Case No: HC-2014-000525

[2014] EWHC 4797 (CH)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building
7 Rolls Building
110 Fetter Lane,
London
EC4A 1NL

Monday, 8 December 2014

BEFORE:

MR STUART ISAACS QC (SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION)

BETWEEN:

VAN HEEREN

Appellant

- and -

COOPER

Respondent

MR SIMON MCLOUGHLIN (instructed by **Lebrasseur**) appeared on behalf of the Claimant

MR SIMON PASSFIELD (instructed by **TLT LLP**) appeared on behalf of the Defendant

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Judgment
(As Approved)

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101 Finsbury Pavement London EC2A 1ER
Tel No: 020 7422 6131 Fax No: 020 7422 6134
Web: www.merrillcorp.com/mls Email: mlstape@merrillcorp.com
(Official Shorthand Writers to the Court)

Monday, 8 December 2014

1. THE DEPUTY JUDGE: The claimant is the judgment creditor and the defendant the judgment debtor under three New Zealand court judgments, of which the latest was dated 19 June 2007, by which the claimant was awarded his costs of certain proceedings, brought by the defendant against the claimant in New Zealand together with interest. The total amount of the costs awarded in the claimant's favour is NZ$55,110.86. The only sum received by the claimant in Settlement of the defendant's liability to him for those costs is a sum of NZ$4,862.63, paid into court by the defendant as security for the costs of an appeal to the New Zealand Court of Appeal, which on 19 July 2011 was released by the court to the claimant's New Zealand solicitors.

2. On 8 May 2013, the claimant issued a statutory demand for the amounts due under the New Zealand court judgments, which demand was determined to have been validly served. On 4 November 2013, Deputy District Judge Skerrett, on the hearing of the defendant's application to set aside the statutory demand determined that it should be set aside, pursuant to rule 6.5(4)(d) of the Insolvency Rules 1986 because she was, "satisfied on other grounds, that the demand ought to be set aside" ("the November order"). On 30 August 2013, the claimant issued a part 7 claim to claim the amounts due under the New Zealand court judgments. On 26 February 2014, Mr Justice Sales granted the claimant permission to appeal against the November order, on the basis that the appeal had a real prospect of success, and directed that the appeal, together with the part 7 claim, be heard together. That is the hearing which has taken place before me today.

3. The Deputy District Judge held that the effect for section 24(1) of the Limitation Act 1980 was to render the judgment debts unenforceable because they were time-barred, and therefore not provable debts within the meaning of rule 12.3 of the Insolvency Rules. It is common ground between the parties that the New Zealand court judgments have not been registered in the English High Court within the 12 month period prescribed in section 9 of the Administration of Justice Act 1920, and so the claimant was therefore only able to enforce them in this jurisdiction by bringing an action on them at common law, and in the absence of exceptional circumstances (of which none was alleged), the statutory demand for a non-provable debt will usually be set aside under rule 6.5(4)(d) of the Insolvency Rules, as happened in the present case, since a bankruptcy order would not be made on a petition presented in respect of a debt that was not provable.

4. The critical issue on which the claimant's appeal and this part 7 claim turns, is whether he can rely on section 29(5) of the Limitation Act 1980, as extending the six year time limit under section 24(1) of that Act from the date on which the defendant is alleged to have acknowledged the judgment debts, so that they were not time barred, and therefore remained enforceable and therefore were provable debts. Section 29 of the Limitation Act 1980 deals with the fresh accrual of action on acknowledgement or part payment. Section 29(5) provides that, subject to an immaterial exception:

> "… where any right of action has accrued to recover – (a) any debt or other liquidated pecuniary claim; … and the person liable or accountable for the claim acknowledges the claim or makes any payment in respect of it, the right should be treated as having accrued on and not before the debt of the acknowledgement of the payment."

5. In the present case, the acknowledgements relied on by the claimant are two emails from the defendant's New Zealand solicitors, Carter and Partners, dated 30 August 2007 and 7 September 2007. The defendant now accepts that those two emails are valid acknowledgments. Deputy District Judge Skerrett held that section 29(5) of the Limitation Act 1980 does not apply to an action to enforce a judgment. I am told by both counsel that there is no authority directly on this point. The claimant submitted that the New Zealand court judgments created a debt or debts enforceable by action of common law or otherwise liquidated pecuniary claims; that the New Zealand court judgments were enforceable by action of common law, and that such action at common law was within the scope of section 29(5).

6. The claimant submitted that the reference in the subsequent part of section 29(5) to "the claim" and to "the debt or claim" did not affect the position because it was clear that the reference to "the claim", was a reference to any debt or claim referred to in sub paragraphs a) and b) of the sub-section. See to this effect, Good v Parry [1963] 2 QB 418 *per* Lord Denning at page 423 and *per* Lord Justice Danckwerts at page 425. That is now accepted by the defendant.

7. The claimant further submitted that the structure of the Limitation Act 1980 supports his construction of section 29(5). Part 1 of the Act, into which section 24 falls, deals with, "ordinary time limits for different classes of action". Part 2 of the Act, into which section 29 falls deals with, "extension or exclusion of ordinary time limits". Hence, it was submitted, section 29 is not for example confined to the ordinary time limit for an action founded on a simple contract under section 5, but is expressed in far wider language.

8. For my part, I do not derive assistance from the structure of the Act, since the extensions of ordinary time limits in part 2 have been held not to cover all of the ordinary time limits in part 1. For example, section 29(5) does not apply to the time limits in sections 2 to 4(a) in part 1, in respect of various court claims. See Welsh Water v Carmarthenshire County Council [2004] EWHC 2991, a decision of Mr Justice Jackson. The claimant also relied in paragraph 25 of his skeleton argument on several authorities, which, it was submitted, supported or were consistent with his interpretation of section 29(5) without being directly his point.

9. The defendant acknowledged the superficial attractiveness of the claimant's submissions, but argued that the working of section 29(5)(a) was ambiguous, and that, in the face of such ambiguity, it was appropriate to consider the legislative history of section 29(5), which put a different complexion on matters. The defendant submitted that an analysis of that legislative history shows that it was not Parliament's intention that an action brought on a judgment should fall within section 29(5)(a). The defendant fairly accepted that if I concluded that the meaning of section 29(5) was plain and clear, then there was no reason to consider its legislative history. In my

judgment, a judgment debt, whether arising under a domestic or a foreign judgment is a "debt" within the plain and ordinary meaning of that word in section 29(5). For the defendant's contrary position to prevail, the unqualified word "debt" would have to be read subject to an implied exclusion of any debt arising under a judgment. There is, in my view, no scope for any such exclusion.

10. In reaching the contrary conclusion, the deputy district judge was, "very much persuaded" by Mr Justice Jackson's decision in Welsh Water. It appears from paragraphs 12 and 13 of her judgment under appeal that by reference to certain statements in paragraph 49 of Mr Justice Jackson's judgment she concluded that section 29(5)(a) was confined to debts or other liquidated pecuniary claims under or in respect of simple contractual obligations and not sums ordered to be paid by reason of a judgment. However, in my view, the Deputy District Judge's conclusion to that effect was wrong. In Welsh Water, Mr Justice Jackson determined as a preliminary issue, that a tortious claim did not fall within section 29(5)(a), since a claim for damages in tort is, by definition not a liquidated claim.

11. In my judgment the statements in paragraph 49 of Mr Justice Jackson's judgement in fact support the claimant. Specifically, the judge explains that the phrase, "liquidated claim" is "a claim for a specific sum", and that:

> "the global phrase 'any debt or other liquidated pecuniary amount' suggests a sum which is due to be paid pursuant to some contractual or similar obligation."

12. It is readily understandable why a tortious claim for damages is not within those phrases. However, a liquidated sum due under a judgment is quite clearly within those phrases and there is nothing in Mr Justice Jackson's judgment to suggest that a judgment debt should be treated any differently from any other debt.

13. A further reason why a judgment debt is entitled to the same treatment as any other debt is that the liability of a defendant in an action brought on a foreign judgment is an action which proceeds on the basis of an implied contract to pay, on the part of the party, against whom the judgement has been recovered. See Grant v Boston [1883] 13 QB 302 at 303 *per* Brett MR and in Re Flynn [1969] 2 Ch 403 at 412 G to H *per* Buckley J, both cited in *Chitty on Contracts* 31st Edition, Volume 1, paragraph 28 – 019. I therefore conclude that recourse to the legislative history of section 29(5) is inappropriate and unnecessary.

14. The alleged ambiguity in section 29(5), which the defendant identified as entitling such recourse was two-fold. First, Mr Passfield, who appeared on the defendant's behalf, submitted that section 29(5)(a) was ambiguous as to whether a debt was a species of liquidated pecuniary claim; second, he submitted that the expression in section 29(5) "right of action … to recover (a) any debt" was ambiguous. As I have indicated, I do not accept that there is any ambiguity in section 29(5). However, for completeness, I turn to consider briefly the legislative history of section 29(5) on which the defendant relies.

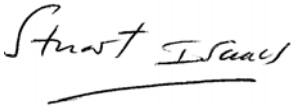
15. It appears that the origins of those provisions, and their predecessor, namely section 23(4) of the Limitation Act 1939, and before that section 13 of the Mercantile Law Amendment Act and section 1 of Lord Tenterden's Act, lie in judge-made law, in a series of cases in which it was held that a promise by a debtor to pay a debt, if given within six years before an action was brought, was sufficient to create a new contract, so as to take the cause out of the ordinary six-year limitation period prescribed by section 3 of the Limitation Act 1623. According to the editors of O'Hare and Brown, *Civil Litigation*, 15th edition paragraph, paragraph 5-015, the underlying policy of section 29(5) is that a creditor should be given more time to negotiate for the payment of an admitted indebtedness without the fear that the claim would become statute barred.

16. The defendant therefore submitted that section 29(5)(a) primarily applies where a claimant seeks to establish that the defendant is indebted to him, on the basis of a quasi-contractual obligation. The doctrine of acknowledgement, submitted the defendant, applies only to claims where the claimant is seeking to establish by way of a judgment that the defendant is indebted. It does not apply to claims on a judgment which has already established the defendant's liability.

17. The defendant drew attention in particular to section 40 of the Real Property Limitation Act 1833, whereby the doctrine of acknowledgment was expressly applied to judgment debts. The predecessor legislation to section 29(5) of the Limitation Act 1980 is section 23(4) of the Limitation Act 1939. That Act was a piece of consolidating legislation enacted in order to consolidate, with amendments certain statutes relating to the limitation of actions. The defendant submitted that, having regard to the legislative background and to the 1939 Act, if Parliament had intended section 23(4) of that Act to apply to all debts, including all judgment debts, and not to just to ordinary contractual claims, one would have expected to see a specific reference in section 23(4) to judgment debts, since in the previous legislation a distinction existed between the two in the provisions made for the application of the doctrine of acknowledgment.

18. I am unable to accept that submission. As Mr Justice Jackson made clear in Welsh Water, at paragraph 34, "The Limitation Act 1939 not only consolidated earlier limitation statutes, but also made some significant changes in section 23(4)." In my judgment, it is significant that amongst the statutes repealed by the 1939 Act, there was included Lord Tenterden's Act and the Real Property Limitation Act 1833. In my view, Parliament's intention in enacting section 23(4) was to bring within its provisions ordinary contract claims and judgment debts. The same is therefore true of the successor legislation to section 23(4) of the Limitation Act 1939, namely section 29(5) of the Limitation Act 1980. In the result, the appeal against the November order is allowed, and the claimant is entitled to judgment on his part 7 claim.

As approved.



6 May 2015