43/01; [2001] VSC 110

SUPREME COURT OF VICTORIA

LEWIS and ANOR v LESLIE

McDonald J

30 March, 5 April 2001

CIVIL PROCEEDINGS – APPLICATION FOR AN INSTALMENT ORDER – PROPOSAL TO PAY OFF AN INTERLOCUTORY ORDER FOR COSTS AT $25 PER WEEK OVER 29 MONTHS – APPLICATION REFUSED BY PROPER OFFICER – APPEAL TO COURT – NEW PROPOSAL PUT FORWARD – WHETHER COURT DEALING WITH A QUITE DIFFERENT APPLICATION – NEW PROPOSAL WOULD TAKE 20 MONTHS TO DISCHARGE DEBT – WHETHER COURT SHOULD GRANT THE APPLICATION: *JUDGMENT DEBT RECOVERY ACT* 1984, SS6(2)(a), (b), (c), (7).

As part of an interlocutory order, Leslie was ordered to pay the sum of $2,969 costs. Later, he applied to a proper officer to pay off the amount at the rate of $25 per week. At this rate, it would have taken some 29 months to discharge the debt. The application was refused. Leslie objected to the refusal to make the instalment order and sought an order that the judgment debt be paid by way of an instalment of $1,100 within two weeks and the balance to be paid by instalments of $100 per month.

HELD: Application dismissed.
1. The *Judgment Debt Recovery Act* 1984 does not confine the court hearing an objection to precisely the same material that was heard before the proper officer. It will be a question of fact for the court to decide whether it is being asked to hear an objection to an earlier application or whether it is being asked to embark on quite a new matter.
***JFT Australia Pty Ltd v Moore* (unrep, Gobbo J, 2 November 1992) applied.**

2. As no evidence was placed before the court to give foundation to the assertion that Leslie could pay $1,100 within two weeks, that matter cannot be taken into account. However, if there were such evidence, the court would be asked to consider a proceeding which would be a different application from that considered by the proper officer.

3. Having regard to the fact that the judgment debt is a debt due in consequence of an interlocutory order and having regard to the amount of the debt, the proposal put before the court provides too long a period to discharge the debt by instalments. Accordingly, the application is dismissed.

McDONALD J:

1. The present proceeding before the court is an application by the defendant pursuant to s6(7) of the *Judgment Debt Recovery Act* 1984.

2. The proceedings in this action were commenced by writ on 16 August 1999. By their statement of claim endorsed on the writ, the plaintiffs, who at all material times are and were legal practitioners, claimed against the defendant payment of $235,771.81. The plaintiffs alleged that such amount was due by him to them on 16 August 1999, together with interest due and continuing to be due on that sum. By their statement of claim the plaintiffs alleged that the defendant was indebted to them in the aforesaid sum together with interest thereon, pursuant to the terms of written agreements entered into by the defendant with them and dated 30 June 1988 (the first guarantee) and 9 February 1999 (the second guarantee) whereby and pursuant to each agreement the defendant had guaranteed payment of monies due to them by Arrow Collections Pty Ltd (Arrow).

3. By his amended defence and counterclaim, filed on 5 November 1999, the defendant denied that he was indebted to the plaintiffs. In part, the defendant alleged that the plaintiffs were in breach of the duty owed by them to him as they had failed to disclose to him any unusual features or material variations in the relationship or transactions between them and Arrow, which would have the effect of making the position of Arrow different to that which he would otherwise expect. Further he alleged that the plaintiffs failed to act in good faith with regard to his interests as surety of Arrow's obligations under an agreement alleged to have been entered into between the

plaintiffs and Arrow, or alternatively Arrow Collection Services Pty Ltd identified in the defence and counterclaim as the "profit sharing agreement".

4. The defendant alleged that by reason of such breaches of duty by the plaintiffs he is released from and entitled to be discharged from liability in whole or in part under each of the first guarantee and the second guarantee.

5. Further, the defendant has alleged that the second guarantee was entered into by him pursuant to a unilateral mistake of fact on his part as known by the plaintiffs.

6. Further, it is alleged by the defendant that the plaintiffs engaged in unconscionable conduct and/or that they acted in breach of s11A of the *Fair Trading Act* 1985 (Vic), in the result, the second guarantee is unenforceable, void or voidable. Again, it is alleged by the defendant that the "profit sharing agreement" referred to was entered into in breach of the prohibition contained in s317(1) of the *Legal Practices Act* 1996 and that in consequence it and each of the guarantees is void or voidable.

7. Further, by his defence the defendant alleged that the first or alternatively the second guarantee is unenforceable by reason of the fact that in entering into such guarantees he was subject to duress, unconscionable conduct or alternatively conduct in breach of s11A of the *Fair Trading Act*.

8. The defendant alleged further that if liable under either the first guarantee and/or second guarantee, he is entitled to be credited pro rata with amounts as identified in his defence and counterclaim. By his amended defence and counterclaim the defendant has sought a declaration that he be wholly discharged from liability under the first and second guarantee and further seeks an order that the first and second guarantee be set aside.

9. The plaintiffs by their reply and defence to the amended defence and counterclaim join issue with the defendant and deny allegations made by him including denying that the agreement entered into between them and Arrow and/or Arrow Collection Services Pty Ltd was an agreement for sharing of income as alleged.

10. On 22 June 2000 there was issued on behalf of the plaintiffs a summons seeking an order that the defendant provide further and better particulars of his amended defence and counterclaim pursuant to a request for such further and better particulars made on 10 December 1999. By that summons the plaintiffs further sought in the alternative an order that the defendant's defence be struck out. By their summons the plaintiffs sought an order that the defendant pay the plaintiffs' costs of the application.

11. On 24 July 2000 a Master of the court on the return of such summons ordered that by 31 August 2000 the defendant file and serve further and better particulars of paragraphs of his defence and counterclaim as identified in the order. It was further ordered that in default of the defendant complying with such order, that his amended defence be struck out and a counterclaim be dismissed. It was further ordered by the Master that the defendant pay the plaintiffs' costs.

12. On that proceeding the defendant appeared before the Master in person. On the day of the return of that summons the solicitor that had previously been acting for the defendant filed a notice of ceasing to act for him. On 28 August 2000 the defendant filed further and better particulars of his defence.

13. On 25 October 2000 a Master of the court taxed the costs ordered to be paid by the defendant to the plaintiffs on 24 July 2000. On that taxation the Master ordered "that the plaintiffs' costs are taxed and allowed in the sum of $2,969."

14. On 19 February 2001 the defendant made application to a Master pursuant to s6(1) of the *Judgment Debt Recovery Act* 1984 for an order that the judgment debt, being the costs ordered to be paid by the defendant to the plaintiffs on 24 July 2000 which were taxed in the sum of $2,969, be paid by instalments. For the purpose of that application a Master of the court was a "proper officer" under that Act. In his application the defendant identified the amount owing by the

judgment debt as $3,019.88, being the aforesaid sum of $2,969 together with $50.88 interest on the judgment. By his application the defendant sought an order for the payment by instalments of the sum owing under the judgment, by weekly instalments of $25 payable fortnightly commencing on 2 March 2001. The grounds on which the application was made by the defendant were that he could "only afford $25 per week on my present income."

15. At the time of making such application there was also lodged with the court an affidavit, sworn by the defendant on 19 February 2001, relating to his financial affairs. By that affidavit the defendant deposed that he was employed as a salesman by "Collection House Group of companies" and that his gross weekly income was $1,000. He deposed, as I understand in his affidavit, that he jointly owned property valued at $180,000, with Ray Isabel Leslie but there was a mortgage registered over that property on which was owed approximately $195,000. The defendant further deposed that his weekly expenses including income tax and the provisions for food were some $814. In addition, the defendant deposed that he also had debts to Visa and Bankcard payable, respectively, on the 10th and 16th days monthly. These amounts accounted for $229 each month.

16. On 29 February 2001 the Master of the court who considered the application of the defendant issued a notice to the plaintiffs, the judgment creditors, and to the defendant, judgment debtor, that he refused the defendant's application. By that notice the Master stated that the application was refused because the period over which it was proposed to pay the judgment debt was too long. On the basis of the application that had been made by the defendant, to pay the judgment debt by instalments of $25 each week, to be paid fortnightly, and putting to one side interest continuing to accrue on the judgment debt, it would have taken the defendant some 29 months to discharge the debt by such instalments.

17. On 7 March 2001 the defendant filed in this court a notice dated 5 March 2001 objecting to the refusal by the Master on 23 February 2001 of his application for an order that he be permitted to discharge the judgment debt by "instalments at the rate of $100 per month".

18. By notice dated 31 March 2001 the Master informed the plaintiffs and the defendant, that the objection would be heard by the court on Friday 30 March 2001. On that day the defendant and the plaintiffs were respectively represented by counsel. Counsel appearing for the defendant on the hearing of the objection, informed the court that the defendant had been able to enter into an arrangement whereby he would be able to pay to the plaintiffs the sum of $1,100 in two weeks' time.

19. Counsel for the defendant sought an order that the defendant pay the judgment debt by instalments and being an instalment of $1,100 to be paid in two weeks' time and the balance of the judgment debt to be paid by instalments of $100 each month.

20. In substance it was submitted on behalf of the defendant that by the defendant having been able to enter into such arrangement and thereby being able to be in funds to pay $1,100 in two weeks' time, that having regard to the financial circumstances of the defendant he was not able to discharge the balance of the judgment debt other than by paying instalments of $100 per month. In the event of such an order being made and putting to one side interest accruing on the judgment debt, it would take some 20 months to discharge the judgment debt.

21. On behalf of the plaintiffs it was submitted that that which the court should determine, on the hearing of the objection to the Master's order, was the application made by the defendant to discharge the judgment debt by instalments as made to the Master. It was submitted on behalf of the plaintiffs that the court should not on this hearing have regard to the new proposal put before the court on behalf of the defendant, for to do so, the court would not be hearing and determining the objection against the Master's rejection of the application of the defendant, but rather it would be hearing and determining a new application made by the defendant. No affidavit was put before the court on behalf of the defendant providing evidence as to the arrangement now said to be able to be entered into by the defendant to provide him with a sum of $1,100 in two weeks' time.

22. In *Dahl-Paulson v Murashkin* (unreported, Murray J, 10 December 1985) and *Cahill & Anor v Howe* [1986] VicRp 62; [1986] VR 630, Young CJ, it was held that the proceedings of the nature now before the court in this matter, that is an objection to the decision of the Master, was

a "de novo" hearing of the application. The proceeding now before the court and being a hearing "de novo" of the application made to the Master to pay the judgment debt by the payment of instalments, means that in these proceedings no consideration should be given to whether the Master's discretion miscarried or not.

23. It is necessary, however, to give consideration to the submissions made on behalf of the plaintiffs that the court in these proceedings should not give any consideration to the new proposal now put on behalf of the defendant, for to do so it would involve the court not hearing the original application "de novo", but rather it would involve the court hearing and determining a new application made by the defendant.

24. Section 6(2)(a), (b) and (c) of the *Judgment Debt Recovery Act* 1984 provides that an application made under s6(1) for an order that a judgment debt be paid on instalments:

> "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 the instalments are proposed to be paid.'"

25. In substance, the submission by counsel for the plaintiffs is that a variation of the amount of instalments and the times at which instalments are to be made as now proposed on behalf of the defendant if had regard to or considered would result in the proceeding not being a rehearing of the application heard and rejected by the Master, but the hearing of a different application altogether.

26. In *JFT Australia Pty Ltd v Moore* (unreported, Gobbo J, 2 November 1992), His Honour had before him a proceeding such as the present under s6(7) of the Act in circumstances where a Master had refused to make an order that a judgment debt be paid by instalments. Material not before the Master was put before the court demonstrating that the judgment debtor's income was expected to increase with the result that whereas the initial application made to the Master was to discharge the judgment debt by the payment of instalments of $2,000 per month, he was able to discharge the judgment debt by monthly instalments of $3,000, thereby reducing the period of time in which the judgment debt could be discharged. In that case, similar to the present, submissions were made that the application then being sought to be made to His Honour, constituted a new application made after the unsuccessful application to the Master. After stating that the hearing before him was a hearing "de novo" of the application, His Honour at page 3 of his judgment said:

> "It does not, however, mean that a quite different application is to be dealt with."

His Honour further said at pages 3-4 of his judgment:

> "I do not accept the argument put on behalf of the respondent that the statute confines the court to precisely the same material that was heard before the proper officer. It seems to me that the words of s6(7) permitting a variation of the order contemplate that a court might do more than merely accept or overturn the original order that was made."

His Honour further said:

> "It is ultimately a matter for the court in exercising its discretion as to what material it does hear that relates to the application."

27. In the matter before His Honour he concluded that he was satisfied that the application of the judgment debtor to increase the monthly instalments from $2,000 per month to $3,000 per month was really "quite a different application from the one that was made before the Master."

28. His Honour further stated:

> "This is not a case of a judgment debtor simply seeking to modify its arguments or vary the material. This is a case where the application is quite a different one. It involves a very significant alteration in the amounts of instalments and in the period."

However, His Honour emphasised that he should not be taken as indicating "that any departure from the instalments constituted a new application."

29. Further at page 4 His Honour said:

> "It will be a matter of fact in each case for the court to decide whether it is in truth being asked to hear an objection to an earlier application or matter or whether it is, in fact, being asked to embark on a quite new matter."

30. In the present case, as I have previously referred to, counsel for the defendant informed the court that the defendant had been able to make an arrangement to pay the judgment debt by instalments of $1,100 to be paid in two weeks' time and thereafter $100 per month. No evidence was placed before the court to give foundation to the assertion that the defendant had been able to make some arrangement to enable him to discharge the judgment debt by instalments, the first of which was to be a payment of $1,100 in two weeks' time. In my view, in the absence of evidence to give explanation as to the arrangement said to be made and entered into by the defendant and what the arrangement was, I am not able to have regard to the matter and I do not take it into account. I am further of the view that if evidence was put before the court to establish the basis of the defendant's new proposal, that which would be sought for the court to have regard to in this proceeding would be a different application to that considered by the Master.

31. The judgment debt, the subject of this application, arises out of an interlocutory order made in proceedings which were commenced in this court on 16 August 1999, which proceedings are defended by the defendant and which have not been yet set down for trial. Even if the present proposal was had regard to and if interest accrued on the judgment debt was put to one side, it would mean that the interlocutory order for costs would take some 20 months to be discharged. In my view, that would be too long a period for the discharge of an interlocutory judgment debt in the sum of $3,019.88. Therefore, if I was to have regard to this proposal, I would not order that the debt be discharged by the payment of instalments as indicated.

32. Putting to one side the unsubstantiated proposal of the defendant to make an initial payment of $1,100 in two weeks' time, the proposal before the Master to discharge the judgment debt, without considering the accrual of interest on the primary debt, it would take some 29 months to discharge the judgment debt. In my view, having regard to the fact that the judgment debt is a debt due in consequence of an interlocutory order made against the defendant in the present proceeding and having regard to the amount of that debt, the proposal put before the court provides too long a period to discharge that debt by instalments. In such circumstances I have concluded that I should not accede to the defendant's application for an order that the judgment debt be discharged by the defendant paying the same by instalments. The application shall be dismissed.

33. I order that the application of the defendant to discharge, by the payment of instalments, the judgment debt owed by him to the plaintiffs in consequence of the order made by a Master on 24 July 2000, be dismissed. Order that the plaintiffs' costs of this application be paid by the defendant.

APPEARANCES: For the Plaintiffs Lewis and Anor: Mr M Galvin, counsel. Lewis Walker, solicitors. For the Defendant Leslie: Mr R Andrew, counsel.
