13/97

SUPREME COURT OF VICTORIA

DWYER JOHNSTON CONSTRUCTIONS PTY LTD v PANE & BEVILACQUA t/as NULEC ELECTRICAL SERVICES

Balmford J

22 August, 6 September 1996

CIVIL PROCEEDINGS – ATTACHMENT OF EARNINGS ORDER – ORDER MADE IN RELATION TO A PERSON NOT AN EMPLOYEE – INVALID ON ITS FACE – "SALARY OR WAGES" – MEANING OF – WHETHER REFERABLE TO NON-NATURAL PERSONS – ENFORCEMENT OF ORDER – WHETHER APPROPRIATE TO USE PROCEDURE UNDER S135 OF *MAGISTRATES' COURT ACT* 1989: *MAGISTRATES' COURT ACT* 1989, SS109, 111(1), 111(9A), (9B), 135(1); *MAGISTRATES' COURT CIVIL PROCEDURE RULES* 1989, O27.

Nulec obtained judgment against a person named Asciak and "related entities within the meaning of the Corporations Law". Asciak was employed by a company which had a consultancy contract with DJ; however, at any relevant time, DJ had never been the "employer" of Asciak nor held any "earnings" on his behalf. Notwithstanding these facts, an attachment of earnings order was made requiring DJ to deduct a certain amount from Asciak's "earnings". It was not possible for DJ to comply with this order. Subsequently, pursuant to s135 of the *Magistrates' Court Act* 1989 ('Act') an order was made that D&J pay the arrears due under the order together with interest and costs. Upon appeal—

HELD: Appeal allowed. Order to enforce the attachment of earnings order set aside.
1. The expression "salary or wages" which is integral to the definition of "earnings" in Rule 27.01(1) of the *Magistrates' Court Civil Procedure Rules* 1989 does not encompass moneys paid to a recipient which is not a natural person. Accordingly, any money which DJ was contractually bound to pay to "entities" cannot be affected by an attachment of earnings order.

2. Section 135 of the Act applies to the enforcement of orders not for the payment of money. It would not have been in the contemplation of the legislature that an attachment of earnings order be enforced by proceeding under s135(1) of the Act. The proper procedure for enforcement, where the attachment of earnings order is valid, is found in Rule 27.20(1.1). Accordingly, the magistrate was in error in making an order for the payment of money pursuant to s135(1) of the Act.

BALMFORD J: [1] 1. The appellant is appealing under section 109 of the *Magistrates' Court Act* 1989 ("the Act") from an order made in the Magistrates' Court at Heidelberg on 28 May 1996. On 27 June 1996 Master Kings ordered that the following questions of law were to be decided in the matter:

> (a) Was the learned Magistrate wrong in law in making an Order for payment of money by the Appellant to the Respondents?
>
> (b) Was the learned Magistrate wrong in law in making an Order for the payment of money by the Appellant pursuant to Section 135(1) of the Magistrates' Court Act?
>
> (c) Did the learned Magistrate make an error of law in assuming jurisdiction to make the Order?
>
> (d) Did the learned Magistrate make an error of law by failing to comply with the provisions of Section 234 of the Magistrates' Court Act? [It is not in issue that "234" is an error for "134".]
>
> (e) Did the learned Magistrate make an error of law in denying natural justice to the Appellant in making the Order?
>
> (f) Did the learned Magistrate make an error of law in making an Order to enforce the Order made 24 November 1995 against the Appellant when the said Order was invalid on its face?

2. The evidence before the Court consisted of two affidavits of Mr Johnston, a director of the appellant, and one affidavit of Mr Farrow, counsel for the respondents, with their exhibits.

3. Section 111(1)(b) of the Act provides that:

> "(1) An order made by the [Magistrates'] Court in a civil proceeding for the payment of money may, subject to and in accordance with the Rules, be enforced by...
> (b) An attachment of earnings order."

Sections 111(9A) and (9B) read as follows:

> **[2]** "(9A) A person to whom an attachment of earnings order is directed must not fail to comply with the order.
> Penalty: 60 penalty units or 6 months imprisonment or both.
> (9B) It is a defence to a charge under sub-section (9A) for the person charged to prove that he, she or it took all reasonable steps to comply with the order."

4. The relevant Rules ("the Rules") appear in Order 27 of the *Magistrates' Court Civil Procedure Rules* 1989. Rule 27.01(1) provides, so far as relevant:

> "(1) In this Order—
> "earnings", in relation to a judgment debtor, means any amounts payable to the judgment debtor—
> (a) by way of wages or salary, ...
>
> "employer", in relation to a judgment debtor, means a person...by whom, as a principal and not as a servant or agent, earnings are payable or are likely to become payable to the judgment debtor;"

5. At some time before November 1995 the respondents obtained a judgment against one Stephen Asciak and Sarb Design and Constructions (Vic.) Pty Ltd. They subsequently sought to enforce that judgment against Mr Asciak by way of an attachment of earnings order against the appellant. The appellant is a building company, and has a consultancy contract with a company known as Asci Developments (Vic.) Pty Ltd. That company employs Mr Asciak.

6. It should be made clear from the outset that it is not in issue in these proceedings that the appellant is not and has never been at any relevant time the "employer" of Mr Asciak within the meaning of the Rules and that the appellant does not hold and has not at any relevant time held any "earnings" of Mr Asciak within the meaning of the Rules.

[3] 7. A hearing of an application for an attachment of earnings order against the appellant came on at the Heidelberg Magistrates' Court ("the court") on 17 October 1995. Mr Asciak told the court that he was not employed by Dwyer Johnston but by "Asci Constructions". The court was unable to make a decision on the material before it, and the matter was adjourned until 21 November 1995. Mr Johnston attended at the court on 21 November 1995 in response to a subpoena. He was asked to give evidence as to Mr Asciak's employment. He said that the appellant contracted with a company with a name like "Asci Pty Ltd", which employed Mr Asciak, and made payments by cheque to that company. He produced copies of orders placed by the appellant on "Asci Systems". Mr Farrow, for the judgment creditors (the respondents in the present proceedings), told the court that his instructing solicitor had caused a company and business name search to be made, but that no company or business of the name "Asci Constructions" or any similar name was found. That hearsay from the bar table appears to have been the only material before the court in contradiction of the evidence of Mr Asciak and Mr Johnston, both of whom by then had given oral evidence to the effect that Mr Asciak was not employed by the appellant.

8. On the evidence before it, the court concluded that Mr Asciak was in receipt of income from the appellant, and that that income, although irregular, was in the order of $50,000 per annum. It ordered that deductions under an attachment of earnings order be made in the amount of $600 per month and that that order applied to payments made by the appellant in respect of debtors' invoices in the name of Asci Developments, Asci Systems, Asci Constructions or similar names.

[4] 9. On or about 26 November 1995 the appellant received a document headed "Form 27L: Attachment of Earnings Order" dated 24 November 1995. The document was addressed to "Dwyer Johnston Constructions Pty Ltd of 31a Clements Avenue, Bundoora, the employer of Stephen Asciak, Sarb Design & Constructions, Asci Developments, Asci Systems, Asci Constructions or related entities within the meaning of the Corporations Law." The introductory words of Form

27L in the Rules, reading "The Court orders that" had been omitted from the document, but can no doubt be implied from the use of that prescribed form and the heading.

10. If those words are implied, the document ("the Attachment Order") may be read as an order of the court. By its terms, it requires that the appellant "on each pay-day whilst Stephen Asciak is employed by it or until this order ceases to have effect, make payments out of the earnings of Stephen Asciak or those entities" at a rate of $600 "each pay day and thereafter monthly". It is fortunately not necessary for me to make any finding as to the meaning of that last expression and I do not do so.

11. It will be apparent that it is not possible for the appellant to comply with that order so far as it relates to Stephen Asciak, as Stephen Asciak is not employed by it and it holds no earnings of his. The expression "those entities" is presumably to be taken as referring to the entities listed in the passage from "Sarb Constructions" to "Corporations Law" cited from the Attachment Order in paragraph 9 above. There is no evidence before me as to the nature of any of them.

[5] 12. The words "salary" and "wages" are not defined in the Act or the Rules. "Salary" is relevantly defined in the second edition of the *Oxford English Dictionary* as:

> "Fixed payment made periodically to a person as compensation for regular work: now usually restricted to payments made for non-manual or non-mechanical work (as opposed to wages)."

and in the *Macquarie Dictionary* as:

> "A fixed periodical payment, usually monthly, paid to a person for regular work or services, especially work other than that of a manual, mechanical, or menial kind."

The word "wage" is relevantly defined in the second edition of the *Oxford English_Dictionary* as:

> "The amount paid periodically, esp. by the day or week or month, for the labour or service of an employee, worker, or servant."

[6] and in the *Macquarie Dictionary* as:

> That which is paid for work or services, as by the day or week; hire; pay.

13. I am satisfied, on the basis of those definitions, that the expression "salary or wages", which is integral to the definition of "earnings" in the Rules, and hence to the definition of "employer", which incorporates the word "earnings", does not encompass moneys paid to a recipient which is not a natural person. Accordingly, any money which the appellant is contractually bound to pay to any of "those entities" cannot be affected by the Attachment Order.

14. In light of the findings in paragraphs 11 and 13 above, it must be concluded that it is not possible for the appellant to comply with the Attachment Order at all. However, as it was not a party to the proceedings in respect of which that order was made, it had no standing to appeal against it.

15. Accompanying the Attachment Order was a document headed "Form 27M: Notice to Employer" which set out certain provisions of the Rules and included the following direction:

> "You must give notice in writing to the Registrar—
> (a) if you are not the employer of the judgment debtor at the time the order is served, forthwith after service;"

Also accompanying the Attachment Order was a document headed "Form 27N: Notice by Employer that Judgment Debtor is not in the Employ of the Employer". This document was signed by Mr Johnston on behalf of the appellant, dated 6 December 1995 and returned to the Registrar of the court. Its purport is apparent from its title. This was the third occasion on which **[7]** the court was informed that Mr Asciak was not in the employ of the appellant.

16. On or about 1 May 1996 the appellant received a document returnable in the court on 7 May 1996 summoning it to attend on an application by the respondents (i.e. the judgment

creditors), presumably under Rule 27.20(1.1), for orders that the appellant comply with the Attachment Order, that it be cited for contempt and that it pay the costs of the application. Mr Johnston attended the court on 7 May 1996 and was represented by his solicitor, Mr Moloney. Mr Moloney told the Magistrate that the appellant did not employ Mr Asciak, tendered a Certificate of Incorporation of Asci Developments (Vic.) Pty Ltd, and told the court that, to the best of the appellant's knowledge, Mr Asciak was employed by that company.

17. The matter was adjourned to 28 May 1996. Apparently the only notification of a hearing that day which the appellant received was a subpoena to produce documents, which was complied with, as its terms permitted, several days before the hearing. However, the matter was stood down while Mr Johnston was notified and came to the court. He told the court that the appellant did not employ Mr Asciak. That was the fifth time that that information, which was not challenged in the present proceedings, had been given to the court, and the second time in which it had been given in the enforcement proceedings, to which the appellant was a party.

18. The court decided however, that it was not able to go behind the Attachment Order. It went on to make an order in the following terms, so far as relevant:

> "Dwyer Johnston Constructions Pty Ltd having failed to comply with an Attachment of Earnings Order dated 21/11/95 pursuant to the *Magistrates' Court Rules* **[8]** 27.20(1.1), the Court Orders, pursuant to section 135(1) of the *Magistrates' Court Act* that:
> 1. Dwyer Johnston Constructions Pty Ltd pay to [the Respondents] the amount of $5,433.50 being the amount payable under the Attachment of Earnings Order dated 24/11/95, plus interest from the date of the Attachment of Earnings Order to today's date, in the amount of $352.83, total debt due $5,786.39.
>
> [2. As to costs and a stay]"

It is from that order that the appellant appeals. No order was made in respect of the application that the appellant be cited for contempt.

19. On 24 June 1996 the appellant received a Creditor's Statutory Demand requiring payment of the debt created by the order under appeal. That document includes the following paragraph:

> "The creditor may rely on a failure to comply with this demand within the period for compliance set out in section 459F(2) [*scilicet* of the Corporations Law] as grounds for an application to a court having jurisdiction under the Corporations Law for the winding up of the company."

20. Both counsel assured the Court that their searches had failed to disclose any case law applicable to section 111(1)(b) of the Act or to the relevant parts of Order 27 of the Rules, being the legislative provisions relating to attachment of earnings orders.

21. It is convenient to consider first question (f), namely:

> (f) Did the learned Magistrate make an error of law in making an Order to enforce the Order made 24 November 1995 [the Attachment Order] against the Appellant when the said Order was invalid on its face?

22. The questions were formulated at a directions hearing at which the respondents were not represented. The expression **[9]** "invalid on its face" was no doubt inserted in question (f) in recognition of the express statement on the face of the Attachment Order, now agreed on all sides to be incorrect that the appellant was the employer of Mr Asciak.

23. Mr Farrow referred to the difficulties which arose from what he described as the "interposition of a corporate entity between the person doing work and the person who at the end of the day, obtains the benefit of those services". The Rules dealing with attachment of earnings orders, he submitted, were not appropriate to deal with "the sorts of relationships that exist in society between purported employers and employees and entities which may be interposed between them." He suggested that the Magistrate may have had in mind that if "a corporate entity had been interposed" it was for the judgment debtor to prove that this was so. I understood him to say that it was too burdensome on the judgment creditor to have to prove to the satisfaction of the court that a judgment debtor who had received moneys stemming from work done for a person

who was not an employee of that person, and that the court must proceed on the basis of what appeared to it to be the situation.

24. There is no evidence before me as to the nature or operations of Asci Developments (Vic) Pty Ltd. It may have a number of shareholders and a number of employees. I do not know. The only evidence relevant to that matter is that at the hearing on 21 November 1995 Mr Johnston told the court that not all payments made by the appellant to the entities mentioned in the Attachment Order would necessarily be in respect of work performed by Mr Asciak. I cannot in any case make a decision in this matter on the basis of assumptions as to that company or any of the other entities listed in the Attachment Order. **[10]**

25. The provisions of the Act and the Rules provide several methods of recovering a judgment debt. Those provisions which relate to attachment of earnings orders provide a mechanism for the recovery of a judgment debt from earnings in the hands of an employer. They do no more than that. I have no reason to suppose that they are intended to do more than that. If it is intended to extend their operation to the attachment of moneys other than amounts payable to natural persons by way of wages or salary, this could no doubt be done by appropriate amendments to those provisions. At present their operation is limited. There are situations in which courts have considered it appropriate to pierce the corporate veil, as for example where the court has taken the view that, in the circumstances before it, the corporate form has been used to avoid an existing duty or liability. There is no evidence before me to suggest that this is one of those situations.

26. Mr Farrow referred to "the hurly burly of the Magistrates' Court in the suburbs" as a possible explanation of the approach which had been taken to this matter. I trust that he did not intend to suggest that the hurly burly of the Magistrates' Court in the suburbs is such that creditors are there permitted to recover their money other than in accordance with the law. He did seem to me to be submitting that it was necessary that an attachment of earnings order be enforceable against a person who was not the employer of the judgment debtor, because judgment creditors needed to recover their money. While judgment creditors do need to recover their money, they must do so according to law.

27. Mr Farrow submitted that the appellant was estopped, in the present proceedings which are concerned with the enforcement order of 28 May 1996, from raising the validity of the **[11]** Attachment Order itself. He argued that the Attachment Order was a final order, which could be challenged only by an appeal under section 109 of the Act. He produced no authority in support of the submission that a person not a party to an order can be estopped by virtue of its failure to appeal against that order. There is, in any case, no evidence before me to suggest that the respondents have relied on the Attachment Order to their detriment.

28. Mr Farrow submitted further that instead of producing evidence that it did not employ Mr Asciak, the appellant, in seeking to defend the application for enforcement in May 1996, should have proved to the court that it had taken all reasonable steps to comply with the Attachment Order, and that it was not possible for it to so comply. The fact that section 111(9B) (set out in paragraph 3 above) establishes such proof to be a defence to a charge of failure to comply with an attachment of earnings order does not seem relevant to the matter before me. The appellant has not been charged with any offence. Had it been charged under section 111(9A), one might have thought that proof that the appellant did not employ Mr Asciak might have been equally effective as a defence. The specification of one matter as an available defence to a charge does not remove the possibility of other defences being raised.

29. Rule 27.19(2)(b) requires that there be served on the person to whom an attachment of earnings order is directed two forms of notice in Form 27N that the judgment debtor is not in the person's employ. The Rules make no provision as to what action is to be taken once such a notice is completed and returned, as was done here, in compliance with Rule 27.24(2). There is power in the Magistrates' Court under Rule 27.21 to discharge an attachment of earnings order, but only on the **[12]** application of the judgment debtor or the judgment creditor. Mr Farrow submitted that the only possible action for the appellant was to wait until it was charged under section 111(9A) and then defend the charge. I do not accept that submission. It is clear that the bringing of the present proceedings was the only action within the control of the appellant which it could take to deal with the situation in which it found itself.

30. I return to the fact that it is impossible for the appellant to comply with the order under appeal, requiring as it does payment out of the earnings of Mr Asciak or the other entities listed in the Attachment Order. One could hardly imagine that it was intended by the legislature that an attachment of earnings order, or an order enforcing such an order, ought to be allowed in the present circumstances. Both parties agree that neither order can be complied with. The possible consequences of failure to comply include the appellant being cited for contempt or being wound up. To enforce the Attachment Order by upholding the order under appeal in these circumstances would be irresponsible and unjust and would bring the law into disrepute.

31. I find that the Magistrate erred in law in making the order under appeal in a situation where, having regard to the matters referred to in paragraphs 11, 13 and 14 above, the Attachment Order was invalid on its face and taking into account the matters referred to in paragraph 30 above. The answer to question (f) is therefore Yes.

32. That being so, it is not necessary for me to consider any of the other questions before me. However, I am of the view that it is appropriate also that I give some brief consideration to question (b), namely:

> **[13]** (b) Was the learned Magistrate wrong in law in making an Order for the payment of money by the Appellant pursuant to Section 135(1) of the *Magistrates' Court Act?*

33. Section 135(1) provides:

> "(1) If by or under this or any other Act a power (whether or not expressed as a power to make an order) is given to the [Magistrates'] Court—
> (a) of requiring any person to do or abstain from doing any act or thing, *other than the payment of money*; or
>
> (b) of requiring any act or thing, *other than the payment of money*, to be done or left undone—
> the Court may exercise the power by an order or orders." [emphasis added]

34. The answer to question (b) depends on whether an attachment of earnings order can be construed as an order requiring the payment of money. Mr Farrow submitted that the Attachment Order was not an order for the payment of money, but an order to perform an administrative function, namely to make payments out of the earnings of the employee. Thus the order under appeal was only an order requiring that process to be followed, being an act or thing to be done, other than the payment of money.

35. While that may be a partial description of the Attachment Order, it is clearly not an adequate characterisation of it for present purposes. So far as the appellant is concerned, the Attachment Order is an order to pay money, albeit an order to pay money belonging to someone else. So far as the respondents are concerned, the Attachment Order is an order to pay money. The issue of the Creditor's Statutory Demand is based on the premise that it is an order to pay money. I do not consider it to have been in the contemplation of the legislature that an attachment of earnings order be enforced by proceeding under section 135(1). The proper procedure for enforcement, were **[14]** the attachment of earnings order valid, is found in Rule 27.20(1.1). The answer to question (b) is accordingly Yes.

36. For both of these reasons the order under appeal will be set aside. Counsel may wish to make submissions as to costs.

APPEARANCES: For the Appellant (Dwyer & Johnston): Mr M Lapirow, counsel. Solicitors: Davies Moloney. For the Respondents (Nulec Electrical Services): Mr FE Farrow, counsel. Solicitors: Thomas Egan & Associates.
