21/2/86

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP No 188/86

(3)

MEDIUM PRIORITY

236

BETWEEN JOHN JONES of 1111 Green Island Road, American Canyon, California, United STates of America, Company Manager

Plaintiff

AND LARRY POFFENROTH presently of Auckland, New Zealand normally of California, United States of America, Company Director

Defendant

Hearing: 10 March 1986

Counsel: Mr M C Black for Plaintiff
Mr A P Randerson for Defendant

Judgment: 14 March 1986

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JUDGMENT OF SMELLIE J

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This is an application by the Plaintiff made pursuant to R 567 of the High Court Rules for leave to issue a Charging Order before judgment on the Defendant's funds in the Westpac Bank at Auckland.

Jimmie Lee Jones (the father of the Plaintiff) and Larry Poffenroth are Californians. In the past they have been good friends. They have both been involved in certain entrepeneurial undertakings in California associated with heavy engineering and transport. They

have also shared an interest in marine engineering which has had an international flavour.

It was this latter interest which led to Mr Jones purchasing a tug and a dredge from the Otago Harbour Board. He decided to send the dredge to the Philipines for reconditioning and the tug to Auckland for conversion to a deisel powered ship with potential for uses other than a tug. Conversion of the tug was also the occasion for Mr Poffenroth coming to New Zealand a year or two ago to do work on that vessel in the first instance on behalf of Mr Jones or one of his companies.

Subsequently however the parties agreed that the tug would be sold to one of Mr Poffenroth's companies. The vessel changed hands under circumstances where the parties contemplated that there would be further purchases by Mr Poffenroth in connection with equipment that Mr Jones had got together in New Zealand and elsewhere for the purpose of converting the tug.

Unfortunately there has been a downturn in the relationship of these two men in the last year or six months, the consequence of which has been the launching of three High Court actions so far this year and there is a furtner one threatened. Initially Mr Poffenroth arrested the dredge and a tug sent from Gibralter to tow it to the Philipines. In due course on terms the Court ordered the

release of those vessels. Mr Jones responded by suing Mr Poffenroth in New Zealand in respect of certain transactions that had taken place in California and in the first instance ex parte obtained a Charging Order on Mr Poffenroth's New Zealand funds. I lifted those Charging Orders in an oral judgment delivered on the 4th March and ordered a stay of the Californian based claims on the grounds that they were more appropriately dealt with there than here.

The current proceedings and the application I have now to deal with represent the third action, this time taken by Mr John Jones, son of Jimmie Lee on a judgment debt obtained in California against Mr Poffenroth and in respect of which Mr John Jones has taken an assignment. On the basis of the action so commenced Mr Jones has also applied for a Charging Order over certain of the funds of Mr Poffenroth here in Auckland. In an Affidavit in Reply to the Affidavit filed in support of the Claim for a Charging Order Mr Poffenroth records that his solicitors are presently preparing a Writ against Mr Jimmie Jones, Mr John Jones and a Third Party alleging a conspiracy against him to injure his business interests. His Affidavit says that that action is likely to be filed this week.

After delivering my oral judgment on 4th March I passed some gratuitous comments from the Bench to the effect that these parties were likely to exhaust

themselves and their modest funds suing each other and that it would be better if they sat down round a table and tried to work out some sensible solution. Unfortunately that suggestion seems to have fallen on deaf ears.

Chronology of Events Relevant to this Judgment

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| 2.1.85 | Dhillon obtained judgment against Poffenroth in the Superior Court of the State of California in and for the County of Alameda for a debt owing plus attorney's fees and interest, a total of $US45,172 and some cents. |
| 24.2.86 | Dhillon assigned the judgment debt to John Jones the Plaintiff in these proceedings. |
| 4.3.86. | Notice of the assignment was given to the Defendant, Poffenroth. |
| 6.3.86 | Demand was made for payment by Poffenroth for the New Zealand equivalent of $87,700. |
| 5.3.86 | The action was commenced and the motion seeking a Charging Order was filed and served. |
| 10.3.86 | The matter came before me at 3 pm on that day on the basis that in all the circumstances an urgent hearing of the application was desirable.<br><br>It was not possible for me to deliver an oral judgment on the 10th but I did undertake to deliver judgment this week. |

The Motion for a Charging Order

The grounds set out in the motion are as follows:-

"That the Defendant intends to defeat the Plaintiff's claim, will make away with the said fund or transfer the same outside New Zealand or dissipate the fund within New Zealand or:

(b) Alternatively the Defendant is about to quit New Zealand and/or is a foreign debtor."

The motion is supported by an Affidavit by Elizabeth

Jane Gunn, an Auckland Solicitor. She attaches the abstract of the judgment and also attaches as exhibits affidavits by the original Judgment Creditor acknowledging the assignment and attaching a copy of it, and a further Affidavit by the original Judgment Creditor who deposes that none of the judgment debt has been paid. I should mention that these "Affidavits" that I have referred to are in fact xerox copies that have been sent to New Zealand either by airmail or by bureaufax. The terms of the assignment are important and I shall return to those in greater detail later in this judgment.

Mr Poffenroth replied by way of Affidavit that was sworn on 10th March and presented at the hearing by consent. He deposed that the Plaintiff, John Jones, is the son of Jimmie Lee Jones. He explained the circumstances under which Mr Dhillon obtained judgment against him in California and then went on to swear that he had arranged with Mr Dhillon that he could pay off the $30,000 debt at the rate of $1000 per month. He gave precise evidence of this arrangement having been arranged between his attorney and a lawyer acting for Mr Dhillon. He then went on to swear that he believed the proceedings had been instituted against him at the request of Jimmie Lee Jones for the purpose of tying up his assets in New Zealand and putting him out of business. He swore specifically in para. 10 of his Affidavit as follows:-

"Not long after the Admiralty proceedings were

> commenced by me, Mr Jimmie Jones told me outside the Travel Lodge Hotel in or about the middle of January 1986 that if I did not release the Writs of Arrest on his boats that he would 'break me' in New Zealand and in California".

Mr Poffenroth also sworn in para 14 of his Affidavit in opposition as follows:-

> "I am prepared to give an undertaking to the Court in respect of the funds held in the Westpac Bank that I will not remove them from New Zealand and further that I will use the funds only for the purpose of discharging legitimate debts incurred in New Zealand. I will also give an undertaking that it is my intention to spend the funds on the Dasher 1 (the tug) project. There may be some items I require to purchase from overseas for the Dasher 1. I would qualify the undertaking to the extent that I need to send funds overseas to purchase parts for the Dasher 1."

So on the face of it Mr Poffenroth acknowledges an original judgment debt owed to Mr Dhillon but says that he made arrangements to pay the debt by instalments and that those arrangements are still on foot. The Affidavit of Elizabeth Jane Gunn, however, contains information that indicates that the original Judgment Debtor does not agree with Mr Poffenroth's sworn statement and in particular that he denies any arrangement for payment by instalments, far less the actual payment of any instalments as suggested by Mr Poffenroth. On the evidence in the Affidavits as it stands at present all I can safely decide is that there is a judgment debt, a substantial portion of which is outstanding. Beyond that there is a conflict which cannot be resolved at this stage of the proceedings as to whether any part of it has been paid and, more

importantly, whether arrangements were in fact made to pay by instalments.

The granting of a Charging Order is of course a discretionary remedy and in exercising my discretion I have to be satisfied that the provisions of the appropriate rule have been satisfied and in the broader sense that the Plaintiff's claim is genuine and has at least a reasonable prospect of success.

Can the Plaintiff Sue on a Foreign Judgment

Although not frequently encountered the common law has recognised a cause of action based on a foreign judgment from the 17th century onwards. In Dicey and Morris 10th Ed "The Conflict of Laws" Vol 2 at p 1037 the learned Editors record as follows:-

> "It was at one time supposed that the basis of this enforcement was to be found in the doctrine of comity. English judges believed that the law of nations required the courts of one country to assist those of any other, and they feared that if foreign judgments were not enforced in England, English judgments would not be enforced abroad. But later this theory was superseded by what is called the doctrine of obligation, which was stated by Parke B. in Russell v Smyth (1942) 9 M & W 810 and Williams v Jones (1845) 13 M & W 628 and approved by Blackburn J a generation later in Godard v Gray (1870) LR 6 QB 139 and Schibsby v Westenholz (1870) LR 6 QB 155 in the following words: 'We think that ... the true principle on which the judgments of foreign tribunals are enforced in England is ... that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms

> a legal excuse for not performing it, is a defence to the action.' It followed that provided the foreign court had jurisdiction to give the judgment according to the English rules of the conflict of laws, the judgment is conclusive in England (unless it is impeachable for reasons of fraud, public policy or the like) and nor merely prima facie evidence of the defendant's liability as had at one time been supposed."
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> (The emphasis is mine)

What Dicey and Morris records is confirmed in Halsbury 4th Ed Vol 8, para 715 and in Farmer "Creditor and Debtor Law in Australia and New Zealand" 2nd Ed at page 93.

Is there any Reason of Public Policy Against Enforcing this Judgment

As earlier mentioned the terms of the assignment are significant. The document exhibited to the Gunn Affidavit record the original judgment creditor swearing as follows on 24th February 1986:-

> "For valuable consideration, receipt of which is hereby acknowledged, I AMARJIT S DHILLON, hereby assign and transfer to John Jones, all of my right, title and interest in and to that certain Judgment entered in my favour in the above-entitled cause on January 2, 1985 in Judgment Book... and against the Defendant LARRY POFFENROTH, individually and trading as INDUSTRIAL TRUCK AND AUTO, and I hereby represent and warrant to John Jones that the Judgment is wholly due and unpaid and owing from the Defendant LARRY POFFENROTH, individually and trading as INDUSTRIAL TRUCK AND AUTO.
>
> I hereby authorize John Jones to collect, adjust, settle, compromise, or enforce the payment thereof in my name or in his name or otherwise, on the condition that John Jones shall pay to me and to Richard D McKay as my attorney of record, fifty (50%) percent of all amounts of monies collected on the said Judgment."

In the papers placed before me there is no suggestion that John Jones had any interest in the original dispute that led to Mr Dhillon obtaining the judgment.

The arrangement between Dhillon and Jones is clearly champertous. The textbook on torts that my generation was familiar with as students was the 2nd Ed of the work by Professor Davis "The Law of Torts in New Zealand". No doubt the work is well out of date in many areas but I apprehend that what it says about maintenance and champerty is a reliable summary of the common law. At page 235 the following is found:-

> "Maintenance is the unlawful assistance, by money or otherwise, proffered by a third person to either party to a civil suit, to enable him to prosecute or defend it. Champerty is that form of maintenance in which the person giving the assistance does so in consideration of his receiving a share of anything which may be gained as a result of the proceedings."

The papers here show quite clearly that Mr Dhillon had failed to find property against which he could execute judgment in California and had made some inquiries in New Zealand without success. The terms of the assignment suggest that Mr John Jones is effectively maintaining Mr Dhillon by ensuring that the judgment debt is pursued by way of action in New Zealand and the 50/50 sharing of the proceeds of anything recovered is clearly champerty.

In Re Trepca Mines Ltd (1962) 3 All ER 351 Denning MR

at page 355 lines E to H discusses the law of maintenance and champerty. The judgment reads:-

"Maintenance may, I think, nowadays be defined as improperly stirring up litigation and strife by giving aid to one party or bring or defend a claim without just cause or excuse. At one time, the limits of "just cause or excuse" were very narrowly defined. But the law has broadened them very much of late: see Martell v Consett Iron Co Ltd [1955] 1 All ER 481. And I hope they will never again be placed in a strait-waistcoat. THere is, however, one species of maintenance for which the common law rarely admits of any just cause or excuse, and that is champerty. Champerty is derived from campi partitio (division of the field). It occurs when the person maintaining another stipulates for a share of the proceeds: see the definitions collected by Scrutton LJ in Haseldine v Hosken [1933) All ER Rep 1. The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be exaggerated; but, be that so or not, the law for centuries has declared champerty to be unlawful, and we cannot do otherwise than enforce the law; and I may observe that it has received statutory support, in the case of solicitors, in s 65 (1)(a) and (b) of the Solicitors Act, 1957.

Counsel for the solicitor asked us to say that the law of maintenance and champerty was confined to actions or suits, and did not extend to a proof in a liquidation. I cannot see any justification for this limitation. If champerty is an evil, as the common law believes it to be, it is just as much an evil in the one case as the other. In my opinion, it extends to any contentious proceedings where property is in dispute which becomes the subject of an agreement to share the proceeds."

It may be observed that champerty is not a tort in America and one is familiar with the contingency fee arrangements that are frequently made by American attornies which in New Zealand would be regarded as

champertous. The tort in fact was abolished in England in 1967 but it survives in all the Australian States except Victoria and in New Zealand.

I am clearly of the view that on the law in New Zealand as it stands at present the cause of action advanced by the Plaintiff would fail. The New Zealand Courts would not be prepared to enforce the Californian judgment because the assignment of it to Mr John Jones is clearly tainted by maintenance and champerty.

I hardly need cite authority for the proposition that a Court will not exercise its discretion to grant a Charging Order if it is satisfied that the cause of action advanced in the claim either will not, or is unlikely to succeed. Having arrived at that stage it probably is unnecessary for me to proceed further. For the sake of completeness however I propose to look briefly at the question of whether or not quite apart from the matters so far discussed the circumstances would justify the exercise of the discretion to grant a Charging Order.

Would a Charging Order have been Granted in any Event

Rule 567 of the New Rules reads as follows:-

> "Leave to issue a Charging Order before judgment shall be granted only on proof that the opposite party, with intent to defeat (either his creditors or the party applying or both) -
> (a) Is making away with his property; or
> (b) Is absent from or about to quit New Zealand."

The old rule was considered in an oral judgment by Chilwell J delivered on 31st August 1983. There His Honour pointed out that:-

> "The rule requires proof that the Defendant is making away with his property or is absent from New Zealand or about to quit New Zealand with intent to defeat his creditors. The qualification 'intent to defeat creditors' applies to each of the three basic criteria"

His Honour then went on to record the general principles applicable in these words:-

> "The principles with regard to Charging Orders obtained before judgment are reasonably clear. It is not the function of the Court to presume that the plaintiff's cause of action has any more validity than the defendant's defence. Nor is it the function of the Court to protect the interests of one litigant against another unless, in the case of a Charging Order before judgment, the necessary proof is before the Court. Pond v Glover [1933] GLR 358 is authority for the proposition that the Court requires reasonable proof that the grounds for a Charging Order nisi before judgment have been established. Conjecture, surmise or opinion is not sufficient. In my judgment the underlying limit of Rule 314 and of the authorities is that the Court will intervene in a proper case if there is reasonable proof that the defendant's conduct is motivated by an attempt to defeat creditors. See, for example Snow v Loft [1914] 16 GLR."

In the particular case before him Chilwell J was dealing with a viable trading organisation in New Zealand and he was not prepared to draw the inference that the Plaintiff invited on the application.

On the evidence before me in this case it was urged

that the necessary intent was established because Mr Poffenroth intends to spend his funds on the conversion of the tug and on living expenses and payment of other debts rather than satisfying the Californian judgment debt. I am satisfied on the evidence that Mr Poffenroth is committed so far as his resources will allow to seeing the conversion of the tug through. What he is really doing is using his money to complete the conversion in order to turn the tug into an income producing asset. In those circumstances I very much doubt whether had been obliged to give a final ruling on this aspect of the application that I would have found the intention to defeat been made out. If it was not then of course this would not be an appropriate case for the exercise of my discretion.

It is perhaps relevant that in the allied jurisdiction of the Mareva Injunction the English Courts have regarded it as an improper use of the jurisdiction to tie up a man's funds to preserve them against the day of judgment as opposed to preventing him from removing them from the jurisdiction. See Cretanor Maritime v Irish Marine [1978] 3 All ER 164 at 170 lines g, h and j. in the judgment of Buckley LJ, Barclay-Johnson v Yuill [1981] WLR 1257 at 1264 in the judgment of Megarry VC, and Iraqui Ministry of Defence v Arcepey [1980) 1 All ER 480 at 486 lines d - j and 487 lines d - e in the judgment of Robert Goff J.

Application Refused and Costs

Taking all the matters discussed in this judgment into account I have no doubt that the proper course is for me to reject this application. With respect it seems to have been launched somewhat hastily and without a proper consideration as to its prospects of success. Mr Poffenroth has been put to the expense of defending the matter at short notice although his solicitor's insistence that the application be made on notice was properly recognised. As a consequence he did not suffer the inconvenience of a Charging Order being made ex parte in the first instance Costs must follow the event and must bear some relationship to the inappropriateness in my view not only of the action but of the application. I fix costs to be paid by the Plaintiff to the Defendant at $350 plus disbursements to be fixed by the Registrar.

Robert Smellie J.