect of the advances which she had previously made to her brother.

Section 56(2) provides:

Every conveyance or transfer of property, every charge made on any property, every obligation incurred, every execution under any judicial proceeding suffered, and every payment made (including any payment made in pursuance of a judgment or order of a Court), shall be voidable as against the Assignee, if -

- (a) It is made, paid, suffered, or incurred by any person unable to pay his debts as they become due from his own money in favour of any creditor or any person in trust for any creditor; and
- (b) It is made, paid, suffered, or incurred within the period specified in subsection (3) of this section:

Provided that nothing in this subsection shall apply to any such transaction or any such payment in respect of any liability incurred, or accruing due, during or after the said period.

The period prescribed in subs (3) is one month immediately preceding the person's adjudication.

Property is defined in s 2 to mean:

Land, money, goods, things in action, goodwill, and every valuable thing, whether real or personal, and whether situated in New Zealand or elsewhere; and includes obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property.

The Official Assignee contended, and Gallen J found, that the moneys in Mrs Bulled's bank account were paid in and held by her at the request of the bankrupt to be disposed of in accordance with his directions and so remained his property for the purposes of the Act.

Although it was common ground that from the date of service of the creditor's petition on 24 July 1991 the bankrupt was unable to pay his debts as they became due, it was not established that the same applied prior to that date. For that reason the Judge decided against the Official Assignee in respect of the payment of \$1,000 to Mrs Bulled on 21 March 1991 and there is no appeal against that.

The first ground of appeal is that the Judge erred in finding that there was any evidence, or any sufficient evidence, that the bankrupt retained property in or control over the funds held in Mrs Bulled's account. This is a challenge to the Judge's finding of fact made after seeing and hearing the witnesses. He drew inferences, contrary to the direct evidence of Mrs Bulled, that the bankrupt had not relinquished control of the moneys by repaying debts but had retained control over the funds paid into the bank account. We are satisfied this was open to him. He accepted the evidence of Ms Sinclair supported by what he accepted as (in effect) a contemporaneous note that she was told by Mrs Bulled that the amount was paid into her account because her brother did not have a bank account. He regarded this as suggesting that the funds were held in some way on behalf of the bankrupt. He found support in the facts that some of the funds were accepted as belonging to the bankrupt and were paid out to him within a month; that the father was not told that the money to repay him was there and that arrangements had been made for its payment and that Mrs Bulled said in her affidavit that her brother had told her not to pay her father immediately. In addition the Judge was entitled to look at the overall position including the relationship between the parties, the dates of the payments in relation to when the moneys originally were placed in the account, the return of the bankrupt and the bankruptcy proceedings. He was also entitled to consider the evidence given by Mrs Bulled and her father as to what they did with the funds.

The Judge took into account the explanation given by Mrs Bulled for the timing and purpose of the payments from the account and noted that if there had been a deliberate attempt to defeat creditors moneys said still to be owing by the bankrupt to her would not have been left in the account at the time of adjudication. However, as was open to him, he found on the evidence overall that the funds remained the property of the bankrupt. Of course he was not called upon to make any finding as to intention to prefer or defeat creditors because such matters are not material to the Official Assignee's power to set aside payments under s 56(2).

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Once the finding of the Judge that the funds were held on behalf and under the direction of the bankrupt is upheld, other submissions made by Mr James also are answered. It follows that the initial payment into the sister's account was not the only disposition which the Official Assignee could seek to upset under s 56. Undoubtedly the legal title to the funds passed from the bankrupt to his sister at that point (which is outside the one month period applicable to s 56(2)) and if he then was unable to pay his debts that might be set aside under s 56(1). However that does not mean that the subsequent relinquishment of a beneficial interest and control does not fall for scrutiny under s 56(2). That is clear from the broad definition of "property" in the Act.

It was also submitted that there was no evidence of any Act performed "by" the bankrupt at the time of the payments so as to come within s 56(2). There was no evidence of any direction given to Mrs Buller to make the payments when she did. However in the circumstances in which the payments were made, if as the Judge held the funds were held on the bankrupt's behalf, the payments clearly must be regarded as having been made by him. That is consistent with the approach to the construction of s 56(2) in *Re Shoreline Homes Ltd* [1982] 1 NZLR 663 and is a conclusion similar to that reached in company contexts in *Westpac Banking Corporation v Nangeela Properties Ltd* [1986] 2 NZLR 1, 4 and *Re Peter Austin Ltd* [1990] 2 NZLR 245, 248. The alternative would be that the payments were made from his funds without his authority and would be recoverable by the Official Assignee in any event.

In developing his grounds of appeal, Mr James placed in the forefront of his argument the submission that the finding of the Judge that the bankrupt could direct disposal of the moneys was consistent with an informal family arrangement falling short of legal entitlement so as to constitute retention of "property". The family

context may give rise to difficulties in identifying the legal position but that does not relieve the Court of the obligation to determine the true nature of the relationships. The Judge found that the funds were held on the bankrupt's behalf. The legal title to the funds having passed to Mrs Buller the appropriate categorisation of the bankrupt's interest must be that of beneficiary of the funds held on trust by his sister. It is helpful to focus on the sum of \$30,000 said to have been owing to the bankrupt's father. At the time of the payment into the sister's account the full sum included moneys said to be owing to the sister (\$21,500) the father (\$30,000) and the bankrupt. The sum of \$30,000 could be regarded as having been held by the sister as her own, as on trust for her father or as on trust for the bankrupt. Only the last is consistent with the Judge's findings of fact. Accordingly we do not consider any less formal interpretation of the legal position is open on the evidence and the Judge's findings.

We are satisfied there are no grounds for setting aside the payments to which this appeal relates.

The appellants also appeal against the refusal of the Judge to exercise his discretion in their favour under s 58(6) of the Act which reads:

Recovery by the Assignee or appointee of any property or the value thereof (whether under this section or under any other provision of this Act or under any other enactment or in equity or otherwise) may be denied wholly or in part if -

- (a) The person from whom recovery is sought received the property in good faith and has altered his position in the reasonably held belief that the transfer or payment of the property to him was validly made and would not be set aside; and
- (6) In the opinion of the Court it is inequitable to order recovery or recovery in full, as the case may be.

It is to be noted that the requirements for relief are cumulative. It must be shown by the parties seeking relief that the payment was received in good faith, that his or her position has been altered in the reasonably held belief that the payment was validly made and would not be set aside and that it would be inequitable to order recovery; see *Westpac v Nangeela* (supra) and *MacMillan Builders Ltd v Morningside Industries Ltd* [1986] 2 NZLR 12, 17.

Gallen J held that Mrs Bulled did not meet these requirements on the evidence. He said that she had altered her position to the extent that she had commenced alterations to her home based on the payments made to her, but in view of his findings on the evidence he was not prepared to conclude that she had altered her position in the reasonably held belief that the transfer was validly made and would not be set aside. Having upheld his factual findings which involved rejection of Mrs Bulled's evidence as to the basis on which she held the funds this further finding is understandable. Mrs Bulled acknowledged that the payments were withdrawn by her after her brother returned. She said she thought she knew he had appeared in Court. She gave no evidence as to her belief other than that she was entitled to deal with the funds as she chose without reference to her brother - but the Judge rejected that. We agree with the Judge that there was no sufficient evidence to bring Mrs Bulled within the requirements of s 58(6)(a).

In the case of Mr Moseley Snr the Judge held that he had inadequate information to justify intervention. Mr James submitted that on the evidence the father knew nothing of the arrangements for payment until payment was actually made to him; that he was owed the sum of \$30,000 which is the sum he received and was entitled to a finding that it was received by him in good faith; that he was therefore entitled to spend the money as he chose, and that he had significantly altered his financial position by gambling away some \$20,000 of the money. It was said that given his age of almost 75 years and the fact that there was little prospect

of his being able to raise an equivalent sum it would be inequitable to order recovery.

However the Judge mentioned that the father seems to have gone to Court with the bankrupt upon his return which was before the payment was made to him and there is no information as to when the betting was carried out nor as to the extent of any knowledge or lack of it Mr Moseley had of his son's affairs.

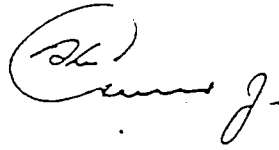
A party seeking discretionary relief from the Court must candidly put all of the relevant information before the Court. The dates between which the gambling is said to have taken place must be critical to any assessment of his claim to a reasonably held belief at the time he changed his position in the manner claimed. The money was paid to him after his son had returned and been to Court so the gambling followed that. It is not clear whether it was between the date of payment to him and his son's adjudication or after that date. He said he gave evidence in Court when he went with his son though he was not able to describe the nature of the proceedings.

The evidence falls well short of establishing either that the requirements of s 58(6)(a) are met or that it would be inequitable for the Official Assignee to recover the moneys.

The appellants of course are entitled to prove in the bankruptcy as unsecured creditors in respect of the indebtedness they claim.

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The appeal therefore is dismissed. The respondent is entitled to costs in this Court which we fix at \$2,000 together with disbursements including any reasonable travelling and accommodation expenses of counsel as fixed by the Registrar.

A handwritten signature in cursive script, appearing to read "C. J.", is centered on the page.

Solicitors

Langley Twigg, Napier for Appellants
Crown Solicitor, Napier, for Respondent