

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY

BETWEEN : RAMANLAL & SONS COMPANY LIMITED : Plaintiff

AND : ISIAH CATER : Defendant

BEFORE THE HON. CHIEF JUSTICE WARD

COUNSEL : Mr Appleby & Garret for the Plaintiff
: Mr Lopeti Foliaki for the Defendant.

Date of Judgment : 19th March, 1999.

RULING OF WARD CJ

In about June of last year, one Robert Allan booked into the Pacific Royale Hotel, which is owned by the plaintiff company. Although he appears to have booked in under his own name, he told the staff that he was involved with an American football company. By September he had run up a total bill with the hotel of approximately \$10,000.00 and, understandably, the management was becoming concerned.

When he was approached about it, Allan explained that he worked for an organisation known as the National Professional Minor Football League Conference Limited and that his "boss" was the present defendant, Cater. A few days later the manager of the hotel received a telephone call, from a man who identified himself as Cater, assuring him that he would cover Allan's bill. Shortly after, this was confirmed in a letter on NPMFLC Inc notepaper, dated 29 September, in which Cater stated that he would soon be in Tonga. It included the following paragraph;

"I understand that you are not running a free board and care facility and you want to be certain that you will be paid. I do not know what the present balance on Mr Allan's bill is, but I would be willing to pay an additional \$2,500.00 over and above whatever that bill is upon my arrival in Tonga. I ask that you consider my offer and please do not put Mr Allan out of the Pacific Royal Hotel"

The hotel management was, surprisingly, receptive to his plea and Allan continued to stay at the hotel until he unexpectedly died on 26 February this year. Shortly before this the defendant had arrived and also booked into the hotel. By 5 March 1999 the total bill was \$44,020.12.

During the period of Allan's stay, there had been negotiations by the NPMFLC to purchase the hotel and, if it had been finalised, no doubt the costs of the two men's stay would have been taken on with the rest of the hotel's business. However, the sale negotiations fell through and it appeared the defendant was preparing to leave Tonga. On 5 March, the plaintiff applied ex parte for orders that the defendant be restrained from leaving the Kingdom unless he lodged sufficient security in court or, alternatively, that he remain in Tonga until the plaintiff's claim has been determined.

On the affidavit evidence before me, I made an interim order that the defendant should not leave the jurisdiction of this court and should attend in chambers on the following Monday, 8 March. I also ordered that he should surrender his passport to the court and that was done.

There have been a number of hearings in chambers since that date in order to present evidence to ascertain the defendant's position vis a vis the NPMFLC and the position of that organisation in Tonga.

Hard evidence has been surprisingly difficult to obtain but the defendant does not deny the existence of the debt to the hotel. It is accepted by the plaintiff that, since my order of 5 March, the defendant has paid the portion of the hotel bill incurred by him personally. The defendant has told the court that he is one of three directors of the NPMFLC and is also its chief executive. He admits the letter of 29 September but in his defence, filed on 9 March, denies it was a guarantee of the whole bill and that any offer was made by him on behalf of the NPMFLC in his capacity as chief executive. Any obligation it may have created was between the hotel and the NPMFLC.

From the evidence that has been provided, I am also satisfied of the following:

1. The NPMFLC started business in 1990 and was incorporated in the State of Alabama in June 1993.
2. The officers of the corporation are the defendant as president and chief executive officer, and two senior vice presidents, a lawyer and the defendant's wife.
3. The NPMFLC has established an American football team in Tonga and also teams in Fiji and the Cook Islands.
4. The team in Tonga is owned by the NPMFLC (75%) and Vision Tonga Ltd (25%) and employs at least three people beside the team members.
5. In order to establish the team in Tonga, the NPMFLC has supplied equipment for the whole team of uncertain present value.
6. The NPMFLC was engaged in active negotiations for the purchase of the Pacific Royale Hotel through a Tonga based agent and consultant and initial offers of finance were made by local financial houses for this purchase.
7. Those offers have since been withdrawn but I am not satisfied upon the evidence available at this stage that the defendant or his agent here knew of that withdrawal at the time of my Order of 5 March.
8. This defendant has left hotel and travel bills in Fiji and Cook Islands, which remain unpaid following failure of the arrangements he had made with those hotels for payment.
9. There is another action filed against him in this court by a bank relating to a dishonoured cheque.

Many of these matters have little bearing on the application before me for determination but they have come to light in the attempt by the defence to establish the bonafides of the NPMFLC and the plaintiff's attempts to demonstrate that the defendant's actions are

fraudulent and/or that this is a case where the court is entitled to lift the corporate veil and examine the NPMFLC because they allege it is no more and no less than the defendant.

The question for determination is whether the Court, having prevented the defendant from leaving pending this application, can continue to detain him in Tonga. As I have stated there are two limbs of the plaintiff's application.

The first is that he should lodge sufficient security in court before he leaves. It is clear that the so-called security they seek is the sum required in full settlement of the hotel bill. I do not think I have power to make such an order and neither should the court in a case such as this where the plaintiff allowed such a bill to be incurred and there is at least an arguable defence that the deceased man's estate or the NPMFLC may be the proper defendant

The second ground is based on the writ of ne exeat regno. I am satisfied that such a writ is available here and the terms on which it will be ordered are the same as in England. The question is whether this is an appropriate case for the issue of such a writ. It is a draconian measure and will only be issued in very clear cases. Already as a result of the original order, the defendant has remained in the jurisdiction for nearly two weeks more than he intended. If the writ is continued he could be here for many months before the case is tried.

There are four requirements for the issue of the writ and the court must be satisfied, on sworn evidence, of them all. They are that;

1. the action is one in which the defendant would formerly have been liable to arrest at law
2. a good cause of action for at least \$100 is established (the sum under the Debtors Act in England is GBP50.00)
3. there is probable cause for thinking the defendant is about to leave the country unless he is arrested, and
4. the absence of the defendant from the country will materially prejudice the plaintiff in the prosecution of his action; per Megarry J in *Felton v Challis* (1968) 1QB 200, 210.

The evidence presented to me on 5 March was sufficient to persuade me that the writ should issue at least to enable the court to hear from the defendant but I was concerned at the time about the real prejudice to the prosecution of the plaintiff's action. It is to this that the hearings have been directed. There is no dispute that the first three requirements are satisfied. Although the evidence of the actual sum still outstanding to the hotel is not clear, there is no dispute that it is very substantially beyond the limit set by section 6 of the Debtors Act.

The plaintiff's endeavours have been directed largely to demonstrating that this is in truth a case of fraud, that the defendant should not therefore be entitled to hide behind the corporation and that they will in that way be able to prove his personal liability. The defendant has striven to demonstrate the bonafides of the NPMFLC and of future sources of finance.

With respect to counsel, I consider the decision of the court is more fundamental. The question is whether, by allowing the defendant to leave the jurisdiction, the plaintiff will be prejudiced in relation to the proof of its case. It is well established that this writ is issued to facilitate the obtaining of judgment and not as an aid to execution; *Drover v Beyer* (1979) 13 ChD 242; *Felton v Challis*. Unfortunately for the plaintiff, the more I hear; the clearer it becomes that the whole purpose of these proceedings is to obtain payment of the debt before the hearing of the claim. Nothing has been produced to me that suggests any way in which

the absence of the defendant from the country will prevent or even delay the obtaining of judgment in this action. There has been no suggestion, for example, that he will be needed to give evidence for the plaintiff or that there will be a need for discovery or that, if there was, it would not be complied with or that he will remove vital evidence from the country on his departure. All the evidence has been directed to the suggested fraud and the insubstantial nature of the NPMFLC.

In Felton and Challis, Megarry J refers to comments made by James LJ in Drover's case (from the Law Journal Reports but not included in the Chancery Division Report);

"...often the absence of a defendant "may be very embarrassing to the plaintiff in regard to obtaining the fruits of his action," as James LJ is reported as observing in Drover v Beyer without it materially prejudicing him in prosecuting the action. He added:

'Indeed, it may be said that the defendant's absence from England will facilitate the plaintiff's action because judgment will go by default.'

In the present case I have no evidence whatever before me to show that the defendant's absence from England would materially prejudice the plaintiffs in the prosecution of their action. I can well see that his absence may very materially prejudice the plaintiffs in obtaining the fruits of their action; but that is not the test."

The writ is issued with caution. In Drover's case, the writ was sought to prevent the departure back to Germany of the surviving owner and master of a vessel that had foundered of the English coast because it was considered necessary to question him about insurances he had in Germany. The writ was refused. In the present case, I am not satisfied the defendant's absence would interfere in any way with the pursuit of the claim to judgment. If the action is successful, the plaintiff will then be able to pursue the judgment debt with the methods of execution available even if the debtor remains abroad.

The application is refused. The defendant is to have his passport returned to him forthwith and the interim Order of 5 March is set aside. The question of the costs of this application and any possible claim against the undertaking given by the plaintiff at the ex parte application shall be determined at the conclusion the main action.



NUKU'ALOFA: 19th March, 1999

CHIEF JUSTICE