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N.Z.L.Reports

M.587/83

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

1150
(1984) 3 NZFLR 108
(1984) 1 FRNZ 368

BETWEEN GENERAL FINANCE ACCEPTANCE LIMITED a duly incorporated company having its registered office at Wellington, Financier

Appellant

AND COOPER of 1 Vasanta Avenue, Femme Sole

Respondent

Hearing: 2 August 1984

Counsel: J G Miles for Appellant
J C Corry for Respondent

Judgment: 10 SEP 1984

JUDGMENT OF EICHELBAUM J

The respondent Mrs Cooper married Mr Cooper in 1946. Following their separation in 1965, pursuant to informal arrangements Mrs Cooper and the only child of the marriage lived in properties provided by Mr Cooper and registered in his sole name. As at 1983 Mrs Cooper for some years had been living at 1 Vasanta Avenue, Wellington.

On 13 May 1983 Mr and Mrs Cooper entered into a matrimonial property agreement. Although it dealt comprehensively with the matrimonial property, except in one respect it did not alter the existing de facto position. That is to say, property which previously had been in the name of the husband was declared to be his separate property, and likewise with the wife. The exception was 1 Vasanta Avenue which was among the items to be the separate property of the wife. The husband undertook to pay rates until such time as the wife

elected to sell it. Pursuant to the agreement the husband executed a transfer dated the same day. There is now before me an appeal by General Finance Acceptance Ltd against the dismissal in the District Court of its application to have the agreement and transfer declared void pursuant to s 47 of the Matrimonial Property Act 1976. That application was made alternatively upon both the grounds available under that section, first that the agreement and transfer were void as having been entered into with the intention of defeating the creditors of Mr Cooper, particularly the applicant, or secondly as having the effect of defeating the claims of such creditors.

I need to commence by considering the onus lying upon an applicant under the first limb of s 47. Mr Corry submitted that the intention to defeat must be the dominant or overriding one. He accepted that it need not be the sole intention. There is obvious room for more than one interpretation on this aspect. Apart from sole or dominant, on a descending scale one might enquire whether substantial or significant intention is sufficient.

Counsel did not cite any authorities directly applicable to this part of the argument. Indeed the only reported decisions on s 47 (both of which were discussed before me) appear to be Official Assignee v Whitehead 1982 5 MPC 110 and Walsh & NZ Law Society v Powell 1982 5 MPC 180. There are however a number of decisions on similar provisions in bankruptcy law. In Re Reimer, ex parte Official Assignee 1896 15 NZLR 198 was a decision on s 79 of the Bankruptcy Act 1892, the fraudulent preference provision, which then as now stated that certain dispositions made "with a view" to giving a particular creditor preference were deemed fraudulent and void as against the Official Assignee. There was some difference between the members of the Court as to the appropriate test. Denniston J, considered that the statute at least required that there should

exist on the part of the debtor, as an operative and effective motive in the transaction, the intention to prefer the particular creditor in favour of whom the impeached transaction was made. His Honour continued :

> " I do not care to insist too much on the 'dominant' motive. A transaction may be made from many motives, as to which it may be difficult to say that any one predominates. But, in order that a transaction should be made with a view of preferring, it must, I think, on the cases, be one which would not have been made by the debtor unless the motive to prefer existed. "
>
> (pp 209-210)

Conolly J's judgment is brief. He referred to the test adopted by Prendergast CJ at first instance, the real and substantial object of the purchaser. Edwards J approached the matter in light of "the dominant view in the mind of the debtor in making the sale". The learned Judge said the English cases had clearly established that as the appropriate test, one which had been applied by Richmond J in Castendyck v Official Assignee of McLellan 1887 6 NZLR 67.

The learned authors of Spratt & McKenzies Law of Insolvency 2nd Ed p 157 say that Denniston J's view has not found support in later cases. In Peat v Gresham Trust Ltd 1934 AC 252 Lord Tomlin in a speech in which Lord Warrington, Lord Russell of Killowen, Lord

Macmillan and Lord Wright concurred stated the requirement simply as "the dominant intent to prefer". In Re Aston (a bankrupt) ex parte Official Assignee 1956 NZLR 703, 705 K M Gresson J referred to the "real dominant or substantial motive" of the debtor and, later in his judgment, to the "governing" motive. The most helpful authority I have found is In re Cutts (a bankrupt) 1956 1 WLR 728 a judgment of a Court of Appeal comprising Lord Evershed MR, Jenkins and Hodson LJJ on the English equivalent of our fraudulent preference section. Referring to the expression "with a view of giving such creditor . . . . a preference" Lord Evershed said he used the word "intention" as synonymous with "view". His Lordship continued :

> " But whether the word used be 'intention' or some other word, since it is notorious that human beings are by no means always single minded, the intention to prefer which must be proved, is the principal or dominant intention. "
>
> (pp 733-4)

He added :

> " There may also be a valid distinction for present purposes between an intention to prefer and the reason for forming and executing that intention. "

Hodson LJ said :

> " The authorities show that the trustee has to prove the dominant intention to prefer and that there is a distinction

> between the intention and the motive for forming the intention. The existence of a dominant intention does not, however, exclude the existence of other objects. "
>
> (p 750)

Although Jenkins LJ dissented he too relied upon the test of dominant intent. He expressed the opinion that "intent" or "intention" were the best equivalents for "view". His judgment contains the following passage :

> " (W)hile the onus of proving . . . . the bankrupt's intent to prefer rests from first to last on the trustee, he need not, in order to discharge that onus, prove the bankrupt's intent to prefer by direct evidence or by circumstantial evidence of which such intent is the only possible explanation. It is enough if he proves facts of which the intent to prefer is so much the most probable of the possible explanations that the court can, on the ordinary principles governing the trial of an issue of fact, properly hold it to be the true explanation. "
>
> (p 739)

These last remarks are I think helpful in deciding whether the onus of proof has been discharged in the present case.

Notwithstanding the difference in language it appears to me that the concept of "view to prefer" is closely analogous with the phrase with which I am concerned, "intended to defeat". Indeed the judgments in In re Cutts support the conclusion that in fraudulent preference cases the requirement to be proved is the same as if the words read "with an intention to prefer". In regard to s 47 the proper approach, in my opinion, is to enquire as to the dominant intention.

I now turn to the facts.

For many years Mr Cooper had been managing director of South Pacific Rent-a-Car Ltd and Dominion Budget Rent-a-Car Ltd. He held controlling interests in those companies by virtue of his shareholding in the parent company White Glove Services (NZ) Ltd. Mr Cooper also controlled a company called H C Services Ltd. During the period September 1980 to March 1983 General Finance made a series of advances to South Pacific and Dominion Budget variously secured by means of debentures, mortgages, instruments by way of security, hire purchase agreements and leases. In respect of such loans Mr Cooper was a principal debtor, a guarantor or both. As at October 1983 the total owing inclusive of interest was $6.6 million.

At the end of 1982 and in the early months of 1983 there were ongoing discussions between General Finance and Mr Cooper regarding financing and refinancing. On 22 April 1983 there fell due a loan originally of $845,000 under which indebtedness now stood at $956,281. On 4 May it became known to Mr Cooper that General Finance was not prepared to refinance this or other loans. Mr Cooper conceded in cross-examination that it was then inevitable that he would default in further payments owing to General Finance. Thereafter, until July, a series of defaults in

fact took place. To protect its position General Finance first appointed a manager and then on 12 July put the companies into receivership. The same month General Finance issued a writ against Mr Cooper claiming repayment of over $5 million said to be owing in respect of 10 loans together with additional amounts for interest.

Mr Cooper took certain steps to mitigate the effects of this tide of events. Early in his judgment the learned District Court Judge summarised this phase of the matter as follows :

> " The evidence is that Mr Cooper became well aware in early May 1983 that his companies' default in payment of their debts to the applicant had become inevitable. . . . . .it is also perfectly clear on the evidence that from about March 1983 onwards Mr Cooper started to take and did take measures to protect his personal position and the personal position of others to whom he may have felt some loyalty. . . . . It is sufficient to say that there is a clear and obvious pattern to them and that the various events and actions and their timing were more than coincidence. "
>
> (p 3)

The Judge did not specify the measures to which he referred but the evidence was as follows. Between 1 March and 10 May H C Services Ltd drew down the unsecured deposits it had with Dominion Budget. The early withdrawals

may not necessarily have had any significance but on 21 April there was one of $225,000 followed on 10 May by another of $123,000. Then on 11 May eighteen individuals withdrew unsecured deposits ranging from $162 up to $13,500. The persons concerned were relatives of Mr Cooper's and employees of the companies or persons having some connection with such employees. Included were the present respondent and Mr Cooper's 79 year old mother. Mr Cooper said that he signed all the cheques. The total amount involved in this flight of money between 1 March and 11 May was close on $500,000.

Among Mr Cooper's assets was a property in Redoubt Road, Manakau on which he had placed a value of $600,000. On 11 May he signed a mortgage in favour of H C Services Ltd in the sum of $750,000 repayable in the year 2003 with interest at 3%. In evidence he said that so far no money had been advanced under the mortgage.

On 3 June Mr Cooper's marriage to the respondent was dissolved. He must have remarried soon afterwards because in the same month he made application to have the Redoubt Road property registered as a joint family home.

The evidence is insufficient to justify an inference that the divorce and remarriage were part of any scheme to endeavour to place assets beyond the reach of creditors but at any rate the other events recited plainly are ones the Judge had in mind in the passage from his judgment quoted earlier. Mr Cooper endeavoured to pass off the withdrawal of deposits as mere coincidence but in this respect it may be noted that except on the subject of motive for entering into the matrimonial property transaction the Judge found Mr Cooper to be an evasive and unreliable witness. In summary then the Judge formed the view that measures taken by Mr Cooper from 1 March

onwards were motivated by an intent to protect himself and others to whom he felt some loyalty, that there was a clear and obvious pattern to such measures, and that their timing was more than coincidence. The particular significance of the last statement lies in these facts : the first default occurred on 22 April, the most substantial steps taken by Mr Cooper were in the period 21 April to 11 May, Mr Cooper admitted that at any rate by 4 May he knew that defaults were inevitable, and there was a concentration of activity during 10 to 13 May. On the face of it therefore it will seem surprising that the Judge found that the transaction between the respondent and Mr Cooper on 13 May, involving as it did the transfer of one of Mr Cooper's major assets, was not made with intent to defeat creditors. To understand the Judge's reasoning it it necessary to refer further to the matrimonial background.

Notwithstanding that between 1965 and 1983 there were no formal arrangements between Mr and Mrs Cooper, evidently Mrs Cooper's needs were sufficiently looked after pursuant to an amicable understanding between them. She lived in the Vasanta Avenue property from 1974 onwards. In 1982 Mrs Cooper wished to move to Hastings to be with her sister whose husband had died. She said that when she first raised this with Mr Cooper in May or June of that year he agreed the property could be sold. The original intention was that Mrs Cooper and her sister would build two town house units. They took the project to the point of having plans prepared but it seems at some stage Mrs Cooper's ideas changed in that she decided to purchase a house in Hastings rather than build. By purchasing a less expensive house she hoped to obtain a sufficient income from investing the balance to cover outgoings. At the hearing she produced an agreement dated 30 September 1983 for the sale of the Vasanta Avenue property for $172,000 and an

agreement dated 26 October 1983 for purchase of a property in Hastings for $65,000 subject to the agreement previously mentioned becoming unconditional and being duly completed by set dates. She said that she had no knowledge of Mr Cooper being in any difficulty, first learning of this through a newspaper article well after the matrimonial property agreement had been signed.

There is no point in examining the evidence relating to Mrs Cooper's knowledge or intentions further. It is clear from the tenor of the judgment that in general the Judge accepted Mrs Cooper's evidence. In particular he found that Mrs Cooper entered into the matrimonial property agreement with no intention whatever that the rights of Mr Cooper's creditors should be affected in any way. There being no evidence that contradicted Mrs Cooper on this point, Mr Miles properly accepted that he could not hope to set that finding aside and did not endeavour to do so.

It is against this background that the Judge's findings of fact in regard to Mr Cooper's intention in entering into the agreement have to be considered. Acceptance of Mrs Cooper's account necessarily involves acceptance of the proposition that in broad principle Mr Cooper agreed to Mrs Cooper's plans for removing herself to Hastings at a stage when so far as the evidence goes there was no reason to suspect that he or his companies were under pressure. The Judge inferred that thereafter some consideration was given to how the property might be transferred to Mrs Cooper without attracting gift duty. This does not appear to be based on any specific matter in the evidence. The Judge thought that the decision to proceed by way of an agreement pursuant to s 21 of the Matrimonial Property Act may also have been prompted by another reason namely

Mr Cooper's decision to remarry. Again it is difficult to see the basis for that finding. Both Mr and Mrs Cooper gave evidence in opposition to the application and one would have thought that having regard to the obvious room for drawing adverse inferences from the proximity of the 13 May transactions to the other events to which I have made reference, they and particularly Mr Cooper would have put forward any factual matter capable of counteracting the unfavourable implications. The Judge said however that on the evidence of both Mr and Mrs Cooper he was satisfied that the agreement was entered into in good faith for the purpose of settling any rights Mrs Cooper might have to matrimonial property. On this aspect the critical extract from the judgment is as follows :

> " I have no doubt whatever that Mrs Cooper entered into the Matrimonial Property Act transaction with no intention whatever that the rights of Mr Cooper's creditors should be affected in any way. I have already said that I accept Mr Cooper's evidence in regard to his motive for entering into the matrimonial property transaction although I should say at once that on other matters I found him an evasive and unreliable witness but I am quite satisfied that it was his primary purpose to bring to a final legal realisation his obligations to Mrs Cooper which had been allowed to lie dormant over some 18 years of separation. For the reasons I have attempted to express I find affirmatively despite all indications to the contrary as far as Mr Cooper is concerned that it was not the intention of either party in entering into

the Matrimonial Property Act agreement
to defeat Mr Cooper's creditors. "

(p 6)

In this passage the Judge refers to Mr Cooper's "primary" purpose which implies that there was another or others. The Judge does not elaborate and it may be that to an extent he would agree with the view I am about to express. That is, that against the background of the events preceding 13 May, it is simply inconceivable that in entering into the matrimonial property agreement and immediately signing a transfer, he was not influenced by the desirability of removing the house property from risk of attack by the applicant and other creditors.

The Judge obviously regarded the steps taken that day merely as the culmination of a proposal that had originated a considerable time earlier and was explicable on the basis of Mr Cooper's obligations to his wife. I can accept that to the extent that had no crisis occurred in Mr Cooper's financial affairs, on past performance he would have agreed to the sale of the Wellington property and the purchase of a substitute one in Hastings. Whether, contrary to the pattern of the previous 18 years, title to that property would have been taken in Mrs Cooper's name is a matter on which I do not think the evidence enables one to form any firm conclusion, and likewise whether the balance generated through purchasing a cheaper property in Hastings would have passed into Mrs Cooper's beneficial ownership or if it might rather have been used to establish some fund from which she would receive the income. It is certain that no convincing reason emerged why Mrs Cooper should receive title to the Vasanta Avenue property when the intention was that it would be sold immediately. In fact

Mr Cooper, obviously an experienced businessman, had to say he just did not know. On the totality of the evidence and in particular the chronology of events I cannot escape the conclusion that the dominant intention on Mr Cooper's part in entering into the agreement at that time was to defeat the appellant. I emphasise "at that time" since I accept that but for circumstances he might otherwise well have proceeded to purchase a property for Mrs Cooper in Hastings in her name when in due course she had found a suitable property.

I reach my decision fully conscious of the advantage of a Judge at first instance who has seen and heard the witnesses. My conclusion however relates to credibility only in one narrow aspect. It does not involve derogating from the finding that Mrs Cooper acted in good faith throughout. So far as Mr Cooper is concerned, as noted the Judge in other respects found him to be an evasive and unreliable witness. The area where I differ from the Judge is confined solely to Mr Cooper's intention in entering into the matrimonial property agreement. There, with every respect, I find Mr Cooper's protestation that at the date of the agreement he had no inkling of the possibility of proceedings against him quite incapable of credence, as unbelievable in fact as the Judge himself found Mr Cooper's explanation of the withdrawal of funds from Dominion Budget in the period concluding 11 May. By that date the matrimonial property agreement must have been in active contemplation and indeed very likely, having regard to the fact that solicitors were involved on both sides, already fully prepared. Perhaps most telling is that two days before signing the matrimonial property agreement Mr Cooper had executed the $750,000 mortgage on the Redoubt Road property, patently a hopeful protective device against creditors which he explained as a tax measure. I am mindful of the principles in Watt v Thomas 1947 AC 484 but for the reasons

stated the present matter turns more upon inference than primary findings of credibility. Indeed in the passage already quoted the Judge himself very fairly said, with reference to his finding absolving Mr Cooper of intention to defeat, that all indications were to the contrary.

On the last matter I add that the possible distinction between intention and motive was not drawn to the Judge's attention, both concepts being referred to in the passage from the judgment quoted earlier. It seems very probable that Mr Cooper's motive was to protect his former wife's position and endeavour to ensure she received what he thought was due to her. Such a finding does not impair the conclusion that his intention in effectuating the transfer at that time was to snatch the property from the jaws of the approaching creditor. See, to similar effect, the remarks of Jenkins LJ in the Cutts case at p 740.

The final point is the effect of the absence of any intent to defeat on the part of Mrs Cooper. Where the instrument under attack is a contract, must the applicant show intent to defeat by both parties ? It would be strange if the applicant's rights differed according to whether he attacked the agreement or the transfer arising from it. In my opinion, if the dominant intent of the donor is to defeat creditors, the agreement is infected with that intent even if as here the donee's intention is not criticisable. It is to be expected that in many cases the donee's intentions will be mixed or impossible to ascertain. If they had to be established as well there is a risk that the purpose of the section would largely be stultified. I appreciate that some remarks in Official Assignee v Whitehead (see p 111) support the opposite view but in that case the first limb was not in issue.

I turn then to the second limb of s 47. Here the factual argument centred on whether the applicant had sufficiently proved its case. The Judge decided this aspect against the applicant on the basis that it had failed to establish that Mr Cooper's present asset position was such that if the value of the Vasanta Avenue property was deleted that would have the effect of the applicant being unable to recover whatever amount may finally be held payable by Mr Cooper.

The question of Mr Cooper's asset position as at the date of the application can be dealt with briefly. In December 1982, as a condition of General Finance continuing to supply accommodation, he had been required to submit a statement of assets and liabilities. The assets totalled $4.3 million, in which the principal item was the holding in White Glove Services (NZ) Ltd ($2.8 million). There was an item described as cash advances, deposits and loans of $598,000. Mr Cooper listed No 1 Vasanta Avenue at $150,000 and the Redoubt Road property at $600,000 in each case inclusive of chattels. In addition there were lesser items of a flat, some real property, two mortgages and his interest in H C Services Ltd. On the liabilities side there were shown his current account with White Glove Services of $2.18 million, a mortgage over Redoubt Road $35,000 and bank overdraft $15,000. The net surplus was stated to be $2,142,000.

Mr Corry took the point that since Mr Cooper was not a party to the present application the statement was mere hearsay. But in para 23 of the affidavit sworn by Mr Cooper on behalf of the respondent he referred to the statement of assets and liabilities and commented on the circumstances in which it was furnished without endeavouring in any way to detract from its correctness. I think the Court is entitled to infer that the information

in the statement can be regarded as setting out Mr Cooper's situation correctly, or at any rate not understating it, bearing in mind that he would have been concerned to satisfy General Finance of his creditworthiness.

Such additional information as was available at the hearing could serve only to worsen Mr Cooper's position. Plainly his holding in White Glove was now worthless. Taking the view most favourable to Mr Cooper the deletion of the value of his holding in White Glove reduced his net worth as disclosed by the December 1982 statement to $1.5 million.

The Judge said it was mere assumption that Mr Cooper's position remained as disclosed in the December statement. With respect I think the reasonable inference is that he had not acquired any new assets of such significance as to have a decisive bearing on the present issue. There is not only the reference in his own affidavit already mentioned but also the fact that when refinancing did not eventuate he was forced to default on payments which then fell due; and he had to concede that further defaults would follow. Theoretically one cannot exclude the possibility that in the meantime Mr Cooper had had the benefit of some windfall. However, the applicant had produced such information as was available to it, and all evidence additional to the statement of assets and liabilities pointed to the conclusion that Mr Cooper's position was a deteriorating one rather than the reverse. He was available to the respondent as a witness and his silence on a topic that was peculiarly within his own knowledge went to confirm the inference to which the rest of the evidence gave rise. Mr Corry said that the applicant could easily have elicited the true position from Mr Cooper in cross-examination. While that is correct there is no obligation on an applicant to embark upon a topic where, without more, he has already discharged the onus of proof. Accordingly

I have to state that in my respectful view the finding of the Judge to the contrary is erroneous.

Mr Corry further contended that the applicant had failed to establish the amount owing to it. As I read the judgment, that was not a ground of the Judge's determination against the applicant, although that may be open to debate. At any rate the respondent is not precluded from endeavouring to support the judgment on that ground.

The applicant's claims against Mr Cooper arising out of the various loans are all for liquidated demands. As at 31 October 1983 it was calculated that with interest they totalled $6,968,128. The arithmetic was not challenged. However, in response to the writ issued by the applicant Mr Cooper has filed a statement of defence raising numerous affirmative defences. It contends that certain of the loans are void as being in contravention of the Hire Purchase and Credit Sales Stabilisation Regulations 1957, that a debenture over the undertaking of Dominion Budget was obtained by undue influence and/or unconscionable acts and conduct on the part of the applicant, that in part the debenture is unenforceable pursuant to the provisions of the Economic Stabilisation (Motorcar hiring) Regulations 1971, that any covenants of which the defendant may be in breach are unfair unreasonable harsh unconscionable and oppressive within the meaning of the Credit Contract Act 1981, and that in relation to the execution of the debenture there was gross inequality of bargaining power between the plaintiff and the defendant. Further, arising out of the allegations of oppressive conduct on the part of the plaintiff and on other like grounds the defendant has counter-claimed for an order setting aside the debenture or reopening it. On other bases the defendant has counterclaimed for $1,912,500 and

for the taking of accounts and/or an enquiry into damages. I have stated Mr Cooper's defences and allegations in broad outline only, for the reason that in evidence in these proceedings the respondent made no attempt to lead any evidence to indicate that any of them were tenable. In the absence of such testimony the evidential position is that prima facie the amounts claimed by the applicant are owing. Further there is Mr Cooper's admission that he had paid interest and, had he been able, would have continued to meet his and his company's obligations under the various loans. In my view therefore the applicant sufficiently discharged the onus of showing that Mr Cooper was indebted to the applicant in a sum in excess of $6.9 million. After taking into account the expected realisation from the receiverships, it was deposed on behalf of the applicant that the deficiency was estimated at $2,629,166. Mr Corry objected that this information too was hearsay but bearing in mind that the receiver had been appointed by and on behalf of the applicant I do not think that that is so. In any event the affidavit in question was allowed to be tendered and used at the hearing without objection and I think it is too late to raise this point for the first time on appeal.

Thus taking as I put it before the most generous view of Mr Cooper's asset position the gap between that and the estimated deficiency is in excess of $1 million. Accordingly removal of the Vasanta Avenue property from Mr Cooper's assets defeated the applicant and other creditors in the sense of depriving them of assets to which they otherwise would have had resort : Official Assignee v Whitehead (above) at p 112. As Thorp J there stated defeat need not be total.

Having dealt with the factual and evidentiary questions relevant to the second limb I turn to Mr Corry's

legal submission to the effect that the application was premature. He said that the question was not whether the transaction may have the effect of defeating creditors but whether it had that result. With respect the statute does not follow the second form of wording any more than the first. According to the section the issue is whether the impeached agreement has that effect and it would be contrary to general principles to demand that such fact should be proved to a standard of absolute certainty. In civil cases the courts treat as certain anything proved to be more probable than not, per Lord Diplock in Mallett v McMonagle 1970 AC 166, 176.

In my opinion therefore the appellant is entitled to succeed under the second limb of s 47 as well.

The appellant filed an application for leave to adduce certain further evidence for purposes of the appeal, namely an affidavit exhibiting an affidavit sworn by Mr Cooper in other proceedings. That last document, dated 1 December 1983, was filed in litigation brought by the White Glove group of companies against the present appellant and others. The point of the appellant's desire to bring this affidavit before the Court is that in it Mr Cooper deposes as to his asset position. The reason why Mr Cooper found it necessary to go into that, so I was informed from the bar, was to establish, for purposes of an application he or his companies had made for an interim injunction, that his undertaking as to damages was meaningful.

The principles governing admission of further evidence upon an appeal are well established and it is necessary to refer only to the judgment of Hutchison J in Sulco Ltd v E S Redit & Co Ltd 1959 NZLR 45, 72. For present purposes the critical aspect is that in general

leave will not be given if the party making the application could, with due diligence, have discovered the evidence before trial.

In one sense it is self-evident that the appellant could not have discovered this very evidence before trial, consisting as it does of an affidavit not sworn until after the hearing. However that point goes only to form. The evidence itself relates to Mr Cooper's financial position. As already noted Mr Cooper gave evidence at the hearing and the applicant was free to cross examine him upon the subject. There is no reason to think that Mr Cooper's answers would have been any different from the information contained in the subsequent affidavit. The situation is quite distinct from that where an opposing witness, having given evidence on a topic at the hearing on some significant point, later makes a contradictory statement which the opposite party wishes to bring before the Court on appeal. The applicant may have refrained from cross-examining Mr Cooper at the trial for good reason; indeed in light of my decision on the merits of the appeal it was unnecessary to do so but that does not warrant saying now that that evidence could not with due diligence have been discovered. Accordingly I dismiss the application.

For the reasons stated earlier the appeal succeeds. With the concurrence of both parties I now adjourn the hearing of the appeal so that the appellant can consider what further orders if any it could appropriately seek under s 77 of the District Courts Act 1947. The appellant should apply for any further order by notice of motion pursuant to leave reserved, and the respondent is to have 14 days notice of any further hearing that may be necessary. The appellant will be entitled to costs

but in the meantime their quantum is reserved.

Finally I should add that if the upshot of these proceedings is that the respondent loses the proceeds of sale of the Vasanta Avenue property then having regard to the background and especially to the Judge's finding regarding her bona fides, which has not been disturbed or indeed challenged, the outcome is naturally an unfortunate one from her point of view. It has been said that in exercising its bankruptcy jurisdiction the Court does not have exclusive regard to the wishes of the parties but has also to consider whether the course proposed is conducive or detrimental to commercial morality and the interests of the general public, see In re Nisbett, ex parte Vala 1934 GLR 553. Similar considerations apply to provisions such as s 47 of the Matrimonial Property Act.

Solicitors :
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