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IN THE SUPREME COURT
OF THE TERRITORY OF
PAPUA AND NEW GUINEA

CORAM : KELLY, J.

Friday,

21st August, 1970.

THE ADMINISTRATION OF THE TERRITORY
OF PAPUA AND NEW GUINEA

Appellant

- and -

BURNS PHILP (NEW GUINEA) LIMITED

Respondent

JUDGMENT

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Kelly, J.

This is an appeal from an order made by the District Court at Port Moresby making absolute an order nisi made on 12th March, 1970 under Section 188 of the District Courts Ordinance on the application of the respondent and which attached all debts owing and accruing from the appellant as garnishee to one R.D. Millar against whom the respondent had obtained a judgment in the District Court and who is referred to as "the defendant" in the District Court proceedings. In making absolute the order nisi the learned Stipendiary Magistrate found that the order nisi could and did attach to so much of the salary of the defendant as had been earned by him up to the date of the order and remained unpaid even though he had no expectation of receiving that pay until 20th March, 1970.

The ground of appeal is that the decision was wrong in law in that the order purported to attach the defendant's salary before the same became both due and payable.

At the hearing in the District Court it was accepted by both parties that at all relevant times -

(a) the defendant was a temporary overseas employee of the garnishee and his terms of service were governed by the Overseas Officers' Temporary Employees Determination No. 3 of 1964 which was made under the provisions of the Public Service Ordinance and Regulations;

(b) the order nisi of the District Court was made on 12th March, 1970 and served on the garnishee on 19th March, 1970;

(c) the defendant's pay fortnight ended on Wednesday, 18th March, 1970 and became payable on Friday, 20th March, 1970.

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The Admin. of T.P.N.G. v. Burns Philp (N.G.) Ltd.

Kelly, J.

Section 188 of the District Courts Ordinance enables an order for attachment to be made in respect of "all debts owing or accruing" from the garnishee to the debtor. The judgment of the District Court proceeded on the basis that the effect of any order made was to attach debts owing or accruing on the date on which the order was made and not on the date of service of the order on the garnishee, and that this is the correct approach is shown by Universal Guarantee Pty. Ltd. v. Derefink (1). Consequently, as the judgment sets out, the only salary on which the order nisi could have operated, if at all, would have been for those days worked up to 12th March, 1970 which had not been paid for, together with any accumulated unpaid adjustment of salary on hours worked up to that date.

The meaning of the words "debts owing or accruing" in this context has been judicially considered from time to time and an authoritative exposition of their meaning is to be found in the judgment of Lindley, L.J. in Webb v. Stenton (2) in these words "I should say, apart from any authority, that a debt legal or equitable can be attached whether it be a debt owing or accruing; but it must be a debt, and a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, debitum in presenti, solvendum in futuro. An accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation." See also Heppenstall v. Jackson (3) a decision of the Court of Appeal and the recent decision of the Full Court of the Supreme Court of Queensland in Music Masters Pty. Limited v. Minelle and Another and the Bank of New South Wales Savings Bank Limited (4) in which the Court points out that this meaning of the phrase has been many times accepted.

In this case it is clear that there was at the time of the making of the order nisi no sum of money which was then payable by the appellant to the defendant and the matter for determination is thus whether there was at that date any sum which would become payable in the future by reason of a then present obligation. In my view, the various decisions to which I was referred dealing with the attachment of salaries and payments of a similar nature are not authority for the proposition that there is any different rule applicable to the attachment of wages or salaries than is applicable to the attachment of any other debt; each of the cases referred to seems to me to depend on its own facts. The test in each case is simply, on the facts, to determine whether there is a debt in the sense indicated by Lindley,

(1) (1958) V.R. 51
(2) (1883) 11 Q.B.D. 518 at p. 527
(3) (1939) 1 K.B. 585
(4) (1968) Qd. R. 326 at p. 330

L.J. in Webb v. Stenton (supra) (5).

It thus becomes necessary to examine the relevant provisions of the Public Service Ordinance and of the Public Service Determinations dealing with the terms of service and remuneration applicable to the defendant.

The Public Service (Overseas Temporary Employees) Determination 1964 provides by Clause 19 that an employee subject to that determination shall be paid at the rate corresponding to the minimum rate of salary fixed for an officer of the same sex and age performing the same class of work with a proviso that in special cases payments at a higher rate may be approved. The rate of salary thus applicable was at the relevant time that prescribed by the Public Service (Salaries and Overtime) Determination 1968. In that determination "salary" is defined as being the annual rate of salary fixed for the officer by that determination. The determination also contains provisions for overtime and extra duty pay computed by means of a formula in which an hourly rate of pay is an element, but this appears to be the only reference in the determination to hourly rates of pay.

The Public Service (Papua and New Guinea) Ordinance provides by Section 54A that pay is payable fortnightly and by Section 54B that all amounts of salary and allowances payable to an officer may be recovered as a debt in any court of competent jurisdiction. Another relevant provision of that Ordinance is Section 60, dealing with temporary employees in which Sub-section (9) provides that the services of an employee may be dispensed with at any time by the Commissioner or the Departmental Head.

In the case of a weekly hiring for a weekly wage the common law rule is that no wages are due until the end of the week, so that if the workman left his employment before the end of the week he would have no claim to any wages for such part of the week as he had worked (Warburton v. Heyworth (6)). This may have been in the mind of Dean, J. in Universal Guarantee Pty. Ltd. v. Derefink (supra) (7) where the judgment debtor was employed at a weekly wage and it had been assumed by the parties that his wages accrued from day to day and Dean, J. at p. 52, while expressing no opinion as to the correctness of this assumption, indicated that he had a good deal of misgiving about it. However, it seems that different considerations apply to a

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(5) (1883) 11 Q.B.D. 518 at p. 527
(6) (1880) 6 Q.B.D. 1, per Brett, L.J. at p. 7
(7) (1958) V.R. 51

yearly hiring, and in George v. Davies (8) Lord Coleridge, J. cited a passage from the judgment of Lawrence, J. in Cutter v. Powell (9) that a hired servant "though hired in a general way is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he serves, though he do not continue in the service during the whole year." In George v. Davies (supra) (10) the plaintiff, a domestic servant, had served for a month and her wages were payable monthly and the Court held that notwithstanding that the plaintiff had broken her contract by leaving without giving the required notice this did not deprive her of the right to recover wages which had already accrued due to her, so that the question of entitlement to wages by reason of their having accrued due as distinct from their being payable did not arise, although it does appear to be implicit in the passage from Cutter v. Powell cited in the judgment that in this type of employment wages do accrue due as earned.

Although the matter cannot be regarded as free from doubt, I have finally reached the conclusion that in the case of a temporary overseas employee in the position of the defendant in this case, his remuneration accrues due as earned, even though only payable fortnightly and by reason of Section 54B of the Public Service (Papua and New Guinea) Ordinance only recoverable by him by action when it has become payable, that is, at the end of the fortnight in which such remuneration is earned. Apart from any other considerations, this appears to be a necessary consequence of the right of the Commissioner or Departmental Head to dispense with his services at any time, as, in such circumstances, which might not necessarily be by reason of any misconduct on the part of the employee but purely because of the exigencies of the service, it is inconceivable that if such dismissal took place at a time which did not coincide with the end of a pay period, the employee would not be entitled to any payment for the period actually worked. I therefore consider that the defendant's remuneration accrued due at all events from day to day (it is not necessary for me to consider what would be the position as to any lesser period and I do not do so) so that in respect of each day worked there was a sum of money payable in the future, namely, at the end of the pay period, to the defendant as an employee of the appellant, by reason of a present obligation on the part of the appellant as employer so that there was a "debt accruing" within the meaning of Section 188 of the District Courts Ordinance.

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(8) (1911) 2 K.B. 445 at p. 449
(9) 6 T.R. 320; 2 Sm. L.C., 11th ed., p. 1
(10) (1911) 2 K.B. 445 at p. 449

This being the result as I see it as a matter of law, I do not find it necessary to consider the question of the practical difficulties which might arise or be avoided as the case may be in applying the provisions for the attachment of debts, depending on which view of the law one takes. I would, however, observe that I can see no practical difficulties in giving effect to Section 188 interpreted in the way in which I have indicated.

I consider that the conclusion reached by the learned Stipendiary Magistrate was correct and that the order nisi made by the District Court on 12th March, 1970 could and did attach to so much of the defendant's salary as had been earned by him up to that date and remained unpaid even though he had no expectation of receiving that pay until 20th March, 1970.

The appeal is accordingly dismissed and the order of the District Court affirmed.

Solicitor for the Appellant : J.G. Smith, Acting Crown Solicitor

Solicitor for the Respondent: J. Anthony Griffin