WILLIAM DOUGLAS McCLUSKEY -v- THE ATTORNEY GENERAL & OTHERS

High Court of Solomon Islands
(Palmer J.)
Civil Case No. 243 of 1993
Hearing: 28 July 1993
Judgment: 27 August 1993

J. Sullivan & T. Kama for Applicant
K.L. Milte & P. Tegavota for the Respondent

PALMER J: There are two applications by way of originating summons brought under Civil Case No.243 of 1993 and Civil Case No. 261 of 1993.

Both are applications for certiorari and in the alternative, prohibition, brought under Order 61 Rule 2 of the High Court Civil Procedure Rules.

The application in Civil Case No. 243 of 1993 related to the issuance of a warrant of arrest against the Applicant by the Central Magistrates Court following the lodging of a private complaint by the Respondent, Wolfgang Meiners pursuant to section 76 of the Criminal Procedure Code. The warrant of arrest was issued pursuant to section 77(1) of the Criminal Procedure Code.

The making of a private complaint is provided for by section 76 (2). That subsection reads:

> *Any person who believes from a reasonable and probable cause that an offence has been committed by any person may make a complaint thereof to a Magistrate having jurisdiction to cause such person to be brought before him."*

The standard of belief required must be based on reasonable grounds. Mere suspicion or conjecture is not sufficient.

The offence alleged to have been committed by the Plaintiff is to be found in the statement and particulars of the charge made against the plaintiff. A copy of that charge is annexed to the affidavit of William Douglas McCluskey filed on the 22nd of July 1993 and marked as annexure 'A'. The statement of the charge reads:

"William Douglas McCluskey is charged with the following offence: Did counsel and procure an undischarged bankrupt to act as Receiver or Manager of the property of a company contrary to the Companies Act (Cap.66) section 334 and Penal Code (Cap.5) section 21."

The particulars read:

"Between 25th March 1991 and 27th July 1991, William Douglas McCluskey counselled and procured Graham Dennis Miller to act as a Receiver and Manager of the property of Reef Pacific Trading Limited being a company incorporated according to the laws of the Solomon Islands."

Section 334 (1) of the Companies Act reads:

"If any person being an undischarged bankrupt acts as Receiver or Manager of the property of a Company on behalf of debenture holders, he shall, subject to the following subsection, be liable on conviction to imprisonment for two years or to a fine of two hundred dollars or to both such imprisonment and fine."

Subsection (2) reads:

"Subsection (1) shall not apply to a receiver or manager where
(a) not relevant
(b) he acts under an appointment made by order of a court."

The key words in section 334 (1) are: 'undischarged bankrupt', and *"acts as receiver or manager on behalf of debenture holders."*

The requirement is that there must be reasonable and probable grounds on which to base the belief that the plaintiff is an undischarged bankrupt, and secondly, is acting as receiver or manager on behalf of debenture holders.

The complaint that was made before the Central Magistrate Court took the form of an affidavit sworn by Wolfgang Meiners. At paragraph 9 of the affidavit it exhibits a copy of the Australian Bankruptcy Index and Online Inquiry printout, showing that Graham Dennis Miller was declared a bankrupt in Darwin, Australia on the 12th of April 1990 and discharged on the 13th of April 1993. There was no evidence whatsoever however that Graham Dennis Miller was an undischarged bankrupt within Solomon Islands territory.

I have been urged by learned counsel for the Defendant that the fact that Graham Dennis Miller was declared a bankrupt in the Northern Territory Registry of the Federal Court of Australia on his own petition on 12 April 1990 would have made little difference to the application of section 334 (1) of the Companies Act.

Mr Sullivan on the other hand, counsel for the plaintiff, submits that an undischarged bankrupt as referred to in section 334 (1) of the Companies Act can only mean an undischarged bankrupt adjudged bankrupt by the High Court of Solomon Islands.

There is no definition of an undischarged bankrupt in the Companies Act to shed light on this. There is also no Bankruptcy Act enacted by the Parliament of Solomon Islands.

However, by Schedule 3 of the Constitution, the laws that are in force in the United Kingdom on 1st January 1961 will have effect as part of the laws of Solomon Islands save where it is inconsistent with the constitution or any Act of Parliament.

The relevant U.K. legislation is the Bankruptcy Act 1914. In Solomon Islands the jurisdiction of the courts in bankruptcy is exercised by the High Court of Solomon Islands. Within the territorial limits of Solomon Islands, a person can only be adjudged bankrupt by this Honourable court pursuant to the relevant provisions of the U.K Bankruptcy Act 1914.

The crucial question is, can a person who had been adjudged bankrupt in Australia by its courts be deemed a bankrupt within Solomon Islands jurisdiction.

In answering this question basic common sense must prevail. The Constitution and the laws of Solomon Islands prima facie have territorial application. They apply to the people of Solomon Islands and those who enter into the territorial limits of this nation and therefore come within the arm of the law in Solomon Islands.

The preamble of the Constitution reads and I quote the relevant parts:

> *"We the people of Solomon Islands, proud of the wisdom and the worthy Customs of our ancestors, mindful of our common and diverse heritage and conscious of our common destiny, do now, under the guiding hand of God, establish the sovereign democratic state of Solomon Islands. As a basis of our United Nation* ***DECLARE*** *that*
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> *(a) all power in Solomon Islands belongs to its people and is exercised on their behalf by the legislature, the executive and the judiciary established by this constitution,..."*

The last sentence of the preamble reads *"AND for these purposes we now give ourselves this Constitution."*

In section (1)(1) it reads: *"Solomon Islands shall be a sovereign democratic State."* And in Section 2 it reads: *"This Constitution is the supreme law of Solomon Islands and if any other law is inconsistent with this Constitution, that other law shall to the extent of the inconsistency, be void."*

The Constitution is the supreme law of the country. It belongs to the people of Solomon Islands who have established a sovereign democratic state of Solomon Islands. That sovereign democratic state is to be ruled by the Constitution and all other laws of application in the country provided that other law is not inconsistent with the Constitution.

The Supreme law of this country by its set up is unique to Solomon Islands. Its application therefore is restricted to the sovereign democratic state of Solomon Islands. All other laws in force in Solomon Islands therefore must primarily be read as only applying to the sovereign democratic State of Solomon Islands, unless it expressly states otherwise or by necessary implication.

The next important question then relates to the application of foreign law to Solomon Islands.

Chapter VII, Part 1 of the Constitution, headed - 'The application of Laws', provides in Section 75(1) as follows:

> *"Parliament shall make provision for the application of laws, including customary laws."*

Subsection 75 (2) reads:

> *"In making provision under this section, Parliament shall have particular regard to the customs, values and aspirations of the people of Solomon Islands."*

Schedule 3 to the Constitution makes provision for the application of certain laws.

Paragraph 1 deals with the application of the Acts of the Parliament of the United Kingdom of general application and in force on 1st January 1961. Paragraph 2 deals with the application of the principles and rules of the common law and equity. Paragraph 3 deals with the application of customary law.

Paragraph 4 provides that: "*No court of Solomon Islands shall be bound by any decision of a foreign court given on or after 7th July 1978.*"

Paragraph 5 is basically irrelevant.

There is provision under the constitution for Parliament to make provision for the application of foreign law. But apart from Schedule 3, there is no other legislation which would specifically cover the application of the Australian Bankruptcy Act 1966 in Solomon Islands. There is also nothing in the Bankruptcy Act 1914 and the companies Act (Cap.66) which is of any assistance. The Respondents too have not made any reference to any relevant legislation which would assist their case.

There is one clear indicator though from paragraph 4 (1) of Schedule 3 to the Constitution. The effect of this, is that any adjudication of bankruptcy for instance, made by the Federal Court of Australia **would not** be binding on any Court in Solomon Islands given on or after the 7th of July 1978. The simple logic here is that if it is not binding, then it is not legally enforceable here. The courts may make reference to that decision and quote it with approval, but until that decision is made into an order of this Honourable Court, or incorporated in its decision, it remains ineffective in Solomon Islands.

In the absence of express legislation adopting the provisions of the Australian Bankruptcy Act, and absence of any adjudication orders of bankruptcy from this Honourable Court, one is left very much flat footed as to the application of a foreign adjudication order in this jurisdiction.

It is simple common sense that a foreign order made by a foreign Court should not have application in the sovereign democratic State of Solomon Islands unless the Constitution or Parliament makes provision for the application of such. There has been none in this case and accordingly that order of bankruptcy made in the Northern Territory Registry of the Federal Court of Australia made on the 12th of April 1990 is not legally enforceable within the sovereign democratic state of Solomon Islands. The High Court cannot enforce that order. The Police cannot enforce it and neither can the Respondent.

My attention has been drawn to the writings of ***D.C. Pearce and R.S. Geddes*** in their book titled *'Statutory Interpretation in Australia'* Third Edition, Butterworths, 1988. At chapter 5 of their book they described certain legal assumptions. These are "... *assumptions based on the expectation that certain tenets of our legal system will be followed by the legislature.*" *(Ibid at p.97)*

One of these is the assumption that parliaments will not pass legislation that applies to people in other countries, hence a presumption is adopted by courts that legislation will not have extraterritorial effect. (Ibid at p.97).

A clear statement of this presumption in the Australian jurisdiction can be seen in the judgement of O'Connor J in *Jumbunna Coal Mine NL -v- Victorian Coal Miners' Assoc (1908) 6CLR 309 at 363:*

> *"In the interpretation of general words in a Statute there is always a presumption that the legislature does not intend to exceed its jurisdiction. Most statutes, if their general words were taken literally in their widest sense, would apply to the whole world, but they are always read as being prima facie restricted in their operation within territorial limits."*

I do not see why that presumption should not apply in the interpretation of statutes in Solomon Islands especially when the supreme law of the country already has that presumption ingrained in its set-up.

The second aspect of statutory interpretation drawn to my attention relates to the interpretation of penal provisions. In the same book Statutory Interpretation in Australia, at page 164, the learned authors state:

> *"What has been laid down in the modern cases is that the duty of the court is to interpret Acts according to the intent of the Parliament which passed them. While this statement is undoubtedly correct, the courts do nonetheless adopt a slightly different approach in regard to these types of Acts, particularly when they are confronted with a choice between two tenable views as to the meaning of an Act. in regard to penal statutes, as is only proper, the courts are very careful to place the liberty of the subject in jeopardy only where the legislature has clearly so ruled."*

I have been urged by Mr Sullivan that section 334 (1) of the Companies Act is a penal provision and therefore where there are two possible interpretations, the one favouring the defendant should be adopted.

The respondents view is that section 334 (1) is a protective clause and therefore should be read liberally.

Section 334 (1) is a penal provision. It imposes a penalty on breach of its requirements. Those requirements I do accept, seek to protect the property of a company on winding up. However, it penalises a person on breach of them.

It is that penalty aspect which brings this section within the category of penal provisions.

The general rules of interpretation of penal provisions is acceptable and should be applied when the occasion warrants it. In this particular case however, I do not think it is necessary as the general presumption against extraterritoriality has not even been rebutted. Therefore the question of possible alternatives does not arise in my view.

In Halsbury's Laws of England, Fourth Edition, Vol. 44 at para. 928, the learned author states:

> *"The persons on whom a particular statute is intended to operate are to be gathered from the language and purview of that statute, but the presumption is said to be that Parliament is concerned with all conduct taking place within the territory or territories for which it is legislating in the particular instance, and with no other conduct."*

The word 'undischarged bankrupt' therefore is to be read as referring to an adjudication of bankruptcy by this Honourable Court. There is no evidence of that in the records before the learned Magistrate.

I now turn to the second part of section 344(1), which is that the person acts as receiver or manager on behalf of debenture holders.

The word 'debenture' is defined in section 2 as including *"... debenture stock, bonds and any other securities of a company whether constituting a charge on the assets of the company or not."*

Osborn's concise Law Dictionary, Sixth Edition by John Burke defines a 'debenture' as

" *(i) A certificate of right to drawback."*

" *(ii) An instrument usually under seal, issued by a company or public body as evidence of a debt or as a security for a loan of a fixed sum of money, at interest. It contains a promise to pay the amount mentioned in it, and usually called a debenture on the face of it."*

In 'Words and Phrases legally defined' ***Third Edition by John B Saunders Vol. 2:D-J, at page 20,*** he states: *"No precise definition of 'debenture' can be found, but various forms of instruments are called debentures. A debenture is a document which either creates or acknowledges a debt."*

In ***LEVY VERCORRIS SLATE & SLAB CO*** *(1887) 37 ch D 260 at 263, 264 per Chitty J, he says:*

> *"Now what is a debenture?... A debenture means a document which either creates a debt or acknowledges it, and any document which fulfils either of these conditions is a 'debenture'."*

The document referred to by Mr Meiners in his affidavit filed on the 20th of July 1993 which he claims is a debenture is the agreement marked exhibit JMB1 in the affidavit of James Molineux Barley filed in Civil action 58 of 1991 on the 25th of March 1991. At page 19 part IV of that agreement headed management, it spells out the terms of appointment of Wolfgang Meiners as a Managing Director of MIL and his salary per annum of $65,000.00 (AUD). Mr Meiners in his evidence under Oath pointed out that he has not been paid his salary. If that is so, then that is actionable under the express terms of the management agreement. The company owes him money for his services. That is a debt due to him. However, I am unable to find that that agreement is a debenture. The important distinction is that a debenture is a 'speciality debt' of the company. *(See Re Shipman boxboards Ltd [1942] OR 118 at 121 per Urguhart J).* It is a document which acknowledge or creates a debt. The agreement did not create or acknowledge a debt. The debt only arose on breach of the terms of the agreement. Had the terms of the agreement been complied with, there would not have been any breach, and no liability and debt incurred. Equally, had no services been provided by Mr Meiners then no salary would have been due. This is quite distinct from a document which contains a promise to pay on the amount mentioned in it.

Mr Meiners therefore is not a debenture holder. He may be owed money for breach of the management agreement, but that is a matter that he may have to prove if it is challenged. If not, then it is a debt that is due to him, but he does not hold a debenture by virtue of the agreement.

What is however of significance is that there is no allegation in the records before the learned magistrate that Graham Dennis Miller was acting on behalf of debenture holders. This is a requirement of section 334 (1). This is therefore another error of law on the face of the record.

The result therefore is that the learned Magistrate could not have been satisfied on reasonable and probable grounds that an offence has been committed under section 334(10 of the Companies Act, and therefore no jurisdiction to issue the charge and Warrant of Arrest.

Certiorari will therefore apply in this case. The charge and the warrant are removed to this court and quashed.

APPLICATION FOR CERTIORARI AND PROHIBITION INRESPECT OF CIVIL CASE 261/93

This action is similar to Civil action 243/93 in that it seeks the same relief against a charge brought by way of a private complaint by the Respondent, Mrs Meiners.

The offence alleged to have been committed by Graham Dennis Miller is section 179(1) of the Companies Act. That section reads:

> *"If any person being an undercharged bankrupt acts as director of, or directly or indirectly takes part in or is concerned in the management of, any company except with the leave of the court by which he was adjudged bankrupt, he shall be liable on conviction to imprisonment for two years or to a fine of two hundred dollars or to both such imprisonment or fine:"*

As in section 334 (1) of the Companies Act the crucial element in this offence is whether Graham Dennis Miller was an undischarged bankrupt.

I do not need to repeat myself here. The word 'undischarged bankrupt' refers to those persons adjudged bankrupt in Solomon Islands. The terms of section 179 favours overwhelmingly the application of the presumption that it should not be read as including persons adjudged bankrupt by a foreign court through foreign law in a foreign land.

Section 179 provides for an exception where the leave of the court by which the person was adjudged bankrupt can be obtained to act as director or take part in or be involved in the management of any company. It would be quite absurd to require Mr Miller to seek leave from the Federal Court in Australia over a matter in Solomon Islands which that court has no jurisdiction. But it would be even more absurd to have the jurisdiction of this Honourable Court ousted.

Further, if the Registrar of Companies (Solomon Islands) wishes to oppose the granting of leave, then he would have to appear before the Federal Court of Australia. With due respects to the submissions of Mr Milte, this court cannot possibly allow a construction on the plain and ordinary meaning of the words which would lead to an absurd result. The language and tenor of section 179 is predominantly territorial and should be read as such.

The charge was therefore made without any legal basis. Again the learned magistrate had no jurisdiction to issue the charge. Certiorari will lie . The charge accordingly is removed to this court and quashed.

I do not consider it therefore necessary to impose any prohibition orders.

Mr Miller would be entitled to exactly the same relief inrespect of the same charges, as the alleged principal offender. Those charges and any warrants or summons issued against him are also removed to this court and quashed.

Costs will be on a party/party basis with certification for overseas counsel to be taxed.

(A.R. Palmer)
JUDGE