

**IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)**

OA NO. 2/2021

IN THE MATTER of Section 173 of the Cook Islands
Act 1915 (NZ)

AND

IN THE MATTER of an Application for leave to issue
execution of a Judgment of the
District Court of New Zealand

BETWEEN **KEEGAN ALEXANDER** a
partnership of Barristers and
Solicitors trading out of premises
at Level 24, 151 Queen Street,
Auckland, New Zealand
Applicant

AND **PAUL NIGEL WEBB**, company
director, recently of 73A Arney
Road, Remuera, Auckland, New
Zealand
Respondent

Date of Application: 28 August 2021

Counsel: Mr S McAnally for Applicant
No appearance for Respondent

Date of this Judgment: 27 September 2021

JUDGMENT OF HUGH WILLIAMS, CJ

[0180.dss]

Introduction

[1] This judgment deals with an application brought ex parte by Keegan Alexander, a New Zealand law firm, for leave to issue execution on a judgment obtained by the applicant against Mr Webb, the respondent who is a former client.

[2] The form of execution sought is Charging Orders over the “Estate, right, title and/or interest” Mr Webb is said to hold in 50 shares issued by Kuru Investments Limited, 50 shares issued by Solar 3000 Limited and 1000 shares issued by Fleet Lease Limited. The amount of the judgment sought to be secured by the Charging Orders is \$110,352.70 plus costs and disbursements.

Facts

[3] Mr Webb was the respondent in a long running dispute under the Matrimonial Property Act 1991-92 which was ultimately concluded by a judgment of the Privy Council¹. Keegan Alexander through Mr McAnally, counsel for the applicant in this matter, acted for Mr Webb throughout.

[4] Only limited reference to the facts in the matrimonial property dispute needs to be recounted in this judgment but it is noted that, amongst other issues, the validity of the Webb Family Trust was in issue². The majority of the Privy Council concluded with relation to the Webb Family Trust that the “bundle of rights which [Mr Webb] retained is indistinguishable from ownership” and commented in relation to Solar 3000 Limited that “it was not disputed that Mr Webb owned shares in Solar 3000 Limited ... and that those shares were matrimonial property”³.

[5] Mr Webb not having paid Keegan Alexander the whole of the amount incurred by him for legal fees, the firm obtained summary judgment against him in the Auckland Registry of the New Zealand District Court on 16 March 2021 for \$96,950.70 plus interest to that date of \$8,925.50 and costs and disbursements of \$4,306.50. Mr Webb did not contest the application for summary judgment.

Shares sought to be charged

[6] The application is supported by an affidavit of the employee of the firm responsible for the matter and amongst the exhibits are extracts from the Cook Islands Companies Online Registry giving details of Kuru Investments Limited, Solar 3000 Limited, and Fleet Lease Limited.

[7] These show that Mr Webb has held 50 shares in Kuru Investments Limited since 13 May 2016, 1000 shares in Fleet Lease Limited since 26 May 2016 and that the Webb Family Trust holds 50 shares in Solar 3000 Limited which it acquired on 5 May 2016.

¹ [2020] UKPC 22, 3 August 2020.

² See particularly paras [68]-[98], of the majority judgment delivered by Lord Kitchin.

³ At [99].

Law

[8] Section 173 of the Cook Islands Act 1915 (NZ) reads:

173 Judgments of High Court or District Court in New Zealand may be enforced by the High Court

(1) Any person in whose favour any judgment whereby any sum of money is made payable has been obtained in the High Court of New Zealand or in a District Court in New Zealand in civil proceedings may cause a memorial thereof, authenticated by the seal of the High Court or of the District Court, as the case may be, to be filed in any office of the High Court of the Cook Islands.

(2) Judicial notice may be taken by the High Court of the seal of the High Court or District Court so affixed to any such memorial.

(3) Every such memorial shall set forth the names and additions of the parties to the proceeding in which the judgment was given, the form or nature of the proceeding, the date on which the judgment was given, and the amount payable thereunder.

(4) Every such memorial being so filed shall thenceforth be a record of such judgment, and execution may issue thereon with the leave of the High Court in the same manner as if the like judgment had been given by the High Court, subject, however, to such terms and conditions as the High Court may think fit to impose.

(5) Leave to issue such execution may be given by the High Court on the application of the party by whom the memorial was filed, and either *ex parte* or on notice to the party against whom execution is to be issued, as the High Court thinks fit.

[9] The sealed copy of the District Court Order for Summary Judgment put in evidence in this matter is a “memorial” of the judgment and satisfies the requirements of s 173(3). There is therefore discretion to grant leave to execute the judgment under s 173(4) and at this stage it is appropriate that the application proceed *ex parte* with Mr Webb having the right to apply to vary or set aside the orders made by the Court in due course should he think fit.

[10] It is therefore the case that, as Mr McAnally submitted, that the New Zealand District Court Judgment is now to be regarded as if it were a judgment of this Court⁴. So the question mainly centres around the terms and conditions on which the Charging Orders might be made, particularly relating to the Webb Family Trust’s holding in Solar 3000 Limited.

⁴ *Kemp v. Kemp* [1996] 2 NZLR 454.

[11] The Court's power to make Charging Orders appears in s 49 of the Judicature Act 1980-81, which reads:

49. Charging orders – (1) Any judgment of the High Court in its civil jurisdiction for the payment of any sum of money may be enforced by a charging order made by the Court against any real or personal property of the person by whom the money is payable (including debts and other money due or accruing due to that person, but not including the interest of a Cook Islander in any Native land). Any such charging order shall be made and have effect in manner provided by rule of Court.

(2) In this section the term “Cook Islander” means a person belonging to the part of the Polynesian race indigenous to the Cook Islands; and includes any person descended from a Cook Islander.

[12] In addition, Rule 248 of the Code of Civil Procedure 1981 is relevant. It reads:

248. Application for Charging order – A charging order under section 49 of the Act may be made by the Court ex parte on the application of the judgment creditor and shall specify the property to which it relates.

Discussion and Decision

[13] The applicant has made out a case for it to be entitled to proceed ex parte for a Charging Order against Mr Webb's interests in the shares in Kuru Investments Limited and Fleet Lease Limited and there will be orders accordingly in relation to those shareholdings,

[14] The shares which, on its face, are held by the Webb Family Trust in Solar 3000 Limited appear to be in a somewhat different category.

[15] Despite the Privy Council's comment noted above, for over five years the shares in Solar 3000 Limited have been in the name of the Webb Family Trust, not in Mr Webb's name personally. As Mr McAnally submitted, the Webb Family Trust⁵ was held to be invalid by both the Court of Appeal and the Privy Council predominantly because the powers reserved to Mr Webb as actual or effective settlor prevented any effective settlement of the trust property and, in addition, the Privy Council held⁶ that the Webb Family Trust was “immediately void at common law” because it infringed the Rule against Perpetuities.

⁵ And the Arorangi Trust.

⁶ At [98].

[16] In light of that, it is appropriate to treat the Register of Shareholders of Solar 3000 Limited as if the 50 shares held by the Webb Family Trust belong, in fact and in law, to Mr Webb.

[17] There will therefore be a Charging Order issued on that holding for the sum appearing in the Draft Order filed in this matter, \$110,352.70.

[18] The terms and conditions on which the three Charging Orders should be executed are that:

- (a) A sealed copy of the Charging Order is to be served on the registered office of the three companies as shown in exhibits A-C of the supporting affidavit together with a copy of this judgment;
- (b) Sealed copies of the orders and a copy of this judgment are also to be served on Mr Webb together with copies of the ex parte application for the Charging Orders and the supporting affidavit. If Mr Webb cannot be served in the Cook Islands, an application for leave to serve the proceedings out of the jurisdiction may be required;
- (c) Mr Webb is to have leave to apply to vary or set aside the Charging Orders on five working days' notice.

A handwritten signature in black ink, appearing to read 'H Williams', written in a cursive style. The signature is positioned above a horizontal line.

Hugh Williams, CJ