37/90

SUPREME COURT OF VICTORIA

FAI INSURANCES LTD v HERSCU and ORS

Smith J

1, 4 June 1990

DEBT – RECOVERY OF JUDGMENT DEBT – APPLICATION FOR NOMINAL INSTALMENT ORDER – WHETHER APPLICATION SHOULD BE GRANTED: *JUDGMENT DEBT RECOVERY ACT* 1984, S6.

An application for an instalment order under s6 of the *Judgment Debt Recovery Act* 1984 involves an order for payment of the judgment debt. Such an order should not be made where an application to pay an interim nominal instalment is made or for an instalment order which would not result in the judgment debt's being paid.

***Cahill v Howe* [1986] VicRp 62; (1986) VR 630, referred to.**

SMITH J: [1] This is an application by FAI Insurances Limited that an application by the defendants, George Herscu and Sheila Herscu, dated 30th May 1990, be dismissed on the grounds that it is an abuse of the process of this Court. The application by Mr and Mrs Herscu is for orders under the *Judgment Debt Recovery Act* 1984; at least it purports to be such an application. The circumstances are stated in that application that FAI Insurances Limited has a judgment against George Herscu in the sum of $2,054,037.30 and costs, and against Sheila Herscu in the sum of $968,411.10 and costs. In respect of both of those judgments, substantial amounts of interest have already accrued.

The applicant in this application relies on the inherent jurisdiction of the Court and Order 23. The test to be applied has been stated many times. For present purposes, it is enough if I simply refer to the statement of Lord Herschell in *Lawrance v Lord Norreys* (1890) 15 AC 219 that -

> "It is a jurisdiction which ought to be very sparingly exercised and only in very exceptional cases."

The rights given to a judgment debtor under the *Judgment Debt Recovery Act* 1984 are set out and defined in s6. The relevant portions appear to me to be the following:

> "6(1) A ... judgment debtor may at any time after judgment is given apply to the proper officer of the court. (a) ... for an order that the judgment debt .... be paid by instalments;"

[2] Section 6(2) provides that:

> "An application .... shall—
> (a) be in or to the effect of the prescribed form;
> (b) specify the amount of the judgment debt then owing to the judgment creditor; and
> (c) specify the amount of each instalment proposed to be paid and the times at which instalments are proposed to be paid."

Section 6(3) provides, *inter alia*, that:

> "... the proper officer of the court may without notice to the judgment creditor or judgment debtor and whether or not the judgment creditor or the .... judgment debtor is before the proper officer—
> (a) order that the judgment debt .... be paid by the instalments and at the times specified in the application; or (b) refuse to make such an order."

Section 6(4) provides:

> "The proper officer of the court shall cause the judgment debtor and judgment creditor to be notified of an order or refusal to make an order under sub-section (3)."

Following that, provision is made for the parties to object and for the matter then to be set down for hearing. So far as definitions are concerned, the definition of "instalment order" is that those words mean "an order made under this Act that a judgment debt be paid by instalments", and "where such an order has been varied under this Act" means "the order as so varied". The Act therefore provides the judgment debtor with relief in a specific form, that is, an order for payment of the judgment debt. It does not provide any other form of relief such as an order for an interim **[3]** payment that would not result in payment of the judgment debt while an enquiry is held into the appropriate instalments. This literal view is reinforced by the fact that the application itself results in an immediate stay of execution of the judgment, and the ultimate order also does so. The relief sought by the judgment debtors in this case, as set out in the application, is:

> "For payment by instalments of the sums owing under the judgment as and when moneys become available from the receivership, management and liquidation of the various companies set out in the accompanying affidavit of George Herscu, together with a further amount of $10 per month, commencing on 30th June 1990 and continuing until the funds referred to are available for the payment of the debts or the judgment debts are paid, whichever be the sooner."

The grounds relied upon are:

> "• That the amount of the judgment debt is currently not available to the judgment debtors and cannot be borrowed at the present time in part or in whole.
>
> • The judgment debtors hope to improve their position to allow payment of the judgment debts in full as the assets of the various companies and trusts formerly in their control are made available."

In my view, the application is clearly not an application which comes within the Act. The application does not specify the amount of each instalment to be paid or the times of payment. It does not seek an order for payment of the judgment debts by payment as specified of instalments at the times specified in the application.

What is sought is an order for an nominal payment, which could not, in the lifetime of Methuselah, pay the judgment out while the applicants wait for the financial **[4]** position to become clearer, when the proper officer will then be invited to make an instalment order. I am satisfied that the proper officer would be obliged to dismiss the application as not being authorised by the legislation. If I am wrong in that view, I am satisfied on the material before me the proper officer would be compelled to dismiss the application because he could not make an order authorised by the legislation. At most, he could only order an interim nominal instalment be paid, which would not enable the judgment debts to be paid. Such an order is not authorised by the legislation. I refer to *Cahill v Howe* [1986] VicRp 62; [1986] VR 630.

Finally, if I am in error in reaching these conclusions, I am satisfied that the proper officer would be obliged to dismiss the application because he could not be satisfied on the material that an order could ever be made for instalments which would result in the judgment debts being paid. Accordingly, I allow the application of FAI Insurances Limited, as made in its summons of 31st May 1990, and consequentially order the dismissal of the applications by George Herscu and Sheila Herscu in their application dated 30th May 1990. (Discussion ensued.) I think, in all of the circumstances, I must decline to make the orders sought for leave to appeal and for a stay. I order George Herscu and Sheila Herscu to pay the costs of FAI Insurances Limited in this application.

APPEARANCES: For the plaintiff FAI Insurances: Mr J Larkins QC with Mr D Levin, counsel. Clayton Utz, solicitors. For the defendants Herscu: Mr S Wilson, counsel. Pryles & Defteros, solicitors.
