21/12; [2012] VSC 202

SUPREME COURT OF VICTORIA

DAVIDSON v WALTERS & ANOR

Mukhtar AsJ

10, 15 May 2012

PRACTICE AND PROCEDURE – JUDGMENTS ORDERS AND DECLARATIONS — JUDGMENT DEBT — APPLICATION FOR PAYMENT OF JUDGMENT DEBT BY INSTALMENTS — APPLICABLE CONSIDERATIONS — JUDGMENT DEBT INCLUDES INTEREST PAYABLE ON JUDGMENT DEBT — APPLICATION REFUSED: *JUDGMENT DEBT RECOVERY ACT* 1984, SS5, 6.

W. applied for payment of a judgment debt by instalments. W. was indebted in the amount of $49,914.46 and offered to repay this amount by instalments of $400 per month. In view of the 10.5% interest rate on a judgment debt, the offer of $400 would not meet the monthly interest payment on the debt.

HELD: Application for instalment order refused.

1. The accrual of interest means the judgment debt is ever increasing and when the Court comes to consider the appropriateness of making an instalment order, the Court has to be satisfied that the instalment amount being proposed by the judgment debtor not only covers the accruing interest but is of a reasonable amount to ensure that the judgment debt can be recovered within a reasonable time. Also, it would not be realistic or proper to make an order if there was a question whether the debtor would be able to adhere to the instalment order.

***Cahill v Howe* [1986] VicRp 62; [1986] VR 630, applied.**

2. It was an irrelevant consideration that the applicant could be pushed into bankruptcy which could result in W. losing his employment. Also, the Act does not contemplate "see-how-we-go" interim instalment orders.

3. Having regard to the fact that the proposed instalment payment did not meet the interest payment on the judgment debt, the application was refused.

MUKHTAR AsJ:

1. The second respondent (Walters) has applied to pay a judgment debt by an instalment order under section 5 and 6 of the *Judgment Debt Recovery Act* 1984. The judgment debt is a substantial costs order. The Court refused the application on 10 May 2012, stating that reasons would be published subsequently. The Court now publishes its reasons which are in essence an acceptance of the submissions made by Mr Sandbach of counsel for the plaintiff, the judgment creditor. That is:

(i) an order should not be made if there is a real risk that there will not be adherence, or if it is not for a reasonable amount, or if involves payments over an unreasonably long period of time;

(ii) under the Act, the judgment debt must also include statutory interest on the judgment;

(iii) the applicant's proposal to pay $400 per month for a judgment debt of $49,914 would not even cover the monthly interest accruing on the judgment;

(iv) the applicant's affidavit evidence is unsatisfactory and the Court cannot be satisfied it has received a full and accurate account of the applicant's financial circumstances;

(v) the prospect of the applicant losing his job if the judgment creditor pursues bankruptcy proceedings is no reason in itself to make an instalment order; and

(vi) the judgment creditor cannot be expected to stand by and see if, in the fullness of time, the applicant can realise a hope of recovering damages against a third party in another case the elements of which are vague.

2. The applicant Stephen Walters is a lawyer who was the principal of a legal firm known as Walters and Associates until 30 June 2006. He says that prior to that time "I had assisted friends

of mine, the plaintiff and the first defendant, who disputed entitlements to the proceeds of sale of a property development in which they were partners, by holding an amount of money in my trust account which I stipulated would be for seven days only." I do not know the elements of the case brought against him, but it seems to concern his handling of those funds subsequently when he closed the trust account and ceased practice. He says he returned the funds to the partner who handled the finances for the partnership. I can only gather that a case was brought against him and the first defendant arising out of the way the funds were handled. What matters for present purposes is that a costs order was made against Mr Walters in this proceeding. By an order of Wood AsJ on 13 February 2012, his Honour ordered that the plaintiff's costs be taxed and allowed, on an interim basis, in the sum of $14,660.08 and be paid by the defendants.

3. On 7 March 2012, Mr Walters applied under the *Judgment Debt Recovery Act* 1984 for an order that the judgment debt of $14,660.08 be paid by instalments. The application stated that he sought to pay $200 per month by 74 payments, which is a little over six years. His grounds for the application were stated to be that "I have no capacity to pay the amount ordered and have only a wage from which to make payment over time." In support of that application, Mr Walters filed a statement of financial situation as is required under the *Rules of Court*. Rule 61.02 requires the judgment debtor to file an affidavit of his financial situation which gives information required by Court Form 72C which is quite comprehensive and detailed. Mr Walters' statement of financial situation was signed and dated but was not sworn as an affidavit. This is something more than a formal defect. Putting that to one side for the moment, his financial statement reveals that he is employed by St Vincent's Hospital Melbourne Limited at Victoria Parade, Fitzroy (I was told as an in-house lawyer) at a gross wage of $3460 per week which after tax is $1950. Without going into the details of his asset position, the total value of his motor car (which is subject to finance), his furniture, household and personal goods was said by him to be $8000. He says he has no interest in land. He has no superannuation or any other source of income. He lists the usual array of living expenses such as food, utilities, household expenses, and insurances. He says he has two dependent children at university, aged 22 and 24. He says he has no housing or mortgage expenses. But he identifies three debts that are outstanding:

> (a) $900,000 to his wife, Maria Teresa Walters borrowed and secured on her property with interest due of a monthly equivalent to $1269 per week;
> (b) $1.1million on a judgment against him to the National Australia Bank on 7 February 2012; and
> (c) $400,000 to a friend which is presently accumulating interest.

4. I am told that the judgment debt to the National Australia Bank was from a judgment of the County Court in which he was sued as guarantor for the liabilities of a company as principal debtor. He was a shareholder of that company. When the trial of that action went before a County Court judge, he sought and was refused an adjournment of the trial. Subsequently, he sought a recusal of the trial judge on the grounds of the judge's shareholding in the National Australia Bank. When the judge refused to recuse, Mr Walters did not remain to defend the action, and a judgment was obtained against him undefended. I am told there is an appeal from one or both of those decisions to the Court of Appeal with which he intends proceeding.

5. When the application for an instalment order first came before me on 20 April 2012, I was unwilling to proceed until such time as there was sworn material about his financial position and, if it was desired, to give the judgment creditor an opportunity to cross-examine Mr Walters. The proposed payment of $200 per month would take six years to repay the judgment debt. But even then, his application did not take into account the interest accruing on the judgment debt under s101 of the *Supreme Court Act*, which is presently at the rate of 10.5%. On that first hearing though, much exposure was given in court to the significance of a decision of Young CJ in *Cahill v Howe*.[1] Something needs to be said about that decision at the outset as it comes to play a major part of the outcome of this proceeding, and it is something which must be kept in mind by both debtors and creditors in these applications.

6. *Cahill v Howe* stands as authority for the proposition that the "judgment debt" on which an instalment order is made under the Act means not just the amount of the judgment debt but also the interest that comes to accrue on that debt. The expression judgment debt is defined in section 3 of the Act to mean money payable under "and in respect of" a judgment. The point is significant because under s9 of the Act an instalment order operates as a stay of enforcement or execution of the judgment. *Cahill v Howe* reasons, compellingly in my respectful view, that

if interest was not to be regarded as being "in respect of" the judgment debt as a matter of the construction of the Act, then anomalous or inconvenient results would ensue. It would mean that a creditor could not levy execution on the accumulating interest until the expiration of the instalment order; or on another view, that the creditor could levy execution in the meantime for the interest owing.

7. The accrual of interest means the judgment debt is ever increasing and when the Court comes to consider the appropriateness of making an instalment order, the Court has to be satisfied that the instalment amount being proposed by the judgment debtor not only covers the accruing interest but is of a reasonable amount to ensure that the judgment debt can be recovered within a reasonable time. Indeed, Young CJ in *Cahill v Howe* held the Court would have power to make an instalment order unless the applicant judgment debt, including interest, was going to be paid.[2] But, so his Honour reasoned, even if there was power, it would not be realistic or proper to make an order if there was a question whether the debtor would be able to adhere to the instalment order. Another judge has said that a proposed instalment order based "more on pious hope than reasonable expectation" should not be made.[3] Other cases in this field demonstrate that courts recognise that a creditor is entitled to enforce a judgment by ordinary means, especially in commercial litigation, and instalment orders that go on for too long should not be made: see for example *Lewis v Lesley*[4] and *Chint Australasia v Cosmoluce Pty Ltd.*[5]

8. Before the adjourned date, Mr Walters filed an affidavit on 27 April 2012. He has not done that which was expected of him, namely, to verify in the way the Rules require a full statement of his assets and liabilities. But he increased his offer from $200 to $300 per month. The affidavit itself is imprecise. But it confirms he receives an annual salary which gives him $7800 per month. He says he has a debit card into which $250 per week is paid for meals under an arrangement with his employer. He then says this:

> 13. I have a number of fixed payments for which I am responsible ... namely:
> (a) Interest only payments relating to money borrowed from my wife which vary but are approximately $5,500.00 per month ...
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> (b) car payments of $670.00 per month, and
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> (c) insurance payments that I have arranged totalling $807.00 per month.
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> 14. After normal weekly expenses such as fares, lunches and sundry expenses I am left with about $800 per month to apply at my discretion. I am able to apply $300.00 per month to the judgment debt which is presently $15,600.00.

9. This affidavit was sworn before the Costs Court made its subsequent order. But even on the figures as they then existed, payment of $300 per month would take four years to meet the judgment debt of $15,600, but that does not account for accumulating interest. Added to that is the real doubt I have about this affidavit because it does not seem to be inconsistent with the previous signed statement of financial affairs. It requires the Court to accept that he has no cost of living expenses or costs for a "roof over his head" because they are all somehow met by or under the interest payments to his wife, under arrangements which are not explained.

10. Then, a significant event occurred after that affidavit was sworn and before the return of the application on 10 May 2012. Wood AsJ made another costs assessment in the proceeding against the applicant on 7 May 2012. The outcome was that added to the interim order for $14,660 was an assessment of a further sum of $35,254.38 which resulted in Mr Walters being indebted for costs for $49,914.46.

11. When the matter returned to court on 10 May 2012, Mr Walters by his counsel decided to increase his offer to $400 per month. It gives no confidence to see figures being spontaneously bid in this way. But even so, working on a 10.5% interest rate on a judgment debt, the offer of $400 would not even meet the monthly interest payment on the judgment debt. I also have my doubts whether Mr Walters has properly exposed all of his actual or potential liabilities. If he is going to proceed with his appeal in the Court of Appeal then presumably he is going to incur substantial legal expenses, none of which have been brought into account in his calculation of disposable income. If he is to pursue some legal action for damages against the water valve company of which

he was a shareholder, then that will also involve expenditure. If his appeal against the National Bank fails, his financial position will almost certainly be untenable.

12. Every judgment creditor has the right to enjoy the means available at law to pursue payment of a judgment debt. The *Judgment Debt Recovery Act* is not a curtailment of that right. Of course judgments are made about the utility of bankruptcy proceedings or warrants of seizure and sale or winding up applications in the case of corporations. What is clear from the authorities though is that as a matter of its proper construction, the purpose of the *Judgment Debt Recovery Act* is to enable a judgment creditor to obtain recovery of its judgment including interest. If a proposed instalment order is not going to realistically and reasonably result in the recovery of a judgment debt, either because it goes on for too long or because there is a real risk that it will not be adhered to, then orders should not be made.

13. On the elementary facts then of this case, if the proposed instalment payment of $400 per month does not even meet the interest payment on the judgment debt, then it will be simply wrong to allow the application. And that is why I have refused it.

14. Mr Connell, counsel for Mr Walters, has said all that could be said on his behalf. And a lot more was said which was not on affidavit. In essence, he submitted first, that it will not be in a judgment creditor's interest to push Mr Walters into bankruptcy because on the evidence it was likely to result in Mr Walters losing his job and lessening the prospects of any recovery. That may be true or likely but it is in my view an irrelevant consideration. The Court ought not concern itself with judgments whether the creditor's interests are better served by accepting an instalment arrangement rather than pursuing a dividend from bankruptcy. The question for the Court is whether the instalments will give recovery over a reasonable time, so as to justify a stay of a creditor's right to pursue ordinary means of recovery.

15. Secondly, based on some vague reference in Mr Walter's affidavit, it was said that there is a prospect of him bringing proceedings to recover about $800,000 as a result of some wrongdoing in the conduct of a company's affairs for which he as shareholder became liable as guarantor. The company was said to be in the business of manufacturing water valves, into which Mr Walters had invested money. From there it was said that the Court should allow an interim instalment order to be made to substantially meet the interest component of the judgment debt and then to have the matter revisited in about 12 months' time to see how Mr Walters was progressing with the prospect of recovering moneys under this proposed action.

16. I cannot accept this. The Act does not contemplate "see-how-we-go" interim orders. The Act is concerned with judgment debt recovery. Moreover, the evidence about this prospective action is so vague that I am bound to disregard it. If there is some prospect of money elsewhere then that is a matter for Mr Walters to negotiate with his judgment creditor. In his latest affidavit, Mr Walters says "Should my actions involving the NAB and other matter fail then I will most likely proceed to insolvency processes".[6] This really does, added to or apart from other matters, cast real doubt whether there will be adherence to instalment orders.

17. Thirdly it was said that *Cahill v Howe* was distinguishable because it was believed that the plaintiff had already recovered costs from the first defendant of over $170,000. Mr Walters says his counsel on the costs assessment failed to seek an order limited to non common costs. But I do not see this as a distinguishing feature. There is a judgment against Mr Walters which the plaintiff is entitled to enforce regardless of the position with the other defendant.

18. It is for those reasons that I have disallowed this application. I see no reasons why costs should not follow the event. I would order that the application be refused and that the second defendant pay the plaintiff's costs of the application, including any reserved costs.

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[1] [1986] VicRp 62; [1986] VR 630.
[2] At p634.
[3] *G & L Tierney Pty Ltd v Endos* (unreported) referred to in *Civil Procedure Victoria* at [65.01.10]
[4] [2001] VSC 110.
[5] [2008] NSWSC 1054.
[6] See para 4 of affidavit sworn 8 May 2012.

APPEARANCES: For the plaintiff Davidson: Mr AW Sandbach, counsel. Goldsmiths, solicitors. For the second defendant Stephen Walters: In person on 20 April 2012 and by Mr DJ Connell, counsel on 10 May 2012.