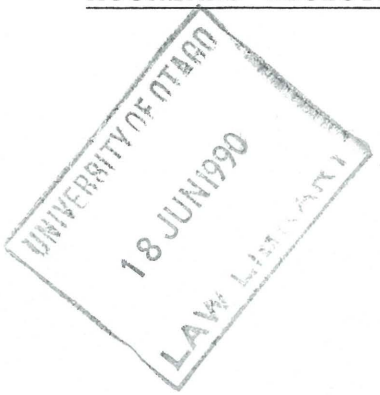
RJS SET-3.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

C.P. NO. 2218/88



BETWEEN LITHO PLATE SERVICES LIMITED

Plaintiff

A N D B.A. AIGNER

Defendant

Hearing: February 20, 1990

Counsel: Mr. Hayes for Plaintiff
Mr. Carden for Defendant

Judgment: 23/2/90

JUDGMENT OF MASTER ANNE GAMBRILL

The Defendant makes an interlocutory application in that the pre-judgment charging order on his interest in his jointly owned property be rescinded and the registration cancelled. The Plaintiff opposes the application. The charging order was made ex parte over C.T. 761/213 and C.T. 761/217. The order was dated 7th October 1988.

The Defendant in support deposes to the indebtedness of the company in which the Defendant was a shareholder and the

acts of the Defendant as a shareholder and Director in a company in liquidation are now the subject of the action by the Plaintiff against the Defendant. The original ex parte application for the charging order and the affidavit in support were properly drawn.

The Defendant is an Austrian National who has permanent residence in New Zealand and on 27th September 1988 the Plaintiff, by its Director Mrs. White, adduced evidence before the Court that the Defendant's property owned jointly with his wife at South Auckland was on the market for $1.5 million.

The Plaintiff's claim alleges, inter alia, (a) the Defendant is liable in fraud; (b) the Defendant is personally liable for making certain statements about the company in which he was a Director; and (c) the Defendant is liable for negligence and under the Fair Trading Act, for misleading or deceptive conduct.

At the time of the application the Defendant was absent from New Zealand and I am informed from the Bar he was overseas until late 1988.

The other allegation is that he is making away with his

property. There is evidence in support of the interlocutory application of assets relating to the company and the proposal by the Defendant to sell the same and I am informed from the Bar, the company property has been sold and the proceeds no doubt paid to creditors or the mortgagee and the company, which was indebted to the Plaintiff, has now been wound up.

No steps have been taken in respect of the charging order until Mr. and Mrs. Aigner signed a contract on 18th January 1989 for the sale of the property. As the Plaintiff pointed out, no steps were taken to review the ex parte decision and over a year has passed since an order was placed on the property. However, being ex parte (but over land) the order was absolute and the Master imposed no requirement as to service.

The grounds on which the Defendant seeks the discharge of the charging order are as follows:

(i) The Defendant did not at the time of making the charging order or at any other time make away with his property or quit New Zealand with intent to defeat the Plaintiff or other creditors.

(ii) The application for leave to issue the charging order should have been made on notice.

(iii) There was insufficient evidence.

(iv) The Defendant is prejudiced.

The affidavit in support of the Plaintiff's application for the charging order made by Mrs. White, details the indebtedness of the company, the conversations with the Defendant, the confidential report she received which showed the Defendant is travelling to Germany to sell his property and his description that the operating costs of the company and the loss has been aggravated by the Patumahoe development, i.e. this property which is the name of Mr. Aigner and his wife as joint owners. The order does not, however, show that it is only the beneficial interest of Mr. Aigner that is charged but the affidavit and memorandum in support make it clear it is only the Defendant's interest per se that can and is charged.

It appears and it is not disputed, that the Defendant went to Germany in the latter part of 1988 and the charging order could accordingly have been sought at that time. There is no doubt the Defendant has been dilatory and, it appears, unco-operative in completing the necessary information for the affidavit of documents, discovery having been sought on 9th December 1988 and an inadequate list of documents filed on 25th July 1989.

Technically, the order should have been against the beneficial interest of the Defendant and it is suggested in the commentary to McGechan on Procedure - Rules of the High Court under R.573, it is implicit that the judgment debtor's interest in land he owns jointly with others can be sold and thus logically charged recognising that there is a legal argument whether the charging order could in fact sever the joint tenancy. The charging order, not requiring to be served and the Defendant and his wife, having entered into an agreement for the sale of their property, now wishes the removal of the charging order.

The Defendant's deposition herein says that the course of his actions have shown the evidence is inconclusive and to be speculative and untrue. He deposes he travelled to Germany and Austria for the purpose of finding a buyer for the property and was attempting to sell it in Europe. He says the claim by the Plaintiff is not bona fide, but this is not the forum in which a decision as to the merits or non-merits of the Plaintiff's claim should be made. Prima facie, it appears the Plaintiff has a cause of action.

The Defendant deposes: "I have never had any intentions to evade bona fide creditors". He does not say in his affidavit at any time that after the sale of the property

it is his intention to remain living in New Zealand and retain his assets in this country. He does not depose as to how the funds from the sale of the property will be utilized. He just says he will be severely prejudiced if the sale does not proceed. I accept, and the Defendant accepts, that the sale must proceed and it is a question of ensuring that the purchasers are not deprived of their right to achieve settlement of the purchase from the Defendant. However, in terms of the agreement the Defendant and his wife are holding the first mortgage over the property. They are therefore obtaining security and an interest in the property of which the Defendant's interest is capable of being charged.

The Defendant's legal submission was that it was mandatory to satisfy the requirements of R.567 and tried to persuade me that I must be satisfied on both grounds set forth in the Rules, i.e. he was making away with his property and was absent from New Zealand. He said as he was no longer absent from New Zealand the Court must be satisfied he was making away with his property.

I am satisfied that the party applying was entitled to apply. I am satisfied that at the time the order was made he was absent from New Zealand. I have no deposition as to what he proposes to do with the proceeds of sale of the

property and I have no deposition that intends to continue to reside in New Zealand. I believe the charging order as made and at the time it was made was properly made.

He referred me to the three reported decisions in relation to the charging order, namely Pond v. Glover [1933] G.L.R. 358; Easton v. Hannan [1924]G.L.R., 401; and Nelson & Robertson Pty. Limited v. Nuie Products Limited A. 853/83 (Auckland Registry) unreported, dated 31st August 1983, a decision of Chilwell, J.

The Defendant's affidavit acknowledges as follows:

> "It is true that I did travel to Germany in or around September 1988 and that I haed the stated aim of finding a buyer for my property. However that was all I intended to do. In the event, I did not find a buy and returned to New Zealand as I had intended to do."

There is no further deposition that would satisfy the Court as to the present situation regarding the disposition of the property. I refer to decision of Chilwell, J. where he makes it clear that:

> "It is not the function of the Court to presume 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."

He expresses the view that the Defendant should have an intent to defeat creditors or is making away with the property. In the case before the learned Judge the Defendant was a viable trading organisation which was not giving up trade in New Zealand, it had offered security and there was no reasonably proof the Defendant was making away with property.

In the case before me, the Defendant is clearly disposing of property and has given me no deposition as to his intentions on receipt of the proceeds of sale. I have no idea as to the indebtedness and I have no information as to what he proposes to do with the first mortgage security he and his wife are jointly receiving for $850,000.

Although the Defendant now says that the charging order should not have been issued, at the time the order was issued it quite clearly was a properly order as the Defendant was absent from New Zealand. I believe the Defendant has not satisfied the Court in his application to set aside the charging order that the charging order should not be sustained. The order was properly made in terms of

the Rules and it is now the Defendant's obligation to satisfy the Court as to why it should be removed. All he says is that he is in New Zealand. He gives no further details or deposition as to his intentions.

My view is that the Court should lay down the conditions for registration of the transfer to the purchaser named in the agreement exhibited to the Defendant's affidavit, as B.J. Hall & Co. Limited or nominee, and that the registration should be effected on the following basis:

(i) The removal of the charging order or cancellation thereof.

(ii) The lodgment of the transfer.

(iii) The lodgment of the first mortgage in favour of the Defendant and his wife.

(iv) The lodgment of a charging order over the Defendant's beneficial interest as joint first mortgagee in the mortgage over C.T.s 761/213 and 761/217. The charging order is to be effective until 6th October 1990.

I am satisfied the costs herein should be reserved. I have not had the time to consider this matter carefully as Counsel request the judgment with the property being due for settlement of the sale on 28th February 1990.

Leave is reserved to Counsel to see me at any time if there

is any doubt over the terms or basis of the implementation of the conveyancing aspects of removing the charging order over the land and reinstating an order over the mortgage interest of the Defendant herein. Counsel for the Defendant expressed doubt whether I could vary the terms of the order but Counsel for the Plaintiff persuaded me that this would be a proper step to take. I made it clear to Counsel I would not remove the order unless the substituted charging order and security thereof would be available.

Anne Gambrill

MASTER ANNE GAMBRILL

Solicitors:

Von Sturmer, Rust & Whitelock, Auckland, for Plaintiff
McVeagh Fleming, Auckland, for Defendant

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JUDGMENT OF MASTER ANNE GAMBRILL

Reserved Decision Delivered this 23rd Day of February 1990 by

C.D. WALKER

Copies sent by Fax this 23 Day of February 1990 to Counsel at the Request of the Master. Confirmation of this is attached to this judgment.

C.D. WALKER