M.145/83

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

BETWEEN JAMES LEO MADISON also known as KENNETH CRAIG RIDDELL of Auckland, Workman

Appellant

AND MOTOR HOLDINGS LIMITED

Respondent

Civil Appeal

Hearing: 12 September 1983

Counsel: Z.K. Mohamed for Appellant
D.J. Heaney for Respondent

Judgment: 18 OCT 1983

JUDGMENT OF O'REGAN J.

This appeal is from the whole of the determination of Judge J.H. Hall in the District Court at Otahuhu made on 20 January 1983 when he gave judgment for the respondent against the appellant in the sum of $19,660.91.

The history of the proceedings will, I apprehend, assume some relevance in the appeal. First, they are relevant to at least one of the submissions made on behalf of the appellant and to the submissions in reply thereto and secondly on the view I take of the case, are relevant to the choice I have as to how the appeal is to be disposed of.

There are no records or evidence as to the formal steps taken by the parties. Some of the matters to which I now refer are recorded in the note of the proceedings which is part of the case on appeal. Others were the subject of statements from the bar by both counsel, neither of whom demurred at or objected to what was said by the other of them and which, of course, I accept.

The proceedings were issued on 8 November 1982. After service the defendant (now the appellant) consulted Messrs Chignell Miller & Co., solicitors, Auckland who filed and served a notice of intention to defend the proceedings pursuant to Rule 113(1) of the District Court Rules 1946. In early November 1982, the respondent sent a form of application for fixture to the appellant's solicitor together with a notice pursuant to paragraph 6 of Rule 113 requiring the filing and serving of "a full and complete statement of the particulars of his defence." On 8 November 1982 the appellant's solicitors advised the respondent's solicitors that they were unable to obtain instructions from the appellant. The respondent's solicitors then applied unilaterally for a fixture. In due time, the Registrar made a fixture and Messrs Chignell Miller & Co., still being on the record, sent notice thereof to the address for service. Those solicitors must have informed the appellant of the date because not only did he appear but he instructed Mr Mohamed a few days prior to the hearing. When the matter was called Mr Mohamed made application for an adjournment. The application was refused. Mr Mohamed then sought and was granted leave to withdraw. I interpolate that, although Messrs Chignell Miller & Co., had filed the notice to defend no one from their firm appeared to

seek leave to withdraw from the proceedings. It would seem, however, that they did notify the appellant's solicitors that they would not be appearing.

After Mr Mohamed withdrew, the Judge asked the appellant what was his position in the action to which the appellant replied that he was the defendant. The Judge then asked :

> " Well, what steps have you taken to set up your evidence in this matter? "

and later :

> " Do you wish to defend in person? "

On receiving a reply in the negative to this question, the Judge said :

> " Well you may, of course, be present during the hearing. If you do not propose to defend it yourself then the matter will proceed by way of formal proof. "

In my view the questions asked by the Judge were, to say the least, ~~unfortunate~~. The appellant had filed a notice of intention to defend and accordingly after the applications for adjournment had been declined the matter should have been ~~allowed to proceed as a defended case with the defendant invited to cross-examine and to make submissions if he so wished~~. And the question to the appellant as to what steps he had taken to set up his evidence contains an unwarranted assumption that his defence included the calling of evidence. The course of events I have just related was most unfortunate but for the present I say no more.

The respondent's cause of action is succinctly stated in its statement of claim in which it was averred that "on divers occasions in or about the year 1977 the appellant whilst in the employ of the respondent fraudulently converted to his own use moneys totalling $12,470.00 the property of the respondent." The ~~respondent claimed claim "for damage suffered in excess of $12,000"~~ and sought judgment for that amount together with interest "in accordance with the provisions of the Judicature Act, as amended" and costs.

When the summons was issued on 18 November 1981 the question whether there was jurisdiction to award interest in the District Court upon a judgment debt pursuant to s 87 of the Judicature Act 1908 or indeed whether that Court had any jurisdiction derived from other sources to award such interest was apparently regarded as being a matter of doubt because by s 4 of the District Courts Amendment Act 1982 (which came into

force on 14 January 1983) a new section 62B was inserted into the District Courts Act 1947 which is a replication of s 87 of the Judicature Act 1908. And subs (2) of that new section provided that the words "any Court" be omitted from s 87 and replaced by the words "the High Court or Court of Appeal".

Those amendments have made it plain that from 14 January 1983 the District Court has the power to award interest on any debt or damages for which judgment is given and that since that date s 87 of the Judicature Act has no application to the Court. But they leave unresolved the question whether prior to that date it applied to the District Court or whether that Court had power aliunde to award interest.

In my view, however, [redacted] renders the power exercisable "in any proceedings in any Court". First, the plain and ordinary meaning of those words seem to me to admit of no other construction. Secondly, the deletion by the amendment of the words "any Court" and replacing them with the words "the High Court or the Court of Appeal" seems to me to indicate that the words "any Court" had previously encompassed courts other than those two and thirdly s 87 itself was part of Part III of the Act which contains many provisions obviously applicable to the District Court as well as to the High Court. - for example sections 90, 94, 99 and 100. And I apprehend no reason to conclude that s 87 should be different from those provisions.

If I be wrong in so concluding, then I am disposed to hold that the provision [redacted] of the Act whereby the District Court is empowered "as regards any cause of action . . . . within its jurisdiction"

to "grant such . . . redress . . . as ought to be granted or given in like case by the High Court and in full and ample a manner" is sufficiently wide to encompass an award of interest. Section 74 of the County Courts Act 1959 is in terms identical with those of s 41. In K v K (1977) 1 All E.R. 576, the Court of Appeal held that interest in a judgment for money came within the word "redress" - see per Lord Denning M.R. at p 581f.

In the present case, the learned Judge gave [redacted] in [redacted] . . . . ". But that Act empowers the Court to order "that there shall be included in the sum for which judgment is given interest at such rate, not exceeding the prescribed rate as it thinks fit . . . ". It is accordingly necessary for the Court to specify within the limit prescribed, the rate of interest. It accordingly follows that the judgment is in this respect [redacted]. I will consider how the matter is to be met after I have dealt with the other submissions offered by the appellant.

The appellant submitted that the claim was not properly proved. The respondent set about proving its case by resort to the provisions of s 23 of the Evidence Amendment Act 1980 which, so far as it is applicable provides :-

> " (1) In any civil proceeding, the fact that a person has been convicted of an offence by or before any Court in New Zealand . . . . shall be admissible as

> evidence for the purpose of proving that he committed that offence, where to do so is relevant to any issue in the civil proceeding.
>
> (2) . . . .
>
> (3) (a) . . . .
>
> (b) Without prejudice to the reception of other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document that is admissible as evidence of the conviction and the contents of the information . . . . or charge sheet on which the person was convicted, shall be admissible in evidence for the purpose of identifying those facts. "

The evidence was given by a Deputy Registrar of the Papakura District Court who produced the sworn information which charged that James Leo Madison "did on 12th day of October 1977 and on divers dates between the said date and the 13th day of March 1978 did steal various sums of money totalling $12,450 the property of Motor Holdings Limited . . . ." The information

records that the accused pleaded guilty to the charge and was convicted thereof.

It seems to me beyond peradventure that by virtue of subs 3(b) those facts - "the facts on which the conviction was based" - were properly proved by the production by the Court Officer of the original information. Accordingly I find that I must reject that part of the appellant's submission that relates to the applicability of s 23.

The Deputy Registrar was the only witness. He did not purport to establish nor was it within his competence to establish that the amount remained unpaid. Mr Mohamed submitted that such proof was an essential prerequisite to a judgment in favour of the respondent and, it not having been adduced, there should have been and now should be judgment for the appellant.

Mr Heaney, in reply, reminded me that the appellant had made no response to the formal requirement that he file a statement of defence and that the appellant neither gave or called evidence and he went on to submit that in those circumstances the Judge was entitled to regard that what was not denied by way of pleading as proved.

But there was no application for an order pursuant to paragraph (7) of Rule 113 or pursuant to paragraph 8 thereof. In the absence of the former, the notice of intention to defend maintains its original efficacy as notice that its giver "disputes the whole or part" of the claim (Rule 113(1)). In those circumstances, the primary rule that a plaintiff must prove his case is of application. I accordingly uphold Mr Mahomed's submission.

It was submitted also on the appellant's behalf that, the respondent having claimed judgment for $12,000 "and interest therein in accordance with the Judicature Act . . .", the claim exceeded $12,000 and was thus beyond the jurisdiction of the District Court.

The plaintiff's cause of action is in tort. The jurisdiction of the District Court in respect of such is contained in [redacted] the Act, the relevant part of which reads :-

> " (1) The Court shall have jurisdiction to hear and determine any action founded on . . . tort where the . . . damage is not more than $12,000 . . . ."

But s 36 provides :

> " (1) Where a plaintiff has a cause of action more than $12,000 in respect of which the Court would have had jurisdiction had the amount been not more than $12,000 the plaintiff may abandon the excess, and thereupon the Court shall have juris-

diction to hear and determine the action. "

In the present case the plaintiff has purported to exercise the right conferred upon him by this subsection. In so doing he has brought into operation subs 2 of the section :

> " Where any action, in which the plaintiff has abandoned part of his claim under this section, is heard in a Court, the plaintiff shall not recover an amount exceeding $12000 together with costs therein, and the judgment of the Court in the action shall be in full discharge of all demands in respect of the cause of action and entry of judgment shall be made accordingly. "

The emphasis is mine.

The subsection is ~~mandatory~~ in its terms. It precludes the recovery of an amount in excess of $12,000 "together with the costs therein." It follows that it ~~excludes the recovery of interest on such amount.~~ Accordingly the judgment therein was entered in contravention of the subsection and cannot stand.

The question next arises as to what should be done. Mr Mahomed submitted that the appeal should be

allowed and judgment entered for the appellant. And in addressing me concerning the fixing of the interest rate Mr Heaney submitted that the case should be referred back to the Court below for a rehearing as to that. I propose to pursue neither of those courses. Instead I propose to invoke the power conferred by subs 1 (d) of s 77 of the District Courts Act upon this Court to make an order in such terms as it thinks proper to ensure the determination on the merits of the real questions in dispute between the parties. To that end, I propose to ~~order a rehearing of the whole case.~~

And I order accordingly. But the respondent must pay the appellant's costs here and below which I fix at $250.

Solicitors for the Appellant : Mabin & Mohamed (Auckland)

Solicitors for the Respondent : Heaney Jones & Mason (Auckland)