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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

NO. M.284/84

[redacted]

1025

BETWEEN ERROL DOUGLAS BALLIN

Appellant

A N D MARKET GARDENERS LIMITED

First Respondent

A N D ROBIN CHARLES THOMPSON and FRANCES COLLEEN THOMPSON

Second Respondents

Hearing: 1 August 1984

Counsel: D.H. Hicks for Appellant
T.W. Fournier for First Respondent
G.P.F. Thompson for Second Respondents - Granted Leave to Withdraw in this matter

Judgment: 6 AUG 1984

JUDGMENT OF COOK J.

Having obtained judgment against the appellant for moneys owing to him, the first respondent then sought a garnishee order in respect of money owing by the second respondents to the judgment debtor. Upon the summons coming before the District Court, despite opposition by the judgment debtor, an order was made. Against this the judgment debtor appealed first against a refusal by the District Court Judge to grant an adjournment and then, in a fresh notice of motion on appeal, against that refusal and also from the judgment of the Court in relation to the garnishee order. The first respondent now moves for an order that the notice of motion on appeal be struck out upon the grounds that it has no merit and

is frivilous and vexatious.

It was submitted that the Court has the same inherent jurisdiction to strike out an appeal as it has to strike out pleadings and that the principle governing the latter, as stated in Lucas & Son (Nelson Mail) v. O'Brien [1978] 2 N.Z.L.R. 289 at p. 294, has application. Possibly this is so, but no reported decisions were cited where an appeal has been the subject of such an application. For present purposes I shall accept that the same considerations apply.

To the extent that the appeal relates to the refusal of the District Court Judge to grant an adjournment, setting aside any question as to the need to obtain leave, the applicant would appear to be in a strong position as the application to the District Court Judge was for a week's adjournment only, but as to the decision come to by the District Court Judge in the exercise of his discretion granting the garnishee order, I am unable to see that it can be said that an appeal could not possibly succeed. It may well be that it will fail, but that is not sufficient.

It is clear that the judgment debtor wishes to arrange and have approved a proposal which will benefit his creditors generally and must stave off the operation of the garnishee order if this is to have any chance of success. Mr Hicks pointed out that under Rule 270 in the District Court Rules, the judgment debtor is permitted to appear and show cause why an order should not be made (provided, of course, that the sub debtor has not paid the amount into Court) and that this gives the District Court Judge a discretion to refuse an order beyond that contained in Rule 274. Possibly that is so. In any event, Mr Hicks was able to support his argument, that the fact that a scheme of arrangement had been set on foot may be a factor to take into account, by citing two English decisions relating to charging orders - Burston Finance Ltd (In Liquidation) v. Godfrey and Others [1976] 2 All E.R. p. 976 and

Roberts Petroleum Ltd v. Bernard Kenny Ltd (In Liquidation) [1983] 1 All E.R. at p. 564. I make no finding on any of these points, but merely repeat that I cannot say that it is not possible for the appeal to suceed. The application must be dismissed with costs reserved. Clearly the appeal itself should be brought on at an early date and I shall inform the Registrar accordingly.

Solicitors:
Rhodes & Co., Christchurch, for Appellant
Loughnan, Jarman & Co., Christchurch, for First Respondent.