The Society of Lloyd's v Cook

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

(Transcript: Beverley F Nunnery)

HEARING-DATES: 16 SEPTEMBER 1999

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COUNSEL:
J Briggs for the Claimant; M Freeman for the Defendant

PANEL: COLMAN J

JUDGMENTBY-1: COLMAN J

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COLMAN J: This is an appeal by Lloyd's against orders made by Master Miller on 12 May 1999 in respect of the execution by Lloyd's of a judgment obtained on 11 March 1998 against the respondent, Dr Cook, in the sum of £170,472.74 and costs, together with accrued statutory interest.

There were two material orders. One was a garnishee order absolute in relation to part of the credit balance on the current account of Dr Cook at Barclays Bank. The other was an order staying execution under Ord.47, r.1 in respect of the judgment on terms that Dr Cook made payments at a specified monthly rate of £400 on each quarter day following an initial payment of £350 on 1 July 1999. The Master also made a charging order over Dr Cook's interest in the premises in Hartland, North Devon, at which he and his partner conduct their medical practice as general practitioners. There is no appeal in respect of that order.

The substance of this appeal is (1) that Master Miller should have made a garnishee order absolute covering the whole of the credit balance on current account at Barclays and not merely for £3,500 when there was a credit balance of £5,582.49; and (2) that the terms of the stay should not have been based on such very modest quarterly payments but should have required that Dr Cook should, instead of making such payments, sell the shares which he owned to the approximate value of £14,000, and pay over the whole of the proceeds to Lloyd's.

It is argued that Master Miller wrongly exercised his discretion. He took into account the evidence that Dr Cook was also indebted to the Inland Revenue in the sum of about £23,000, and that the debt was, as he was informed by Dr Cook's solicitor, Mr Michael Freeman, about to be settled at £18,000, and that if it were not paid, the Revenue would commence bankruptcy proceedings. Although Master Miller did not give a reasoned judgment, he explained that his order was made on the basis that the Revenue were pushing for payment and that Dr Cook had no other means of payment at that date except his shares.

Mr John Briggs, on behalf of Lloyd's, accepts that it was open to the Master to stay execution on terms in this case. Firstly, there did not appear, on Dr Cook's evidence, to be any chattels on which execution by fi.fa. could be levied, and secondly, my own decisions in Society of Lloyd's v Gollon & Hatley (6 November 1998, unreported) provided a basis for withholding execution in the special circumstances of these enforcement proceedings against Names unable to discharge their R&R liabilities. However, he submits that the Master wrongly exercised his discretion in taking into account the outstanding Revenue debt and in depriving Lloyd's of the benefit of the proceeds of sale of the shares. It is argued that if a judgment debtor has some available disposable assets (such as the shares) and a credit balance at Barclays, existence of another unsecured creditor, such as the Inland Revenue cannot, in the exercise of the court's discretion, properly be a ground for depriving the judgment creditor of his right to enforce his debt against an available bank account or other property such as shares.

Mr Briggs concedes that where bankruptcy proceedings are already afoot, the court should take into account the insolvency of the judgment debtor in deciding to what extent execution should be

permitted. But he submits that, as there are no such extant proceedings against Dr Cook, and no arrangement with creditors, the court's discretion as to enforcement should be exercised without regard to other creditors or to what steps as to enforcement of their debts those other creditors might take.

Since the hearing before Master Miller, there have been some material changes in the underlying facts. Firstly, Dr Cook has disposed of most of his shares. The proceeds amounted to £11,867.77. Of that some £9,867.77 has been paid to the Inland Revenue, and the balance of £2,000 has been paid to the United Names Organisation to fund the pending Jaffray claim against Lloyd's for fraudulent misrepresentation in inducing the Names to become members. Dr Cook has a counter-claim similar to that which Jaffray also brings against Lloyd's.

Secondly, the Inland Revenue's claim against Dr Cook has reduced. It claims that, after payment of £9,867.77, £7,040.77 is still due, whereas Dr Cook claims that £4,397 is still due. Further, there can be no doubt (and it is not disputed) that, leaving aside Dr Cook's counter-claim for damages against Lloyd's, Dr Cook is insolvent. Thus, in addition to the amount due to the Inland Revenue (which is £4,397 on Dr Cook's own admission) he is presently indebted to Lloyd's to the extent of £170,472.74 together with interest and costs. Against these debts, he owns two or possibly three groups of shares, namely 224 National Power, valued on 3 September 1999 at £978, net of sale expenses; and 149 PowerGen, valued at that date at £925 net of sale costs. He may own 347 National Grid Group, but believes that in 1998 he transferred them to his wife, from whom he is now separated but whom he still supports, albeit without any formal order to that effect. The value is about £1,620.

In an affidavit sworn on 2 September 1998, Dr Cook stated that his average income per month was £2,500 to £2,800 before tax and that his essential outgoings, including support for his wife, were £2,100 per month. In a later affidavit sworn on 2 April 1999 he gave details of necessary personal expenditure amounting to £1,983.45 per month, including payments of £870 to his wife or for her benefit. He also then paid sums of £100 and £400 for his daughter to help with her mortgage and household expenses when she could not work because of her new baby, and while her husband was in training as a draftsman.

Dr Cook's monthly expenses include £650 for the hire of a car. This was necessary according to his evidence for his medical practice and he had refrained from buying one because he feared it might be subject to execution by Lloyd's.

Finally, in Garrow v Society of Lloyd's (17 June 1999 unreported) Jacob J, in what appears to have been treated as a test case, set aside a statutory demand in respect of amounts the subject of a judgment obtained by Lloyd's for outstanding Equitas premium. He did so on the basis that, and in regard to, the pendency of the Jaffray proceedings, and the judgment debtor's counter-claim for fraud and the need of the judgment debtor to continue to fund those proceedings through the United Names organisation, it was in the interests of justice that a bankruptcy petition should not be presented. He applied Bankruptcy Practice Note 1/87 and the approach of the Court of Appeal in Re Bayoil; Seawind Tankers Corp v Bayoil SA [1999] 1 All ER 374, [1999] 1 BCLC 62. His view was that to permit bankruptcy proceedings to commence would be a disproportionate remedy having regard in particular to the approaching hearing in the Jaffray case.

I observe that Jacob J applied to the issue before him in relation to the commencement of bankruptcy proceedings a similar underlying test to that which I had previously applied to the availability of a stay of execution in Society of Lloyd's v Gollon & Hatley (supra) in the following passage:

The availability of a stay of execution must be a facility which the court may deploy because it is in the interests of justice to both parties that execution should not be made, either for the time being or at all."

It is further to be noted that amongst the factors which he took into account was the possible advantage which a judgment creditor/petitioner would derive from the mere issue of a petition which would fix the date by reference to which the effectiveness of the prior dispositions of the debtor's property fell to be judged.

An appeal in Garrow has already been heard by the Court of Appeal. The judgment has been

reserved. I have considered whether I ought to reserve this judgment until after the availability of the judgment of the Court of Appeal, but in view of the fact that I shall not be available to give judgment for several weeks, I have decided that the sensible course is to give judgment immediately. The practical effect of that decision on this case is therefore that unless the appeal is allowed, it will not be open to Lloyd's to make an effective statutory demand, and thereby to commence bankruptcy proceedings against Dr Cook.

I have to say that I find the outcome of the discretionary exercise performed by Jacob J to be both consistent with principle and wholly convincing. The significance of that decision for the present appeal is that it illustrates, to a limited extent, what presents itself to me as a principle underlying not only the jurisdiction to set aside statutory demands as a prelude to bankruptcy, but also the jurisdiction to arrest other forms of execution, such as fi.fa., garnishee orders absolute and charging orders: namely, that if the consequences of the form of execution sought by the judgment creditor are likely to give rise to serious injustice as between the debtor and the creditor, it is open to the court in the exercise of its discretion to set aside the execution proceedings wholly or in part, temporarily or absolutely, or to permit execution wholly or in part on such terms as the justice of the case may require. The pendency of a substantial and well arguable counter-claim may in many cases be the basis for a conclusion that execution or bankruptcy would give rise to material injustice.

In this connection it is to be observed that not only is there a discretion under Ord.47, r.1 to stay execution by fi.fa. in the circumstances there specified, but there is a discretion to withhold the making of a garnishee order (or indeed a charging order) if it would be inequitable to grant it. Because such orders are an equitable remedy, it may be necessary for the court to consider whether the granting of relief would give rise to the risk of injustice to the garnishee, to the judgment debtor, or, where the judgment debtor may be insolvent, to other creditors. That consideration was made clear by Buckley LJ in D Wilson (Birmingham) Ltd v Metropolitan Property Developments Ltd [1975] 2 All ER 814, Bar Library Transcript No. 383A of 1974, and repeated in Rainbow and anr v Moorgate Properties Ltd [1975] 2 All ER 821, [1975] 1 WLR 788 at page 793 of the latter report.

Lord Brandon considered the effect of the authorities in Roberts Petroleum Ltd v Bernard Kenny Ltd [1982] 1 All ER 685, [1982] 1 WLR 301. That was a case in which, prior to the hearing of the issue whether a garnishee order nisi should be made absolute, the judgment debtor company passed a resolution for a voluntary winding-up on the basis that it was insolvent. The issue was whether the garnishee order ought to have been made absolute. The Court of Appeal held that it should be because, there being no properly developed arrangement between creditors, the judgment creditors were entitled to enforce their judgment, notwithstanding the claims of other creditors. Thus, at page 307 of the latter report, Lord Brandon summarised the position as follows:

In cases where a charging order being made absolute is not precluded by a winding up order, those principles can, in my view, be summarised as follows.

(1) The question whether a charging order nisi should be made absolute is one for the discretion of the court.

(2) The burden of showing cause why a charging order nisi should not be made absolute is on the judgment debtor.

(3) For the purpose of the exercise of the court's discretion there is, in general at any rate, no material difference between the making absolute of a charging order nisi on the one hand and a garnishee order nisi on the other.

(4) In exercising its discretion the court has both the right and the duty to take into account all the circumstances of any particular case, whether such circumstances arose before or after the making of the order nisi.

(5) The court should so exercise its discretion as to do equity, so far as possible, to all the various parties involved, that is to say, the judgment creditor, the judgment debtor, and all other unsecured creditors.

(6) The following combination of circumstances, if proved to the satisfaction of the court, will

generally justify the court in exercising its discretion by refusing to make the order absolute: (i) the fact that the judgment debtor is insolvent; and (ii) the fact that a scheme of arrangement has been set on foot by the main body of creditors and has a reasonable prospect of succeeding.

(7) In the absence of the combination of circumstances referred to in (6) above, the court will generally be justified in exercising its discretion by making the order absolute."

George Lee & Sons (Builders) Ltd v Olink [1972] 1 All ER 359, [1972] 1 WLR 214, was not cited to the Court of Appeal in Roberts Petroleum. It was a decision of the Court of Appeal consisting of Russell, Phillimore and Buckley LJJ. It concluded that where, on the evidence, it appeared that the judgment debtor was insolvent, a garnishee order absolute was inappropriate if its effect would be to prefer one unsecured creditor over another. Where there was a doubt as to insolvency, the appropriate course was to require the garnishee to pay the money into court to abide the result of an enquiry as to the solvency of the judgment debtor. There is no suggestion in the judgment of Russell LJ that an order absolute should normally be made unless there were pre-existing insolvency proceedings or some other analogous procedure.

In my judgment, as a matter of principle, the absence of such proceedings should not be treated as an overriding consideration when the court exercises its equitable jurisdiction in deciding whether to make a garnishee order or a charging order in a case where the judgment debtor may, on the evidence, be insolvent. Having regard to the interests of other creditors is predicated by the state of insolvency and not by the pendency of formal proceedings arising from that insolvency. The exercise of the equitable jurisdiction must be sufficiently flexible to take into account the interests of such other creditors where there is evidence of insolvency, even if, at that stage, there has been no formal action designed to protect the creditors.

Accordingly, I do not consider the Roberts Petroleum case should be treated as laying down any principle which would in such a case close off consideration of the other debts of the judgment debtor or the interests of the other creditors. In this connection it is to be observed that the stay jurisdiction under Ord.47, r.1 is expressly stated by r.3 to have regard to "any other liabilities" of the judgment debtor in a case where he asserts that he is unable to pay. It would indeed be highly anomalous in principle if, in contrast, the exercise of the discretionary jurisdiction to make garnishee orders and charging orders could only take into account the existence of debts owed to other creditors in the face of evidence of insolvency if liquidation proceedings or bankruptcy proceedings or at least a creditor's arrangement were in being.

Having regard to these authorities, and as a matter of principle, I conclude that, where, as in the present case, the court has both to decide whether to stay execution under Ord.47 and if so on what terms, and also whether to make garnishee orders or charging orders in respect of the same judgment debt, it is open to the court to take into account in the exercise of its discretion in respect of all means of execution before it the existence of debts due to other creditors in circumstances where the judgment debtor is or may be insolvent. The objective in exercising the discretion must in such a case be to arrive at a just solution with regard to the interests of the judgment creditor, the judgment debtor and the other creditors.

In the present case, it seems probable that the Master believed that the ability of the judgment debtor to prosecute his counter-claim would be materially prejudiced if the Inland Revenue sued him to bankruptcy before the determination of the Jaffray case, and that this was the reason why he left the shares and part of the current account balance at the disposal of Dr Cook, so that he could pay off or at least very substantially reduce his Revenue debt, and therefore avoid the risk of bankruptcy proceedings being commenced. The effect of that order, however, has undoubtedly been to prefer the Inland Revenue as a creditor over Lloyd's, to whom the indebtedness was more than 10 times that of the debt to the Revenue. That could represent a very unfair position if the counter-claim ultimately fails, for the large judgment debt will only be minimally reduced by the quarterly instalments. Indeed, it will take over two years for those instalments to equal the amount already paid to the Revenue. By that time, the additional interest on the undischarged debt to Lloyd's will have exceeded what has been paid by the instalments. Lloyd's has, in addition, the charging order over Dr Cook's interest in the partnership premises, but that would appear on the evidence to be of little or no value due to the prior charge upon those premises.

In my judgment, the special facts in these Lloyd's execution cases, in particular the likely impact of bankruptcy proceedings on the ability of the judgment debtors to pursue their counter-claims, as well as the uncertainty as to the outcome of those counter-claims, call for a solution which protects all parties from injustice so far as possible. This is particularly important where, but for the counter-claim, the judgment debtor is insolvent and there are other unsecured creditors. In such cases the just solution, in my judgment, is that the judgment debtor's disposable capital should be frozen until the counter-claim has been determined, or until further order. If, following such an order, another creditor were to take steps, such as the making of a statutory demand, which appeared likely to prejudice the prosecution of the counter-claim, the matter could be restored to enable the court to determine at that point of time how, if at all, the outstanding capital should be dealt with.

This course, which reflects the extremely flexible remediable facilities of the court's equitable jurisdiction, would enable a decision to be taken at the time when the threat to the prosecution of the counter-claim became real as distinct from possible. In particular, when it is more accurately known than at present how much time will elapse before a judgment on the counter-claim can be expected. Now that most of the disposable capital has been dissipated, and having regard to the approach which I have outlined in this judgment, the appropriate order is, in my view, that such of the remaining shares as are indeed owned by Dr Cook should be sold and that the proceeds should be paid into court, together with a sum equivalent to the difference between £3,500 and the total amount of the debt, the subject of the garnishee order nisi, namely £2,082.49. That fund will remain in court until the determination of the counter-claim, or further order.

To that extent, this appeal will be allowed. That will leave intact that part of the Master's order which provided for the payment by Dr Cook of quarterly instalments at the rate of £400 per month as a term of the stay of execution. This judgment is to be released for publication.

DISPOSITION:
Appeal allowed in part.

SOLICITORS:
Legal Department, the Society of Lloyd's; Grower Freeman & Goldberg