22/86

SUPREME COURT OF VICTORIA

PRINTING AND KINDRED INDUSTRIES UNION (TRUSTEES) v HOWE (Sub nom Cahill v Howe)

Young CJ

14 March, 9 April 1986 — [1986] VicRp 62; [1986] VR 630

PROCEDURE – JUDGMENT DEBT – ENFORCEMENT OF – APPLICATION FOR INSTALMENT ORDER – RECURRING INTEREST DISREGARDED BY APPLICANT – MEANING OF "JUDGMENT DEBT" - WHETHER POWER TO MAKE ORDER – APPLICANT INVALID PENSIONER – PROPOSAL TO PAY LARGE PROPORTION OF PENSION – WHETHER ORDER SHOULD BE MADE: *JUDGMENT DEBT RECOVERY ACT* 1984, SS6, 9.

A judgment was entered against H. in default of appearance. When action was taken to enforce the judgment, H. applied for an order that the judgment debt be paid by instalments. H. proposed to pay off the debt within 27 years, however, made no proposal in respect of the interest which would be payable on the amount of the judgment debt outstanding from time to time. Upon a refusal of the application by the Senior Master, H. filed a notice of objection under s6(5) of the *Judgment Debt Recovery Act* 1984 ('Act').

HELD: Application for instalment order refused.
(1) A hearing under s6(5) of the Act is a hearing *de novo*, and it is not necessary to consider whether the discretion exercised by the proper officer has miscarried.
***Dahl-Paulsen v Murashkin* (unrep, Murray J, 10 December 1985), followed.**

(2) An instalment order under the Act means an order that a judgment debt be paid by instalments. A judgment debt embraces moneys payable both under the judgment and in respect of it, such as interest. Accordingly, where an application for an instalment order would not result in the payment of the amount owing under the judgment together with interest accruing from time to time, there is no power to make an instalment order.

(3) As the application for the order required the judgment debtor to pay over half his weekly income for the purpose of incurring an ever-increasing debt, it would not be a realistic or proper order to make.

YOUNG CJ: [1] This is an application under s6(5) of the *Judgment Debt Recovery Act* 1984 by John Thomas Howe, a judgment debtor, who applied to the Senior Master for an order that he pay the judgment debt of $71,389.50 by instalments. The Senior Master refused the application, whereupon the judgment debtor filed a notice of objection under s6(5) of the Act, which in due course came on for hearing before me.

In *Dahl-Paulsen v Murashkin* (not yet reported, judgment delivered by Murray, J on 10th December 1985) His Honour said that counsel had told him that so far as they were aware the application to His Honour was the first application of its kind under the Act. His Honour held **[2]** that a hearing under s6(5) is a hearing *de novo* and that consequently there was no need to consider whether the Master's discretion had miscarried. Miss Lewitan, who appeared for the judgment debtor before me, urged me to act upon that view, and although I did not have the benefit of a contrary argument, the judgment creditors not being represented before me, I am content to adopt that course, for, with respect, I agree in Murray J's opinion.

The judgment debt was incurred in an action in which the trustees of the Victorian Branch of the Printing and Kindred Industries Union claimed that the judgment debtor was during 1982 and up to 11th March 1983 employed by the union as accountant and book-keeper, during which time he fraudulently converted $55,014.79 of the union's funds to his own use. The court file reveals that no appearance was entered in the action, that the judgment creditor left Melbourne on 11th March 1983 aboard Pan Am Flight No.812, which was travelling to the United States of America, and that his whereabouts were unknown. The writ in the action was issued on 29th March 1983, and an order for substituted service was obtained on 14th December 1983. The order provided for service upon the wife of the judgment debtor, who, it was said, lived with the

judgment debtor, prior to his sudden departure, in a jointly owned house at 10 Highlands Avenue, Airport West. The wife of the judgment debtor gave notice of motion for 29th March 1984 that the order for substituted service be set aside. The file does not reveal the fate of that motion, save that on 2nd April 1984 judgment was entered in default of appearance in the sum of $55,014.79 and $450.00 costs.

[3] A writ of *fi. fa.* was issued on 3rd July 1984, and the return to it shows that the property remains in the Sheriff's hands for want of bidders. It appears from an affidavit filed on behalf of the judgment creditors in support of an application for a renewal of the writ that on 15th November 1984 an auction was held of the judgment debtor's interest as a joint proprietor of an estate in fee simple in the property at 10 Highlands Avenue, Airport West. There were no bidders, and the property was passed in by the Sheriff. It also appears from the same affidavit that after the judgment debtor returned to Australia discussions took place between him and the judgment creditors with a view to devising means whereby the judgment debtor might discharge the judgment debt. No agreement was reached and so the judgment creditors sought a renewal of the writ of *fi. fa.* and leave to issue a writ of *venditioni exponas*. That leave was granted on 28th June 1985, but the order on the file does not show clearly whether it was granted in the presence of the judgment debtor or *ex parte*. At any rate, a writ of *venditioni exponas* was issued on 29th July 1985, and it may be noted that it incorrectly recites that the writ of *fi. fa.* required the Sheriff to levy execution upon the property of the judgment debtor and his wife. On 31st December 1985 the judgment debtor was served with a notice that the Sheriff intended to sell his interest in 10 Highlands Avenue, Airport West, for the best price offered on 22nd January 1986. That sale must have been stopped by the judgment debtor's application to the **[4]** Senior Master for an order that the judgment debt be paid by instalments. At any rate, the Senior Master refused such an application on 6th February 1986. The court file does not reveal the material which was before the Senior Master. It is against that refusal, however, that the judgment debtor upon notice of objection now seeks from me an order that the judgment debt be paid by instalments.

The application shows the amount due under the judgment as $71,389.50 being:

(a) $55,014.79, the amount due under the judgment;
(b) $1,906.71, the amount of costs;
(c) $14,468.00, the amount of interest.

The order sought is that the amount be paid by an instalment of $1,000 followed by 1,408 instalments of $50 per week, the first instalment to be paid on 1st March 1986 and the last on 29th March 2013. The proposal seems to ignore the fact that interest will remain payable on the amount of the judgment debt outstanding from time to time. In support of the application the judgment debtor has deposed that he is an invalid pensioner with a total weekly income of $92.15, of which $10 comes from his wife. He says that his total property and assets amount to $33,950, including the house property and a motor vehicle which he also owns jointly with his wife. His average weekly expenses amount to $42.33.

The judgment debtor's wife has also sworn an affidavit in support of the application. She says that the house at Airport West was bought in 1960 and that it has been the matrimonial home ever since. She fears that **[5]** her husband's interest in it will be sold at an undervalue, that she will be forced to sell her interest, and that they will lose their home. She says her only income is a wife's pension of $8.65 weekly and that they will suffer hardship if forced to leave their house. Finally, she says that she is advised by her husband that he is willing to give a charge over his interest in the house to the judgment creditors to secure the repayment of the judgment debt.

I have found the question so presented for my decision to be a difficult one, because there is little guidance in the *Judgment Debt Recovery Act* as to the cases or circumstances in which Parliament considers that it is appropriate for an instalment order to be made. The Act, however, is concerned with the payment of judgment debts. Thus the long title begins "An Act to provide for the recovery of judgment debts by instalments..." and the short title is the "Judgment Debt Recovery Act". Moreover, an "Instalment Order" is defined in s3 to mean "an order made under this Act that a judgment debt be paid by instalments..." (emphasis added). "Judgment" is defined in the same section to mean "a judgment or order for the recovery or payment of money made or given by a court in an action". "Judgment Debt" is defined to mean, "the amount of money recoverable or payable under and in respect of a judgment" (emphasis added). I asked counsel

whether any assistance in understanding the circumstances in which an instalment order might be made could be obtained from extrinsic materials. I was referred to the second reading speech of the Minister in the Legislative Council (*Hansard*, 28th March 1984, p2074). In that speech the Minister seems unequivocally to characterize the Act as a debt recovery Act, notwithstanding that the **[6]** fraud summons procedure of the *Imprisonment of Fraudulent Debtors Act* which is repealed and which the new procedure replaces had been unequivocally held not to be a debt recovery procedure but a means of punishing dishonest debtors: *R v Wallace ex parte O'Keefe* [1918] VicLawRp 49; [1918] VLR 285; 24 ALR 123; 39 ALT 199 and *Newmarch v Atkinson* [1918] HCA 53; (1918) 25 CLR 381; (1918) 24 ALR 294. However, the view expressed by the Minister is consistent with and tends to confirm the view to be obtained from a reading of the Act.

The most striking feature of the present case is that upon the judgment debtor's application the amount presently owing, namely, $71,389.50 would not be paid off until 29th March 2013. As I have said, the proposal ignores the fact that interest continues to accrue on the amount outstanding from time to time.

After the hearing concluded and whilst I was considering the matters it occurred to me that the order that I was asked to make might not be an order that I was empowered to make. I have already set out the definition of "instalment order": it occurred to me that an order that resulted in the judgment debtor's incurring an ever-increasing debt to the judgment creditors might not be an order that the judgment debt be paid by instalments.

I conveyed this view to Miss Lewitan, and invited her, if she was so advised, to submit a memorandum by way of further argument. Miss Lewitan accepted the invitation and submitted a carefully reasoned memorandum. In it counsel submitted that by reason of the definition of "judgment" and "judgment debt" which I have already quoted, the only amount of which an instalment order can be made is an amount **[7]** which is ordered by a court to be paid or which is the judgment of the Court in the action. In the present case, judgment was entered in default of appearance in the sum of $55,014.79 and $450 costs and the argument was that that was all that could be ordered to be paid by instalments. No application was however made to amend the application in respect of the order sought. In other words, Miss Lewitan invites me to ignore the interest accruing by virtue of the operation of s161 of the *Supreme Court Act*.

The argument thus involves reading the expression "judgment debt" as meaning the amount of money recoverable or payable under and in respect of a judgment or order for the recovery or payment of money made or given by a court in an action and in particular it treats the word "and" in the phrase "under and in respect of" as used conjunctively. Thus, it is said, that the judgment debt is only the money to be paid under and in respect of a judgment. This seems to me to be both a curious and strained meaning to give to the language and I should have thought the clear intention of the definition of "judgment debt" was to embrace moneys payable both under the judgment and in respect of it, e.g. for interest. Very curious results indeed would follow if this were not the correct meaning.

In this case, for instance, it would result in an accumulation of a huge debt for interest of which execution could not be levied under the writ of *fi. fa.* until the year 2013 because s9 of the *Judgment Debt Recovery Act* provides that while an instalment order is in force and is being complied with the instalment order shall operate as a stay of enforcement or execution of the judgment in respect **[8]** of which the instalment order was made. I would take that section to include interest accruing on the judgment debt. If it did not do so, of course, the purpose of the present application would be entirely defeated for the judgment creditors could levy execution in respect of the interest owing.

The proposal of the judgment debtor as set out in the application would not result in the payment of the judgment debt, as I think that expression should be interpreted. That is to say it would not result in the payment of the amount now owing under the judgment together with interest accruing from time to time. The proposal would result in the judgment debtor's incurring an ever-increasing debt to the judgment creditors. Thus the order sought would not be an "instalment order" in the sense that it would not be an order that the judgment debt, as I have interpreted that expression, be paid by instalments.

If the application were modified to encompass no more than $55,464.79, an order might be

made which might result in that amount being eventually paid, but in the meantime, a substantial debt for interest would be incurred and that is a debt which might ultimately be recovered under the writ of *fi. fa*. It thus seems to me, that for the reason that it would not result in the judgment debt being paid I have no power to make the order originally sought.

But if I am wrong in that conclusion and do have the necessary power, I do not think that it would be an appropriate order to make. To make an order requiring the judgment debtor to pay such a very large proportion of his weekly income, indeed **[9]** over half his weekly income including some of his wife's modest income, for the purpose of incurring an ever-increasing debt, would not, in my view, be a realistic or proper order to make. It would not be realistic because it must be extremely unlikely that the order would be adhered to: it would not be proper to make an order that would result in the judgment debtor's incurring an ever-increasing debt to the judgment creditors. If the matter were considered on the alternative basis suggested, it would be equally wrong in my view to make an instalment order. The order sought must accordingly be refused.

Solicitor for the applicant: Consumer Credit Legal Service.
