Privy Council Appeal No. 6 of 1995

Mark Gregory Hardy *Appellant*

v.

Focus Insurance Company Limited (in liquidation) *Respondent*

FROM

THE COURT OF APPEAL FOR BERMUDA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, Delivered the 13th July 1995

Present at the hearing:-

Lord Jauncey of Tullichettle
Lord Browne-Wilkinson
Lord Slynn of Hadley
Lord Hoffmann
Sir Roger Parker

*[Delivered by **Lord Jauncey of Tullichettle**]*

In July 1991 the liquidator of the respondent insurance company ("Focus") raised an action against the appellant and two other persons in the Supreme Court of Bermuda seeking recovery of a sum of US$19,714,142. The three defendants were directors of Focus and it was averred that the appellant, who had acted at all material times as if he had authority to bind Focus and manage its affairs, authorised and instructed between 1988 and 1990 payments totalling the above sum to his personal bank account, to companies in which he had an interest and to other companies, in almost every case without any contractual obligation by or benefit to Focus. In short, it was alleged that he had milked Focus of very large sums of money.

The case has had a chequered procedural history and, in order to understand the issues which were canvassed before this Board, it is necessary to set out a chronology:-

March 1991 An examination of the three defendants under section 195 of the Companies Act 1981 was carried out in Chambers before the Chief Justice.

5/7/91 Order of Chief Justice (first Mareva order) (1) restraining appellant from dealing with certain specified assets and realty in a number of jurisdictions and restricting his monthly expenditure; and (2) requiring disclosure of the full value of his assets in those jurisdictions.

10/1/92 Appellant's application to discharge above injunction adjourned after four-day hearing before Chief Justice and never restored.

24/2/92 Order of Chief Justice (second Mareva order) extending both parts of first Mareva order.

11/5/92 Order of Chief Justice refusing appellant's application to strike out the claim and granting Focus leave to add six more defendants.

25/11/92 Order of Court of Appeal dismissing appeal by appellant against order of 11/5/92 but striking out action against the second and third defendants.

23/12/92 Two orders of Chief Justice:-

(1) Finding, after hearing evidence, that the appellant was in breach of the first and second Mareva orders and ordering his appearance on 8/1/93 to show cause why he should not be committed to prison for contempt ("contempt order"), and

(2) ordaining the appellant *inter alia* (a) to sign and deliver to Focus within twenty-one days a letter of authority to eight specified banks and companies authorising them to disclose to Focus all documents relating to any account for the appellant from 1/1/88 to the date of the order, and (b) to file a list of all his property and assets wheresoever situated within fourteen days. This order (the Unless Order) provided that in the event of the appellant failing to carry out (a) or (b) within the specified time limits his defence would be struck out and judgment entered against him. When these two orders were made the appellant was represented by counsel but no evidence was led on his behalf and he was not present.

8/1/93 Order of Chief Justice granting warrant for arrest of appellant who had not appeared.

14/1/93 Issue of summons by appellant to stay the Unless Order. By this time both the time limits referred to in the order had expired.

15/1/93 Judgment in default was entered by the Chief Justice for the plaintiff in the sum of US$19,714,142.

11/3/93 The Court of Appeal, in separate orders, refused leave to appeal against the Unless Order and the default judgment of 15/1/93.

28/10/93 The appellant appeared in person before the Judicial Committee of the Privy Council and was granted special leave to appeal against the following judgments of the Court of Appeal:-

(1) 25/11/92,

(2) 11/3/93 refusing leave to appeal against the Unless Order and

(3) 11/3/93 refusing leave to appeal against the default judgment, "upon condition of the petitioner purging his contempt in the Supreme Court of Bermuda before 30/1/94". During the course of this hearing the appellant admitted that he had been in breach of that part of the first Mareva order which restrained him from dealing with a specified property in the United States of America.

18/11/93 The Supreme Court, having read the transcript of the proceedings before the Judicial Committee and the appellant having tendered his apology in respect of his disobedience to the orders of the court, adjourned the question of penalty to be imposed on him for contempt *sine die* pending the determination of this Board of the appeal.

The present position is as follows. The two Mareva orders were never appealed nor was the contempt order. These orders therefore stand unchallenged. Although no stay was obtained in relation to the Unless Order the appellant has taken no steps to implement the two above-mentioned provisions thereof. Indeed far from expressing any willingness to obey these provisions he made it clear before the Judicial Committee on 28th October 1993 and before this Board that he had no intention of so doing. Although he apologised to the Supreme Court on 18th November 1993 the appellant has taken no steps to purge the contempt referred to in the Unless Order. It should at this stage be mentioned that he was adjudicated bankrupt in England on 10th June 1993. He is not, however, bankrupt in Bermuda.

At the outset of the proceedings before the Board counsel for the respondent moved that the appellant be not heard in view of his admitted contempt. After hearing the appellant, who appeared in person, their Lordships considered that in view of some possible confusion which might have arisen during the proceedings before the Judicial Committee on 28th October 1993 as to precisely what was required of him before the appeal could proceed justice required that he should be allowed to present the appeal.

The appellant's first argument related to his striking out application. His principal ground of attack was that the "facts" before the Chief Justice disproved the allegations in the pleadings which therefore should have been struck out. These "facts" comprised the evidence given by the appellant in the Companies Act proceedings in March 1991. The appellant appeared to have some difficulty in appreciating that a striking out application, save in circumstances, which do not here arise, is concerned solely with pleadings and not with facts. When the pleadings are examined it is absolutely clear that they disclose a proper cause of action. They set out details of a large number of payments made by the appellant from Focus' funds for which it is alleged there was no justification. These payments, taken together, add up to the sum which is claimed. In particular paragraph 7 of the re-amended statement of claim describes *inter alia* 22 amounting to more than US$12,850,000 authorised and instructed by the appellant between March 1988 and September 1990 to his personal bank account, to named companies in which he had an undisclosed interest, and to other named companies, and in almost every case in the absence of any obligation by or benefit to Focus. The detailed averments in the claim give fair and adequate notice of the case against the appellant and their Lordships have absolutely no doubt that the Chief Justice and the Court of Appeal were correct in so concluding.

In attacking the Unless Order the appellant maintained *inter alia*:-

(1) that the two above-mentioned parts thereof were contrary to (a) Article 1(c) of the Constitution of Bermuda which provides that every person is entitled to "protection for the privacy of his home and other property and from deprivation of property without compensation" and to Article 3(1) which provides "no person shall be subjected to torture or to inhuman or degrading punishment" and (b) the European Convention for the Protection of Human Rights;

(2) that he had been denied a fair hearing before an independent and impartial tribunal contrary to Article 6(1) of the Constitution inasmuch as the Chief Justice who pronounced the order had already decided the case against him by

pronouncing the two Mareva orders, and by finding him guilty of contempt and was therefore neither independent nor impartial contrary to Article 6(8);

(3) that Focus had failed to make full and proper disclosure when obtaining the Mareva orders, and

(4) that he had been improperly deprived of putting forward a valid defence to the claim contrary to natural justice.

The first three arguments have no substance and do not merit further consideration. In relation to the fourth argument it is certainly unusual to enforce a Mareva injunction or a disclosure order by way of a default judgment. But the circumstances in this case were far from usual. During the contempt proceedings which immediately preceded the Unless Order counsel for the appellant accepted that there was a *prima facie* case of contempt to answer in respect of three matters. The motion to commit the appellant for contempt and the summons for the Unless Order were dated 1st September 1992 and appear to have been lodged with the Registrar of the Supreme Court at or about that time, with the result that the appellant had ample opportunity to instruct proper opposition, if such existed, to both orders. In the event the appellant failed to appear and in relation to the Unless Order his counsel simply sought an adjournment stating that he was not in a position to respond to the summons. Thereafter the appellant took no steps to implement the order. He did not even seek to stay it until the time limits therein had expired. Faced with a litigant who was in clear breach of prior unchallenged orders, who was not present within the jurisdiction and who had given no indication that his attitude to the order about to be made would be in any way different to that which he had adopted in relation to the prior orders, it is difficult to see what else the Chief Justice could have done to enforce obedience to the order which he was about to make. It lay within the appellant's power to avoid the sanctions imposed by obeying the terms of the order. Had he done so the Chief Justice would have had no occasion to order that judgment be entered by default on 15th January 1993. However, faced with the appellant's continued disobedience, non-appearance and lack of co-operation, the Chief Justice had little option but to enter judgment.

The Unless Order was an interlocutory one. It is well settled that where, as here, the terms of such an order are within the discretion of the judge at first instance an appellate court will only interfere with the exercise of that discretion in limited circumstances (*Hadmor Productions Ltd. v. Hamilton* [1983] 1 A.C. 191, 220 per Lord Diplock). There are no such circumstances present in this case and their Lordships have no

doubt that the Chief Justice's exercise of his discretion was entirely proper and cannot be challenged. Their Lordships would, however, wish to emphasise that it is only in special circumstances such as the present that it would be appropriate to enforce a Mareva or a disclosure order by way of a default judgment and that such mode of enforcement should not be taken to be normal procedure.

For the foregoing reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondent's costs before their Lordships' Board.