IN THE COURT OF APPEAL [1994] QCA 177

SUPREME COURT OF QUEENSLAND

Appeal No. 28 of 1994

Before Fitzgerald P.
McPherson JA.
Derrington J.

[Clout v. Qld. Steel and Sheet]

BETWEEN:

DAVID CLOUT as Liquidator of Enterprise Sheet Metal Pty. Ltd. (in Liquidation)
(First Plaintiff) First Respondent

AND:

ENTERPRISE SHEET METAL PTY. LTD.
(In Liquidation)
(Second Plaintiff) Second Respondent

AND:

QUEENSLAND STEEL AND SHEET PTY. LTD.
(Defendant) Appellant

REASONS FOR JUDGMENT - FITZGERALD P.

Judgment delivered 26/05/94

The circumstances giving rise to this proceeding are set out in the reasons for judgment of McPherson JA and Derrington J. I agree with the orders proposed by their Honours and with their observation to the effect that the existing position is costly and inconvenient. However, I note that a critical element of what has been decided has been based on a concession by the parties: see 3, below. Nonetheless, as presently advised, I am of opinion that that concession was correctly made.

My reasons for my conclusions can be briefly stated.

1. An action for money had and received may be brought to recover a payment avoided as a "preference, priority or advantage" in reliance upon section 565 of the Corporations Law of Queensland: Marks v. Feldman (1870) LR 5 QB 275, 281; F.C.T.

v. Jacques (1956) 95 CLR 223, 229.

2. I am content to assume that, unless excluded by some other statutory provision, the Magistrates Court would have jurisdiction to entertain such an action provided that it meet any relevant monetary and geographic limitations.

3. The parties are agreed that the Magistrates Court does not have jurisdiction in such an action if it involves a civil matter arising under the Corporations Law of Queensland. This is because the conferral of jurisdiction on the Supreme Court of Queensland (and other specified courts) in respect of "civil matters arising under the Corporations Law of Queensland" by sections 42 and 42A of the *Corporations (Queensland) Act 1990* is a grant of exclusive jurisdiction; sections 42 and 42A of the *Corporations (Queensland) Act* by implication exclude the existence of all or any part of the jurisdiction referred to in any court not nominated in those sections: Churcher v. Edwardstown Carpets (Reg) (1993) 11 A.C.L.C. 393; Putnin v. Jenka Pty. Ltd. (1994) 12 A.C.L.C. 282; 13 A.C.S.R. 68.

4.(a) An action for money had and received involves a civil matter; i.e., a matter other than a criminal matter: *Corporations (Queensland) Act*, subsection 40(1).

(b) In the context, the "matter" is the "subject matter for determination" or "the claim of a litigant brought for determination" in the action: cf. Phillip Morris Inc v. Adam P. Brown Male Fashions Pty. Ltd. (1981) 148 CLR 457, 509; Fencott v. Muller (1983)152 CLR 570; Stack v. Coast Securities (No.9) Pty. Ltd. (1983) 154 CLR 261.

5.(a) The claim brought for determination in the action is based upon the right to avoid the payment which owes its existence to the Corporations Law of Queensland.

(b) Accordingly, the matter arises under the Corporations Law of Queensland: L.N.C. Laboratories Ltd. v. B.M.W. (Australia) Ltd. (1983) 151 CLR 575, 581.

6. As is pointed out by McPherson JA. and Derrington J., the decision which this Court has arrived at is supported by the

judgment of the Full Court of W.A. in Putnin v. Jenka

5. The "subject matter for determination" in an action for money had and received to recover a payment avoided as a "preference priority or advantage" under subsection 565(1) of the *Corporations Law of Queensland* is the issues raised by such an action.

THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 28 of 1994

Brisbane

Before Fitzgerald P.
McPherson J.A.
Derrington J.

[Enterprise Sheet Metal v. Qld. Steel & Sheet P/L.]

IN THE MATTER OF District Court Appeal No. 34 of 1992 on appeal from the Magistrates Court Brisbane Plaint No. 17373

- and -

IN THE MATTER OF a Case Reserved for the consideration of the Court of Appeal by His Honour Judge Pratt D.C.J.

BETWEEN

DAVID CLOUT as Liquidator of Enterprise Sheet Metal Pty Ltd. (In Liquidation)
(First Plaintiff) First Respondent

AND

ENTERPRISE SHEET METAL PTY. LTD. (In Liquidation)
(Second Plaintiff) Second Respondent

AND

QUEENSLAND STEEL AND SHEET PTY. LTD.
(Defendant) Appellant

JOINT REASONS FOR JUDGMENT - McPHERSON J.A. & DERRINGTON J.

Judgment delivered the Twenty Sixth day of May 1994

This is a case reserved by a judge of District Courts on an appeal to him from the magistrates court in an action in that

court (no. 17373 of 1992) to recover an amount of $11,000 alleged to have been received in circumstances making it a preference payment in the winding up of a company Enterprise Sheet Metal Pty. Ltd., which is co-plaintiff with the liquidator Mr Clout in the action. The principal question in the case is whether, having regard to the provisions of s.565(1) of the Corporations Law of Queensland and s.42(1) of the *Corporations (Queensland) Act 1990*, the magistrate in this case was correct in deciding that the magistrates court had jurisdiction to entertain a claim for recovery of money in the circumstances alleged. By s.42(1) jurisdiction is conferred on the Supreme Court of Queensland "with respect to civil matters arising under the Corporations Law of Queensland". On the strength of the decision of the Full Court of South Australia in *Churcher v. Edwardstown Carpets* (1993) 11 A.C.L.C. 393, the parties before us were content to accept that the provisions of s.42 are exhaustive of relevant jurisdiction in this matter; and that, if the claim in this case falls within those provisions, only the Supreme Court has jurisdiction to hear and determine it.

The character of the claim in this case calls for some initial consideration. There are two different methods of enforcing a preference claim in winding up. One is to apply for a declaration that the subject payment, etc. is void as a preference, and for a consequential order that the recipient pay the amount of it to the applicant liquidator. The source of power to make such an order is the Court's equity jurisdiction;

but, for enforcement purposes, the order is given the status of a judgment for a money sum by s.19 of the *Common Law Practice Act* 1867. See *Peel v. Fitzgerald* [1982] Qd.R. 544, 549.

Power to make a declaration or an order like that is not given to the magistrates court, which has no general jurisdiction in equity. Nevertheless, for a long time the law has been that preference claims can be enforced at common law, in the case of a payment, by action for money had and received; or, if the preference arose from a transfer of chattels, by an action for conversion : *Marks v. Feldman* (1870) L.R. 5 Q.B. 275. Mr Sullivan argued that before such an action could succeed the liquidator would first have to obtain a declaration that the payment or other transaction was void as a preference. But that is plainly not so. Section 565(1) makes the payment etc. "void" as against the liquidator, which, in this context is equivalent in meaning to voidable at the option of the liquidator : *Stevenson v. Newnham* (1853) 13 C.B. 285, 502; 138 E.R. 1208, 1215; *Marks v. Feldman* (1870) L.R. 5 Q.B. 275, 281. A communicated election to avoid is therefore necessary, but it is also sufficient : *Re Waters, ex parte Hodgens* (1887) 5 N.Z.L.R. 431, 433. Whether, having regard to the circumstances that prevailed when the payment was made, the liquidator is entitled to avoid is an issue the court will in the end have to decide; but a formal declaration to that effect is not a condition precedent to recovery.

Once the payment, etc. has been validly avoided, the

liquidator can recover it in a court of competent jurisdiction. Speaking of s.95(1) of the Bankruptcy Act 1924, which made preference payments void against a trustee in bankruptcy, the High Court in *Federal Commissioner of Taxation v. Jacques* (1956) 95 C.L.R. 223, 229, said it "simply renders certain transactions void as against the trustee, leaving the general law or other statutory provisions to supply appropriate remedies for the situations thus created ... the trustee's remedies are to sue for the recovery of the money as money had and received for his use, which is a remedy provided by the common law ...". The claim by the plaintiffs in the present action is framed accordingly. It is to recover as moneys had and received an amount of $11,000, which is within the jurisdiction of the magistrates court in terms of both monetary limit and subject matter. There is therefore jurisdiction to hear and determine the action unless the effect of s.42(1) of the *Corporations (Queensland) Act* is to reserve it to the Supreme Court.

On that question there have in this State been several conflicting decisions of District Court judges. There is also a decision of Dowsett J. in the Supreme Court holding that jurisdiction to entertain what may conveniently be termed a preference action is not confined by s.42(1)to the Supreme Court but extends to a District Court : *Re Jefferson v. Ideal Electrical Suppliers* (O.S. 748 of 1993). The question turns on whether proceedings to recover preferences are to be considered "civil matters arising under" the Corporations Law within

s.42(1). The language of s.42(1) has evidently been modelled on s.76(ii) of the Constitution or on statutory provisions enacted under the powers conferred there. In that context, it has been said of the word "matter" that it "does not mean a legal proceeding, but rather the subject matter for determination in a legal proceeding". *Fencott v. Muller* (1983) 152 C.L.R. 570, 590. In addition, in *Stack v. Coast Securities (No. 9) Pty. Ltd.* (1983) 154 C.L.R. 261, 290, it was held that the scope of federal jurisdiction under s.76 extends to "the litigious or justiciable controversy between parties of which the federal claim or cause of action forms part".

With respect to the expression "arising under" a law, it has been said that "a matter may properly be said to arise under a federal law if the right or duty in question in the matter owes its existence to federal law or depends upon federal law for its enforcement, whether or not the determination of the controversy involves the interpretation (or validity) of the law". In adopting this statement, which was made by Latham C.J. in *R. v. Commonwealth Court of Conciliation, ex parte Barnett* (1945) 70 C.L.R. 141, 154, the High Court in *L.N.C. Laboratories Ltd. v. B.M.W. (Australia) Ltd.* (1983) 151 C.L.R. 575, 581, added:

> "When it is said that a matter will arise under a law of the Parliament only if the right or duty in question in the matter owes its existence to a law of the Parliament, that does not mean that the question depends on the form of the relief sought and on whether that relief depends on federal law. A claim for damages for breach or for specific performance of a contract, or a claim for relief for breach of

> trust, is a claim for relief of a kind which is available under State law, but if the contract or trust is in respect of a right or property which is the creation of federal law, the claim arises under federal law. The subject matter of the contract or trust in such a case exists as a result of the federal law."

It is not necessary to decide here whether the extension of federal jurisdiction that was mentioned in *Stack v. Coast Securities (No. 9) Pty. Ltd.* is capable of attaching to the word "matter" in s.42(1). Language borrowed, especially from a constitutional context, for use elsewhere does not necessarily carry with it every nuance of meaning. It is however clear that in this action in the magistrates court the subject matter for determination is whether the impugned payments (of which there are alleged to have been two) were made in circumstances rendering them preferences under s.565(1) of the Corporations Law. The question whether the liquidator had, in the circumstances alleged, the right to avoid the payments and recover the amount from the defendant depends entirely on s.565(1). It is the power created by that provision that affords the only legal basis here for recovering money that was lawfully paid and received in discharge of what was evidently an acknowledged debt. In the absence of s.565(1) of the Corporations Law, there would be no title in the liquidator to recover the payments. We may add that the reasoning of Anderson J. (with whom Malcolm C.J. agreed) in the Full Court of Western Australia in *Putnin v. Jenka Pty. Ltd.* (1994) 12 A.C.L.C. 282 accords with what we have said here.

The result is that action no. 17373 in the magistrates court, or the subject matter for determination in it, is a "civil matter arising under the Corporations (Queensland Law)" within the meaning of s.42(1) of the *Corporations (Queensland) Act* that only the Supreme Court can entertain. It follows that Question (a) of the stated case (which is whether a magistrates court has jurisdiction to hear and determine an action like this) must be answered "No". Question ((b) asks the same question in relation to a District Court. Although in the light of these reasons, the answer may be self-evident, the question does not arise in this action and we do not answer it. Because of the additional cost and inconvenience that will be occasioned by having to bring in the Supreme Court all future claims to recover preference payments, irrespective of amounts involved, we think we should add that s.42(1) merits urgent attention by the legislature.

As to costs, the case before us was reserved by the judge of District Courts acting, or so it would appear, under a combination of s.95(2) of the *District Courts Act 1967* and s.7 of *The Judicature Act*. No explicit power or guidance as to costs is provided by those provisions; but, as regards the costs of the proceedings in this Court, the general jurisdiction with respect to costs is exercisable. Before us the defendant in the action has been successful, and the plaintiffs should be ordered to pay its costs. We were asked in that event to grant the plaintiffs an indemnity certificate under the *Appeal Costs Fund*

Act 1973. So far as relevant, s.15(1) of that Act it provides power to grant such a certificate in respect of an appeal "to any respondent to an appeal", where an appeal to the Supreme Court succeeds on a question of law. The term "appeal" is defined in s.4 of the Act to include "a question of law reserved in the form of a special case for the opinion of a superior court". The proceedings before us fall directly within those terms. In *ex parte Neville* (1966) 85 W.N. (Pt. 1) (N.S.W.) 372, 374, Maguire J. said that if a stated case reserving points of law was an appeal, he had no difficulty in regarding the applicant in the case before him as "respondent to the appeal" under a statutory provision that is substantially indistinguishable from s.15(1) of the *Appeal Costs Fund Act*. In addition, because the effect of our decision here is to reverse the magistrate's decision which was made the subject of the appeal to the District Court, it seems correct to say that in terms of s.15(1) an appeal to the Supreme Court against the decision of a court on a question of law has succeeded. The matter is one in which in other respects a certificate is appropriate, and we will consequently make an order to that effect in favour of the plaintiffs in the action.

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Fitzgerald P.
McPherson J.A.
Derrington J.

Judgment delivered 26/05/94

Joint reasons for judgment by McPherson J.A. & Derrington J.
Separate reasons by Fitzgerald P.

THE QUESTIONS RESERVED FOR THE CONSIDERATION OF THE COURT ARE ANSWERED AS FOLLOWS:

QUESTION (a): NO

QUESTION (b): NOT ANSWERED

ORDER THAT THE RESPONDENTS, BEING THE PLAINTIFFS IN ACTION NO. 17373/1992 IN THE MAGISTRATES COURT, PAY THE COSTS OF AND INCIDENTAL TO THE PROCEEDINGS IN THIS COURT OF THE DEFENDANT IN THAT ACTION. ORDER THAT THOSE RESPONDENTS HAVE AN INDEMNITY CERTIFICATE UNDER *THE APPEAL COSTS FUND ACT.*

CATCHWORDS **CORPORATIONS LAW - WINDING UP - PREFERENCES - Case Stated - Action to recover preference payment during winding up - Appeal to District Court from Magistrates Court - Whether Magistrate has jurisdiction - Interpretation of s.42(1) *Corporations (Qld.) Act* - Whether proceedings to recover preferences are "civil matters arising under" the Corporations Law.**

COSTS - CASE STATED - Whether indemnity certificate under *Appeal Costs Fund Act* 1973 available - Treatment of applicant as "respondent to the appeal".

Counsel: J. Sullivan for the appellant

H. Zillman for the respondent

Solicitors: C.A. Sciacca & Associates for the Defendant/Appellant

Bennett Carroll & Gibbons for the Plaintiff/Respondent

Hearing Date: 4 May 1994