Tonga Air Services Ltd v Fowler

Supreme Court
Civil Case Nos. 23 & 175/1980

3 November 1989

Civil Procedure - enforcement of judgment - Rules of Supreme Court England applicable - principles to be applied by court in excercising its discretion to grant leave to enforce judgment Limitation of actions - not applicable to enforcement of judgment

In 1981 the plaintiff company obtained judgment for T$82,170 plus 10% interest against the defendant in the Supreme Court. Shortly afterwards the defendant left Tonga without having made any arrangements to satisfy the judgment and without leaving any property in Tonga. The defendant was traced to Shaw Island in the State of Washington USA and in 1988 leave to issue a writ of execution was granted by the Supreme Court but this judgment was not accepted by the Washington Supreme Court because notice had not been given to the defendant. In 1989 a further application for leave to issue a writ of execution was made to the Supreme Court and served on the defendant.

HELD:

Granting the application.

(i) The Rules of the Supreme Court of England were applicable to the enforcement of judgments of the Supreme Court of Tonga, in particular Order 46, rule 2.

(ii) The Court has a discretion as to whether or not to grant leave to enforce a judgment of that Court which is to be exercised according to recognised principles and the balance of justice.

(iii) Application for leave to issue execution is not an action subject to statutory provisions relating to limitation of actions.

Cases considered

Roberts v Bank of British Columbia (Privy Council) App. 2/85
Lee v Bude and Torrington Junction Railway Co (1871) LR 6 CP 576
W T Lamb & Sons v Rider [1948] 2 KB 331
Hulbert & Crowe v Cathcart [1986] AC 470
National Westminster Bank v Powney; The Times Law Reports 11 October 1989

Statutes considered

Order 46, rule 2, RSC England

Counsel for plaintiff : Mrs Vaihu
Counsel for defendant : Mr Seeto

Webster J

Judgment

The Plaintiff, Tonga Air Services Ltd, applies for leave to issue a writ of execution against the Defendant, Wayne Fowler.

From the affidavits presented to the Court by each party the facts are as follows:

1. Trial of this action was held at Nuku'alofa in August 1980. After the trial the Defendant left Tonga leaving no property in Tonga and without making any arrangements to satisfy any judgment which might be made against him. The Plaintiff knew that the Defendant was intending to leave Tonga but not when or to where. The Defendant left an address with the Court, apparently "Shaw Island, Washington 98286, USA", where he still resides.
2. Mr Uliti Uata, the majority shareholder in the Plaintiff and one of its officers, had visited the Defendant at this address in 1977.
3. Written judgment of this Court was given in favour of the Plaintiff for t$82,170.00 plus 10% interest (from the date of judgment until paid) by Hill J on 22nd October 1981. Through his Counsel the Defendant admits receiving that judgment. No appeal was taken against it.
4. The Plaintiff wrote to the Defendant at Shaw Island on 17th August 1981 about paying what was due under the judgment, including a negotiated settlement if the Defendant was unable to pay the full amount. The Plaintiff wrote again on 5th August 1982 about unanswered calls on the shares of the Defendant. No answers were received and the Plaintiff does not say that the letters were returned.
5. Letters were also written to the Defendant at Shaw Island by the Plaintiff's Company Secretary in March, April, June, August, September and October 1982 in connection with calls on the Defendant's shares in the Plaintiff amounting to T$98,000.00. These were sent by registered mail, but no answers were received and the letters were not returned.
6. The Plaintiff then tried to find out whether the Defendant had any other address. Its Company Secretary asked SDA Pastor John Lee and other friends of the Defendant in Tonga if they knew of any other address for the Defendant, but with no success.
7. The Defendant has not stated whether or not he received any of these letters.
8. The Plaintiff therefore believed that the Defendant must have moved to some other address and left matters there in the hope that the Defendant might turn up one day or that they might find his address. The Plaintiff did not know the procedure for enforcing judgments in the United States and the idea did not occur to Mr Uata as the Defendant's whereabouts was unknown.
9. When Mr Uata was in the United States in 1988 he visited his daughter at the University of California and after discussion with her decided to instruct a law firm in the United States to take up the matter.
10. This firm then found the Defendant at his address at Shaw Island and that he owned a property valued at over US$300,000 free of mortgage, in other words sufficient to satisfy the Plaintiff's judgment and interest.
11. On 10th June 1988 the Plaintiff recorded the Judgment of this Court in the Superior Court of the Country of San Juan, Washington State, U.S.A. in order to enforce the Judgment against the Defendant.

12. On 22nd November 1988 the Plaintiff applied to this Court ex parte for leave to issue a writ of execution, which was granted in this Court by Martin CJ on 24th November 1988.
13. On a hearing in the United States to obtain recognition of the Judgment of this Court of 22nd October 1981 the Washington Superior Court ruled that the Judgment was not enforceable in Washington State because the Defendant had not been given notice of the application for leave to issue a writ of execution or an opportunity to be heard at the hearing in November 1988.
14. The present further application for leave to issue a writ of execution dated 17th March 1989 was received by this Court on 3rd April 1989. After due notice to the Defendant, and after each party had filed several affidavits with a full opportunity to reply to the opposing party's averments, this further application was heard on 7th June and 21st September, 1989. Each party was represented by Counsel on both occasions.

The Rules of the Supreme Court of England apply in Tonga where there is nothing in the Supreme Court Act or the rules under it: Civil Law Act (Cap 14) and Roberts v Bank of British Columbia (Privy Council) Appeal 2/85 and it was agreed by both Counsel that Order 46 rule 2 (1) applies. This is -

"2 (1) A writ of execution to enforce a judgment or order may not issue without the leave of the Court in the following cases, that is to say:

(a) where six years or more have elapsed since the date of judgment or order.
(b) ....."

The relevant law shows that in reaching a decision on the application this Court should be guided by the following principles:

(a) the decision is a matter of judicial discretion, to be properly exercised according to the known rules of law: Lee v Bude and Torrington Junction Railway Co (1871) LR 6 CP 576; W T Lamb & Sons v Rider [1948] 2 KB 331; [1948] 2 All ER 402 (CA), 408.
(b) there must be adequate reasons for the long delay in enforcing the judgment, meaning "proper and just ground" (Lee v Bude p 581) Examples are repeated unsuccessful attempts by the creditor to contact the debtor and attempts by the debtor to conceal his whereabouts (Lamb v Rider p 405 D). It depends on the degree of diligence which might reasonably be required and the degree of change which has occurred. Delay which would otherwise bar the Plaintiff may be excused if it is explained: Bank of Montreal v Bailey & Bailey (1943) Ontario Reports 406, 411.
(c) the exercise of the discretion depends on whether the balance of justice or injustice is in favour of granting the remedy or withholding it: Bank of Montreal v Bailey p 411 quoting Harris v Lindeborg (1931) SCR 235, (1931) 1 DLR 945.

The Defendant's Counsel Mr Seeto, in his very helpful and full address to the Court on the relevant law, argued that there was no legal obligation on a debtor to take steps to satisfy a judgment of the Court but I cannot accept this submission. There has been an obligation on an unsuccessful defendant to pay a successful plaintiff in existence before the judgment, albeit a contested obligation: otherwise courts could never be right in

awarding interest pre-dating a judgment. Then if the Court gives judgment against a party, he has an obligation to follow the court's order and to implement it. If it is an order for payment of money, the party who does not pay may not at that stage technically be in contempt of court until execution takes place, but he is certainly under an obligation to obey the court's order.

I am satisfied that to say that the obligation is primarily on the judgment creditor to enforce his judgment timeously as Mr Seeto submitted, is, in colloquial terms, to stand the matter on its head. In the English House of Lords case of Hulbert & Crowe v Cathcart [1986] AC 470, cited for the Defendant, and which is highly persuasive by virtue of section 166 of the Evidence Act (Cap. 13) if not binding in Tonga by virtue of section 3 and 4 of the Civil Law Act (Cap 14), Lord Herschell states -

> "It is to be observed that the respondent was ordered by a Court of Justice to pay these costs and that those orders of the Court had been treated with contempt. That being so, it is, as it seems to me, only right and proper that every legal process should be employed to compel the person who has treated those orders with contempt no longer to treat them with contempt but to make the payment which those orders directed. No doubt it is in the discretion of the judge whether or not he will issue the order" (p. 473)
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> "... but I cannot myself agree with the view which seems to have been entertained that it rests with the creditor who has obtained from the Court an order for the payment of his costs to ferret out, first, information as to the means of the debtors, and then to secure proof that, if he gets the sequestration order, the sequestrator will be able practically, by the stringency of the process, to procure to him his costs. I think that puts the issue upon the wrong person. Prima facie, the person who has obtained an order of the Court which has been treated with contempt has a right to the process of the Court to secure that its order shall not be so treated; and it seems to me to rest upon the debtor who alleges that the proceeding would be futile to show to the court that it would be so" (p. 474)

This is also supported by Lord Davey at p. 476.

Mr Seeto cited Lamb v Rider in support of his submission but I do not find such support in that case, where the observations about explanation of long delay relate not to execution but to appeals out of time, where rather different considerations apply.

The general principle of enforcement is that the judgment or the order of the court must, so far as possible, be obeyed or complied with for otherwise the authority of the court would be diminished and the legal order would suffer a breakdown: "The Fabric of English Civil Justice", Sir Jack Jacob p. 187. However the process of enforcement is at the initiative of the successful party and it is for him to activate and take the appropriate steps in the judicial process of enforcement. (p. 188). But this does not relieve the debtor of his basic obligation to pay in satisfaction of the court order.

The background and reasons for the 6 year rule are well explained in Lamb v Rider at p. 406-8 and in the Canadian case of Stubbs v Allen (1934) 2 WWR 459 at 468-470:-

> "In early times, on account of a desire to be lenient to debtors the Courts [of England] established a rule that, if a judgment creditor did not issue executions within a year and a day, he had, in the case of personal actions, to bring an action on his judgment; and in the case of real actions, he had either to bring an action or proceed by way of

scire facias. The presumption was that, if an execution did not issue within a year and a day, the judgment was satisfied." (p. 468)

Then the Common Law Procedure Act 1852 relaxed this practice and established a new practice with respect to the issue of execution, which might then issue within 6 years from the recovery of the judgment without a revival of the judgment. After the expiration of 6 years, no execution could issue without either procuring a suggestion to be entered on the judgment roll that it manifestly appeared that the party was entitled to execution. These provisions of the 1852 Act subsequently became the subject of the Rules of the Supreme Court after the Judicature Acts 1873-5.

It is thus clear that the relaxation in 1852 was a deliberate step to improve the position of judgment creditors and that there is not meant to be an automatic cut off of execution after 6 years, but that execution is still to be available after that time, but with leave of the Court in appropriate cases. This is still the position under Order 46 rule 2.

Execution is essentially a matter of procedure and is machinery which the Court can operate for the purpose of enforcing its judgments, subject to rules in force (Lamb, p. 407 G). The application to extend the process of execution on a judgment is not an "action" for the purposes of limitation as was decided in Lamb and has recently been followed in the Court of Appeal in England in National Westmister Bank v Powney; The Times Law Reports 11 October 1989, in face of the apparently irreconcilable case of Lougher v Donovan; [1948] 2 All ER 11.

In reaching its decision on the facts of this case the Court therefore takes into account the following factors -

(i) the Defendant has an obligation to obey the order of the Court;

(ii) the Defendant made the first and major change by leaving Tonga and the jurisdiction of this Court without leaving property or taking other steps to satisfy any judgment against him;

(iii) despite at least eight letters from or on behalf of the Plaintiff seeking payment of this debt and other sums, the Defendant has taken no steps to make or discuss payment of the sum due under the Court's judgment. The Defendant has not denied receiving these letters;

(iv) this failure of the Defendant to respond to letters may not quite amount to trying to conceal his whereabouts, but given the distance involved across the Pacific Ocean, it comes very close to this;

(v) even if the Plaintiff did know that in 1977 the Defendant's family home was at Shaw Island and that he owned property there, that is not conclusive that the Defendant still owned it in 1981 or later;

(vi) the Plaintiff believed that the Defendant must have moved to some other address but left things at that. It did not attempt to trace the Defendant further at that time. It is excusable in a small remote island to be ignorant of the possibility of tracing people through enquiry agents;

(vii) the Plaintiff did not know the procedure for enforcing judgments in the United States. It might have tried to find out but did not do so because they did not know the Defendant's whereabouts. In any case this would have been a waste of time and money until it knew exactly where the Defendant was. In this respect the difficulties of obtaining information in remote islands must be remembered. It is only in the last few years that great improvements have been

made;

(viii) the Plaintiff's delay was therefore largely contributed to, if not caused entirely by, the actions of the Defendant, which left the Plaintiff in a considerable state of uncertainty. It was not, as was submitted for the Defendant, solely caused by neglect of the Plaintiff. This must execuse much of the delay;

(ix) the Defendant is in no better financial position now that he was in 1981 and may even have benefitted from the delay due to the difference between the rate of interest on the judgment debt (10%) and prevailing US interest rates of 12% to 15%;

(x) the Defendant will therefore not suffer any prejudice by reason of any delay in executing the judgment;

(xi) the Defendant is unlikely to have suffered any serious prejudice between the time when the Plaintiff could have excuted the judgment as of right i.e. the period of 6 years from the date of the judgment (i.e. up to 22 October, 1987) and the time in 1988 when the Defendant was given notice that the Plaintiff was taking steps to enforce the judgment.

The Court is faced therefore with a situation where there has been some lack of action by each party, not just by the Plaintiff. There is not meant to be an automatic cut-off of execution after 6 years, but execution is still available after that time with leave. Here I believe that proper and just grounds have been made out for extending the time for execution against a debtor who departed from the jurisdiction of this Court without adequate arrangements to satisfy the judgment and who then failed to answer correspondence which the Court must assume was delivered to him. The application is reasonable and the balance of justice is in favour of granting leave to issue execution - and equally the balance of injustice would be for withholding leave.

In all these circumstances the Court is satisfied that the Plaintiff ought to have leave and accordingly grants leave to the Plaintiff to issue execution notwithstanding that six years or more have elapsed since the date of the Judgment.