KHY Co. (SI) Limited and CHRISTOPHER ANTHONY KWAN -v- LING KUN XIANG, ZHAO LI QIN, GUANGNAN HONG CO LIMITED and GUANGDONG ENTERPRISES (HOLDINGS) LIMITED

High Court of Solomon Islands
(Ward C.J.)
Civil Case No. 201 of 1989
Hearing: 4 October 1989 at Honiara
Judgment: 5 October 1989

J. Sullivan and T. Kama for applicant/plaintiffs
D. Campbell for First and Second Defendants

WARD CJ: On the application of the plaintiff, the Court has allowed various amendments of the Writ of Summons issued 21 September 1989 and the Notice of Motion filed on the same date. I do not need to recite them here but, as a result of the amendment to the Notice of Motion, application is now made for issue of a writ of ne exeat regno or ne exeat colonia against the first and second defendants. I have heard argument as to whether such writs still exist and, if so, the basis on which they may issue.

The writ ne exeat regno was an equitable remedy applicable where there was no legal debt and therefore no power of arrest by way of remedy at law. By para 2 of Schedule 3 to the Constitution, the principles and rules of equity have effect as part of the law of Solomon Islands. I have no doubt that a writ of ne exeat regno is within the power of this Court and I do not consider the writ ne exeat colonia is appropriate here.

There is no specific provision for such a writ in the High Court (Civil Procedure) Rules but, by Order 71, where no provision is made, the procedure practice and forms in force for the time being in the High Court in England shall, so far as they can be conveniently applied, be in force here.

The numerous authorities from the mid and late nineteenth century in England (most of which are listed in Daniell's Chancery Practice) establish the general rule that such a writ will only issue for an equitable debt on demand and for a sum certain and payable in praesenti.

In the present case, as a result of the amendment to the writ of summons, the claim is now for account and, although the sum of the debt is, therefore, still to be ascertained, there is good authority for the proposition that account is an exception to the general rule.

In **Boehm v. Wood** (1823) T. & R. 332 Ld Eldon said @ 343

> "There are certain circumstances attending the application for the writ which admit of no dispute. In the first place the debt must be equitable. In the second

> place it must be due; and in the third place it must be a debt in respect of which the Court can see its way to direct what sum shall be marked upon the writ. To the rule that the debt must be equitable there is one case of exception, the case of account; that exception stands upon this ground: that this Court (i.e. the Court of Chancery) has jurisdiction in matters of account as well as a court of law, and that the proceedings at law in such matters are attended with very great difficulties. This Court has therefore said, though it be a general rule that the debt shall be equitable and the affidavit as to amount positive, yet, in matters of account, that shall be considered as an equitable debt which is also a legal debt, and it shall be sufficient for the party to swear to his belief as to the amount of the balance."

Since the passing of the Debtor's Act, 1869, the writ has not been issued except in cases that fall within section 6 of that Act and the Court of Chancery has proceeded by analogy with the process at common law; **Drover v. Beyer** (1879) 13 Ch. D 242.

> "The granting of a ne exeat by the Court of Chancery was a kind of reflection of the common law process of arrest. It seems to me that the Court of Chancery never ordered arrest for an equitable debt except in cases where, if the debt had been legal, the Courts of Common Law would have done so"

per Bowen LJ, **Colverson v. Bloomfield** (1885) 29 Ch D 341 @ 343. As a result the writ has only issued where the requirements of section 6 were satisfied.

In the recent case of **Felton and Another v. Callis** (1969) 1 QB 200, Megarry J set out the requirements @ 211 -

> "Put briefly, an order can thus be made under the section only if four conditions are satisfied, and these must be established by evidence on oath to the satisfaction of a judge before final judgment. The conditions are as follows:
>
> (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 50 is established.
>
> (3) There is "probably cause" for believing that the defendant is "about to quit England" unless he is arrested.
>
> (4) "The absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action.""

He then went on to consider two "over-riding considerations" namely that, even if all four conditions are satisfied, the issue of such a writ was discretionary and the standard of proof is high to the point that the court must be convinced.

It has been suggested by Mr Campbell for the defendants that the Debtor's Act does not apply in Solomon Islands. I am satisfied it does and I accept Megarry J's statement in **Felton v. Callis** as authoritative.

Very briefly, the present case, seeks an account from the first and second defendants in relation to their conduct of the first plaintiff, KHY Co (SI) Ltd, of which they were the Managing Director and General Manager and deputy General Manager respectively. The first plaintiff claims breach of fiduciary duty and negligence and the second plaintiff negligence in their running of the company. As a result it has been deposed by the second plaintiff, who is the non executive Chairman of the Board of Directors, that he believes that on the taking of account there will be a sum due to the plaintiffs of not less than $300,000.

On the evidence before me, I am entirely satisfied that this is an action in which the defendants would formerly have been liable for arrest and there is a good cause of action for substantially more than the minimum sum in section 6.

The basis for the belief that the defendants are about to quit the country is that tickets have been booked and their contributions to the National Provident Fund have been withdrawn. The first defendant has given explanations for this in two affidavits. I have considered all those matters and I am convinced he has not been truthful on these and I am satisfied that there is good cause for believing both defendants are about to leave the jurisdiction.

Passing to the last condition, I must be satisfied on the evidence before me that the absence of the defendants will materially prejudice the plaintiffs in the prosecution of their action. Having considered the nature of the claim and the state of the companies and their accounts as shown in the affidavits, I am satisfied that such prejudice is extremely likely.

Thus in all the circumstances and bearing in mind the severe nature of the remedy, I am convinced that this is a proper case for me to exercise my discretion and order such a writ to issue.

The plaintiffs have given the usual understaking as to damages and I therefore order that a writ of ne exeat regno be directed to the Sheriff against each of the first and second defendants and should require security from each such defendant in the sum of $300,000.

The Notice of Motion also sought an order that the defendants should attend the auditor, Mr Emery, and supply all information necessary to allow him effectively to carry out the audit. I am not satisfied at present that, the defendants' presence within the jurisdiction having been assured, such an order is necessary and I refuse it.

I order that any party may apply for discharge of the writs on 7 days notice.

Costs of this application to be costs in the cause.

Sheriff's costs to be met by the plaintiffs and to be costs in the cause.

Interim injunction discharged on the defendants attendance on the Sheriff.

(F.G.R. Ward)
CHIEF JUSTICE