EYOTA PTY LTD v HANAVE PTY LTD

SUPREME COURT OF NEW SOUTH WALES — EQUITY DIVISION

MCLELLAND CJ in Eq

21, , 28 February 1994 — Sydney

Winding up — Statutory demand — Application to set aside — Whether ''genuine dispute'' established — (NSL) Corporations Law s 450H.

In an appeal and cross-appeal the parties contended that the Master has erred in relation to questions whether a ''genuine dispute'' within the meaning of s 450H of the Law had been established.

The Master had found that there was a genuine dispute regarding the existence of a loan for $200,000 but no such dispute in relation to a loan for $500,000 and made an order varying the statutory demand accordingly and declaring it to have effect as a demand for $500,000 from the date of service.

Held, setting aside the statutory demand:

(i) The meaning of the expression ''genuine dispute'' in s 450H of the Law connotes a plausible connection requiring investigation, and raises much the same sort of considerations as the ''serious question to be tried'' criterion which arises on an application for an interlocutory injunction or caveat extension application.

(ii) The court is not required to uncritically accept as giving rise to a genuine dispute every statement in a supporting affidavit. However, a court should not embark, except in an extreme case, on an inquiry as to the credit of a witness.

Re Morris Catering (Aust) Pty Ltd (1993) 11 ACSR 601; *Mibor Investments Pty Ltd v Commonwealth Bank of Australia* (1993) 11 ACSR 362, applied.

(iii) Accordingly, the Master was correct in finding a genuine dispute existed in relation to the debt of $200,000 even though expressing the view that the credit of the main witness was poor. The witness' evidence was not so inherently improbable or otherwise defective as to preclude any need for further investigation.

(iv) There is no room for any discretion under s 459G or s 459H to resolve the merits of a dispute.

Brinds v Offshore Oil NL (1983) 10 ACLR 229; 60 ALJR 185, considered.

(v) In relation to the debt of $500,000 the Master erred by in effect making a finding on credit against the main witness by finding that this uncorroborated evidence should not be accepted. The court's task is not to resolve any dispute nor to assess the merits.

Plunkett v Bull (1915) 19 CLR 544, applied.

(vi) Appeal accordingly allowed.

Appeal

This was an appeal and cross-appeal from the decision of a Master to a judge of the Supreme Court of New South Wales. The facts are set out in the following judgment.

J Simpkins instructed by *McBride Harle & Martin* for the plaintiff.

G McVay instructed by *Diana Perla & Associates* for the defendant.

McLelland CJ in Eq Presently before the court are an appeal and a cross-appeal from an order of Master Macready made on 16 December 1993. That order was made under s 459H of the Corporations Law in relation to a statutory demand for $700,000 served on the plaintiff by the defendant. That amount was the total of the amounts of two alleged debts claimed to be owing by the plaintiff to the defendant, namely $200,000 said to have been lent by the defendant to the plaintiff on or about 30 July 1992 and $500,000 said to have been lent by the defendant to the plaintiff on or about 5 April 1993.

The Master held that there was a genuine dispute between the parties about the existence of the $200,000 debt and that there was no genuine dispute about the existence of the $500,000 debt. There being no offsetting claim, the Master held that the substantiated amount of the demand was $500,000 and made an order varying the demand by reducing it to $500,000 and declaring it to have effect as so varied as from when the demand was served on the plaintiff.

In its appeal, the plaintiff challenges the correctness of the Master's finding that there was no genuine dispute about the existence of the $500,000 debt and in its cross-appeal, the defendant challenges the correctness of the Master's finding that there was a genuine dispute about the existence of the $200,000 debt.

It is convenient to deal first with the cross-appeal. There is no doubt that the defendant made an advance of $200,000 by way of loan on or about 31 July 1992. There are two areas of alleged dispute. The first is whether the advance was made to the plaintiff on the one hand or to Dr Grammat who was in control of the plaintiff, on the other hand. It is sufficient to record my respectful agreement with the Master's finding, for the reasons he gives, that the parties undoubtedly treated this as a loan from the defendant to the plaintiff and that there is no genuine dispute about that.

The second area of alleged dispute is whether the advance was to be payable within 12 months carrying interest at 12% per annum payable by monthly instalments of $2000 (as the defendant asserts) or was interest free and repayable by monthly instalments of principal of $2000 each (as the plaintiff asserts).

The defendant's version is supported by elements of circumstantial evidence including the defendant's own records, and the plaintiffs version by evidence from Dr Grammat as to conversations with Mr H Burke, the controller of the defendant, at or about the time the advance was made. I should add that Mr H Burke has since died. The Master said that if he were deciding the issue on a final hearing basis he would have no doubt that the monthly payments were made by way of interest and not as repayment of principal, but that this would involve a finding that Dr Grammat was not a witness of credit. The Master went on:

> However, making a finding on the question of the credit of a witness is not appropriate when one is merely considering whether there is a genuine dispute. To that extent it means that one is determining the merits of the dispute. In these circumstances I am constrained to find that there is a genuine dispute in respect of the $200,000.

The defendant submits in the first place that the credit of a witness is one of the matters which should be considered by the court in deciding whether it is satisfied that there is a genuine dispute. In support of this, it is argued that the hearing of an application under s 459G is a final, not an interlocutory hearing, in respect of which the onus rests upon the plaintiff. I do not consider it necessary or useful for present purposes to consider whether the hearing of an application

under s 459G is technically to be regarded as an interlocutory or final hearing: see *Mibor Investments Pty Ltd v Commonwealth Bank of Australia* (1993) 11 ACSR 362 at 368.

It is, however, necessary to consider the meaning of the expression ''genuine dispute'' where it occurs in s 450H. In my opinion that expression connotes a plausible contention requiring investigation, and raises much the same sort of considerations as the ''serious question to be tried'' criterion which arises on an application for an interlocutory injunction or for the extension or removal of a caveat. This does not mean that the court must accept uncritically as giving rise to a genuine dispute, every statement in an affidavit ''however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself, it may be'' not having ''sufficient prima facie plausibility to merit further investigation as to [its] truth'' (cf *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341), or ''a patently feeble legal argument or an assertion of facts unsupported by evidence'': cf *South Australia v Wall* (1980) 24 SASR 189 at 194.

But it does mean that, except in such an extreme case, a court required to determine whether there is a genuine dispute should not embark upon an inquiry as to the credit of a witness or a deponent whose evidence is relied on as giving rise to the dispute. There is a clear difference between, on the one hand, determining whether there is a genuine dispute and, on the other hand, determining the merits of, or resolving, such a dispute. In *Mibor Investments* (at 366-7) Hayne J said, after referring to the state of the law prior to the enactment of Div 3 of Pt 5.4 of the Corporations Law, and to the terms of Div 3:

> These matters, taken in combination, suggest that at least in most cases, it is not expected that the court will embark upon any extended inquiry in order to determine whether there is a genuine dispute between the parties and certainly will not attempt to weigh the merits of that dispute. All that the legislation requires is that the court conclude that there is a dispute and that it is a genuine dispute.

In *Re Morris Catering (Aust) Pty Ltd* (1993) 11 ACSR 601 at 605 Thomas J said:

> There is little doubt that Div 3 ... prescribes a formula that requires the court to assess the position between the parties, and preserve demands where it can be seen that there is no genuine dispute and no sufficient genuine offsetting claim. That is not to say that the court will examine the merits or settle the dispute. The specified limits of the court's examination are the ascertainment of whether there is a ''genuine dispute'' and whether there is a ''genuine claim''.
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> It is often possible to discern the spurious, and to identify mere bluster or assertion. But beyond a perception of genuineness (or the lack of it), the court has no function. It is not helpful to perceive that one party is more likely than the other to succeed, or that the eventual state of the account between the parties is more likely to be one result than another.
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> The essential task is relatively simple — to identify the genuine level of a claim (not the likely result of it) and to identify the genuine level of an offsetting claim (not the likely result of it).

I respectfully agree with those statements.

In the light of these considerations, I consider that the Master was correct in finding that there was a genuine dispute in respect of the $200,000. The evidence of Dr Grammat was not so inherently improbable or otherwise defective as to preclude any need for further investigation. It raised a genuine dispute within the

meaning of s 459H and the Master was right to decline to make a finding on the question of Dr Grammat's credit and to determine the merits of the dispute.

The matters to which I have already referred are sufficient to dispose of the additional submission made on behalf of the defendant that the court has a discretion in an application under s 459G to resolve the merits of a dispute, analogous to the discretion to determine in an appropriate case in a winding up application, the validity of the debt relied on by the applicant as establishing its status to claim the relief sought: see *Brinds v Offshore Oil NL* (1983) 60 ALJR 185. The provisions of ss 459G and 459H leave no room for any such discretion.

I turn now to the plaintiffs appeal in relation to the $500,000 advance. Again there is no doubt that the defendant made an advance of $500,000 by way of loan and again there are two areas of dispute alleged. The first is whether the advance was made to the plaintiff or to Dr Grammat and/or his wife.

As to this, the Master said:

> In respect of the $500,000, there does not seem to be much difficulty with the identification of the parties. I have already referred to the minute of April 1993. Admittedly the cheque was paid to the bank as part of the settlement process but on the cheque butt it is shown to be in favour of the plaintiff as a loan carrying interest at 10%. This accords with what Dr Grammat ultimately conceded in cross-examination.

Although it is not entirely clear to what the Master is referring in that last sentence, the view seems to me to be open that the Master fell into error in thinking that Dr Grammat had conceded in cross-examination that the advance was made to the plaintiff. No such concession had been made. What was conceded was that the advance of the $500,000 was by way of loan, not by way of gift. But that payment appears to have had nothing to do with the plaintiff (at least as regards communications between Mr Burke and Dr Grammat and Dr Grammat's wife at the time it was made or subsequently). It was made to assist in the purchase by Dr Grammat and/or his wife in the wife's name of a home for themselves, and the cheque was made out, as the Master says, in favour of the bank as part of the settlement process.

Although it was recorded in a minute of a directors' meeting of the defendant as a loan to the plaintiff, there is no evidence that this was communicated to Dr Grammat or his wife, and Dr Grammat's evidence was inconsistent with any such communications ever being made. It appears to me that there is a genuine dispute about whether this was a loan to the plaintiff.

The second area of alleged dispute is whether in or about June 1993, that is about 2 months after the advance was made, a conversation took place between Mr H Burke and Dr Grammat, the effect of which was that a gift was made by the defendant of $500,000 releasing the borrower from any obligation of repayment of the loan. Before the Master, there was evidence from Dr Grammat of a conversation between Mr Burke and himself and his wife, in the presence of Dr Grammat's mother (who was Mr Burke's wife) in which Mr Burke is alleged to have said:

> I have decided to give you the money. I will not ask for it back. It is a gift to Svetlana and you.

Notwithstanding having held in relation to the $200,000 that he should not, for the purpose of considering whether there was a genuine dispute, make a finding on the question of Dr Grammat's credit, the Master in effect did so in relation to Dr Grammat's account of this conversation with Mr Burke, on the ground that Dr Grammat's evidence had not been corroborated by the evidence of his wife or

his mother, both of whom were said to have been present at the conversation but from whom no evidence was adduced, notwithstanding that they were both available. In taking this course, the Master relied on the principle exemplified by *Plunkett v Bull* (1915) 19 CLR 544 that in a claim based on communications with a deceased person, the court will treat uncorroborated evidence of such communications with considerable caution, and will regard as of particular significance any failure of the claimant to bring forward corroborative evidence which was, or ought to have been, available.

In my opinion, the Master was not justified, by reliance on this principle, in treating Dr Grammat's own evidence as insufficient to give rise to a genuine dispute as to the occurrence of this conversation. The principle exemplified by *Plunkett v Bull* would of course be of great importance in resolving any such dispute or assessing the merits thereof, but as I have already indicated this was not the court's task.

During the hearing before the Master, Dr Grammat was cross-examined as to why he had not adduced corroborative evidence from his wife or his mother, and said in effect that he did what his solicitor asked, his solicitor did not ask for evidence from his wife or the mother, and if his solicitor had asked for such evidence they would have been there. During counsel's addresses which followed shortly thereafter it appears that the question arose as to the need for the plaintiff to have called available evidence to corroborate Dr Grammat's account of his conversation with Mr Burke, and counsel for the plaintiff applied for leave to re-open the plaintiff's case to call that evidence. That application was refused for reasons then given by the Master, which included the statement that no explanation was provided as to why that evidence was not called during the plaintiff's case.

In my opinion the plaintiff should have been given leave to re-open for that purpose. There had in fact been an explanation by Dr Grammat for the failure to call corroborative evidence, namely that his solicitor did not ask for it. At that stage, it was at least arguable that corroborative evidence was not necessary (as I have now held) and it was not unreasonable for the plaintiffs legal representatives to have conducted the case on the footing that it was unnecessary. For this reason I granted leave to the plaintiff to adduce further evidence on the hearing of the appeal, both from Dr Grammat's wife and from his mother.

However, the question of the conversation between Mr Burke and Dr Grammat and his wife purporting to make a gift of $500,000 is not essential to the determination of this appeal, on the view I have already expressed as to the existence of a genuine dispute on the question of the parties to the relevant loan. I would merely add that I find some difficulty in seeing how the conversation with Mr Burke deposed to by Dr Grammat (and now corroborated by his wife and his mother) could have had the effect in law of releasing the borrower from any obligation to repay the loan, since there seems to have been no consideration moving from the borrower.

My conclusion is that for the reasons already given, the appeal must be allowed and the statutory demand set aside. In view of Dr Grammat's refusal to convey relevant information to Mr W R Burke after the death of Mr H Burke, in response to reasonable and legitimate inquiries, the plaintiff should not have its costs of the proceedings before the Master, and each party should bear its own costs of those proceedings. The defendant must however pay the costs of the appeal.

Orders

(1) Order that the appeal be allowed.

(2) Order that the cross-appeal be dismissed.

(3) Order that the orders of the Master of 16 December 1993 be set aside.

(4) Order that the statutory demand from the defendant to the plaintiff dated 20 October 1993 be set aside.

(5) Order that the defendant pay to the plaintiff its costs of this appeal.

(6) No order as to the costs of the proceedings before the Master.

J LICHTENBERGER
BARRISTER