IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.No. 1483/84

1509

BETWEEN BRETT DAVID RILEY of 6 Craig Road, Maraetai Beach, Auckland, Professional Racing Driver

APPLICANT

A N D MILLSTEN HOLDINGS INC. being Promoters and WAYNE JOHN STENING, Driver both care of DAVID GEORGE McMILLAN of Parnell, Driver

RESPONDENT

Hearing : 13th November 1984

Counsel : Mr. Brown-Haysom for applicant
Mr. McGrane for respondent

Judgment : 16th November 1984

JUDGMENT OF SINCLAIR, J.

The respondents obtained a judgment in England against Dart Racing Design Limited, which judgment was duly registered in New Zealand and in the process leading up to registration of the judgment a copy of the application was served upon one Alan Walter Burrows who is a principal of Dart Racing Design Limited. No steps were taken to oppose

registration of the judgment and in due course an application was made to the Court to restrain any dealing with a formula specific rolling chassis (Dart 83M-003) and an order was duly made on the 17th October 1984. The order in relation to the vehicle, which I will refer to as the "racing car", followed the form used for a Mareva injunction.

On the 2nd November the present applicant applied for an order rescinding or dissolving that Mareva injunction, it being alleged that the applicant Brett David Riley was, in fact, the owner of the racing car in question. At the same time, in an abundance of caution, counsel for the applicant sought to join Mr. Burrows as a co-applicant in the present proceedings or, alternatively, that he be joined as a second defendant in the proceedings which were instituted by the respondents and in which the Mareva injunction was made. This was done as it was believed that it may be alleged that the present applicant had no standing to seek an order rescinding the interim injunction. However, it is quite clear, from the law, that a stranger to an injunction, who is affected by the injunction, can apply for its discharge.

If any authority is required it is to be found in Cretanor Maritime Co. Ltd. v Irish Marine Management Ltd. [1978] 1 W.L.R. 966. At page 978, during the course of the judgment of Buckley L.J., reference is made to the above principle and the relevant authorities are collected. Thus, Mr. Riley does have standing to bring the present application and the ancillary motion is unnecessary and is dismissed.

So far as the present application for a rescission of the Mareva injunction is concerned, I have considered not only the affidavits which were filed in that particular proceeding, but also the affidavit of Mr. McMillan which was filed in relation to the application for the Mareva injunction. Mr. McMillan is a shareholder of Millsten Holdings Inc. In that affidavit Mr. McMillan relates the history of his association with Dart Racing Design Limited and from his knowledge, gleaned from that association, he was of the view that the racing car in question belonged to Dart Racing Design Limited.

There is support for that view contained in a letter written by Mr. Burrows to Mr. McMillan on the 26th October 1983 on a Dart Racing Design letterhead in which reference is made by Mr. Burrows to his sending a car to Australia which would race both there and in New Zealand and reference is made to the car being driven by Brett which is a reference to the present applicant. There is no reference in that letter to the vehicle belonging to the present applicant and the only inference to be drawn from it was at least, in October 1983, Mr. Burrows was writing in a manner which would indicate to any reasonable person receiving the letter that the vehicle belonged to Dart Racing Design Limited.

However, the matter is further advanced by Mr. McMillan in a subsequent affiavit in which he refers to a conversation which took place with Mr. Riley at Mr.

McMillan's premises in Parnell. According to Mr. McMillan, Mr. Riley indicated that he wished to be able to race the racing car during the forthcoming summer season in Australia and New Zealand and that, having come from England, he did not wish to miss out on that opportunity.

Mr. McMillan stated that he suggested that the whole matter could be resolved if Mr. Riley purchased the racing car from Mr Burrows for the amount of the debt owed to the respondents and that that amount could then be paid by Mr. Burrows on behalf of Dart Racing Design Limited. During the course of that conversation nothing was said by Mr. Riley as to his being the owner of the vehicle and, indeed, Mr. McMillan stated that during the last motor racing season in New Zealand he spoke to Mr. Riley on a number of occasions and on no occasion did he claim to be the owner of the racing car in question.

That affidavit from Mr. McMillan is supported from one by Mr. Powell who was present during the above conversation. In fact, Mr. Powell confirms the conversation and he formed the view that Mr. Riley was opposed to purchasing the vehicle from Mr. Burrows because of possible adverse repercussions from creditors in England.

For his part, Mr Riley does not say that he informed Mr. McMillan he was the owner of the vehicle but resorts to saying that at no time was he asked that question by Mr.

McMillan. However, to my mind, if ever there was a time for Mr. Riley to speak up and say the vehicle was his, it was at that meeting when he could have disabused Mr. McMillan's mind that the Dart organisation had any interest in the ownership of the racing car at all.

In his first affidavit Mr. Riley refers to an agreement having been arrived at whereby he was to complete construction and assembly of a Dart chassis 003 at no labour cost to Dart Racing Design Limited and he was to supply the engine and gear box, also at no cost. He further claimed that he was to pay all the testing and development costs and, inter alia, to supply the Dart organisation with all the testing and development information he gained from the vehicle. That was said to be an oral agreement but nowhere, in his affidavit, is it stated where the agreement was made or when.

The affidavit from Mr. Burrows, which purports to confirm the claim made by the applicant, suffers from the same deficiencies. There is nothing in writing to support the applicant's contentions and such customs documents which are available are quite equivocal on the question of ownership. It is obviously the desire of the applicant to have the racing car available for him to race in Australia which would mean its removal from the jurisdiction. Once removed, it may, of course, never return.

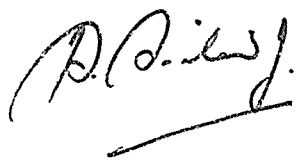
Having regard to the issues which are involved between these parties, it is my view that the respondents have established a more than arguable case in relation to the ownership of the racing car and the present application has all the appearances of a belated attempt to defeat the judgment which has been obtained in England.

I have no hesitation in finding that there is a serious question to be tried and that, within the principles laid down in Consolidated Traders Ltd. v Downes [1981] 2 N.Z.L.R. 247, the interim injunction ought to be sustained. I appreciate that that may involve some difficulties with the Customs Department over the racing car but it is the duty of this Court to act as it considers best in the interests of justice and in relation to the proceedings at present before the Court.

I observe, from Mr Burrows' affidavit, that he claims that he knew nothing of the proceedings in the United Kingdom until he received the documents which have been filed in this Court. But he took no steps whatever to resist the registration of the judgment in this country and under section 6(1)(c) of the Reciprocal Enforcement of Judgments Act 1934 this Court is empowered to set aside the registration if it is satisfied that the defendant in the proceedings did not receive notice of the proceedings in sufficient time to enable it to defend them and did not appear. If, in Mr. Burrows' mind, there was anything which would have entitled him to resist the registration of the

judgment it is amazing that he did not see fit to take the appropriate steps. Accordingly, the present application is dismissed and the respondents are entitled to costs which I fix at $250. and any disbursements.

During the course of the hearing I was asked by counsel for the respondents to consider making an order pursuant to Rule 478 of the Code of Civil Procedure and an order for the preservation of the racing car is accordingly made and I direct the applicant to forthwith advise the Registrar of the present whereabouts of the vehicle. Upon that information becoming available, such further action as is necessary can be taken at the behest of the respondents. In any event leave is reserved to the respondents to apply further in relation to this order.



Solicitors :

Applicant : Brennan & Brown-Haysom, Papatoetoe

Respondents : Russell McVeagh McKenzie Bartleet & Co. Auckland.