WH GROVE AND SONS LIMITED — **Plaintiff**

-V-

SOLOMON ISLANDS CONSUMERS CO-OPERATIVE SOCIETY LIMITED — **Defendant**

HIGH COURT OF SOLOMON ISLANDS
(PALMER J)

Civil Case No. 167 of 1995
Hearing: 22 November 1995
Judgment: 9 January 1996

A. Radclyffe for the Plaintiff
J. C. Corrin for the Defendant (on Liquidation)

PALMER J: By summons filed on 19 June, 1995, the Plaintiff sought to register a judgment of the High Court of New Zealand dated 20 October, 1994 in CP No. 260/94, in the High Court of Solomon Islands, pursuant to the provisions of the **Foreign Judgments *(Reciprocal* Enforcement) Act 1988**. In that judgment, the Plaintiff had obtained judgment against the Defendant in the sum of NZD296,064.49; which converts to SBD596,543.40 at the exchange rate as on the 20th October, 1994, of 0.4963. Copies of that High Court Judgment and details of the exchange rates from the Westpac Banking Corporation are attached to the affidavit of Andrew Radclyffe filed on 19 June, 1995, and marked **"A"** and **"C"** respectively.

The application came before this Court on 17th August, 1995. On the same date, an order was made registering the said judgment in this Court to have effect as if it were the judgment of this Court.

On 20 September, 1995, a further application was heard, by summons filed on 22 August, 1995, for the Defendant to show cause why its Fixed-Term Estate in Parcel No. 191-034-35 at Kola Ridge, Honiara should not stand charged with the payment of SBD596,543.40 and interest due on the said judgment. On the same date, an order was made to the effect that the Fixed-Term Estate in Parcel No. 191-034-35 registered in the name of the Defendant stands charged to the extent of the judgment sum of SBD596,543.40 plus interest and costs.

On the 22nd of November, 1995, a further application was heard by summons filed on 10 October, 1995, for an order for sale of the fixed-term estate in Parcel No. 191-034-35 pursuant to the charging order dated 20th September, 1995, and for directions as to sale of the said property. On that date Ms Corrin appeared on behalf of the Liquidator of the Defendant to oppose the application. It then became apparent by affidavit filed by Joseph Puaara, who was the Registrar of Co-operative Societies, that on the 18th of October, 1995 he had made an order cancelling the registration of the Defendant under the Co-operative Societies Act (CAP.73). He had also by letter of appointment dated 19 October, 1995, appointed Mr. Robert Mewebu as the Liquidator of the said society.

Ms Corrin now seeks to argue that by virtue of the dissolution of the said society the Plaintiff would not be entitled to retain the benefit of the execution against the liquidator unless he had completed the execution before the dissolution. She cited in support by way of comparison the provisions of The Bankruptcy Act, 1994, in particular, section 46, which dealt with the rights of a creditor under execution or attachment. Section 46(1) reads:

> **"Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he had completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or the commission of any available act of bankruptcy by the debtor."**

Subsection 46(2) of the Act then provides:

> **"For the purposes of this Act -**
>
> **(a) an execution against goods is completed by seizure and sale;**
> **(b) an attachment of a debt is completed by receipt of the debt;**
> **(c) an execution against land is completed by seizure or by the appointment of a receiver; or**
> **(d) in the case of an equitable interest, by the appointment of a receiver."**

Ms Corrin argues that although the provisions of subsections 46(1) and (2) cannot apply here, the general principles contained therein may be adopted as guidelines in which to deal with the particular circumstances of this case. That principle, as pertinent to the circumstances of this case can be summarized as follows:

Where a creditor has issued execution against the goods or lands of a registered co-operative society or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the Liquidator of the Co-operative Society, unless he had completed the execution or attachment before the date of the cancellation of the registration of the said society or the date of appointment of the Liquidator.

In the case of an execution against land, it would be completed by seizure or by the appointment of a receiver.

If the above principle is adopted, she argues that there is no evidence before this Court to show that the execution had been completed by seizure or the appointment of a receiver. Accordingly, this Court should not make the orders sought in the summons by the Plaintiff for the sale of the said property.

What is the law on the rights of a creditor as to execution or attachment in the case of a registered co-operative society being dissolved?

As correctly submitted by Mr Radclyffe, the Co-operative Societies Act is silent as to the rights of such creditor. The question before this Court therefore is what rule of law or principle should be adopted by this Court in this particular instance. Apart from the provisions of the Bankruptcy Act, 1994 referred to by learned Counsels, there are also similar provisions contained in the Companies Act, but with a slight difference. Those provisions have not been referred to, but it is my respectful view that they are apposite, not only for comparison purposes, but also for whatever principle of law can be gleaned therefrom. Section 304(1) and (2) of the Companies Act read as follows:

"(1) **Where a creditor has issued execution against goods or immovable property of a company or has attached any debt due to the company, and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator in the winding up of the company unless he has completed the execution or attachment before the commencement of the winding up:**

(2) **For the purposes of this section, an execution against goods shall be taken to be completed by seizure and sale, and an attachment of a debt shall be deemed to be completed by receipt of the debt, and** *an execution against immovable property shall be deemed to be*

completed by making the judgment a charge on the immovable property." **(Emphasis added)**

Under the Companies Act, an execution against immovable property is deemed to be completed by **"making the judgment a charge on the immovable property".** A charging order therefore under the Companies Act will have the same effect as a seizure or the appointment of a receiver in the case of an execution against land under the Bankruptcy Act. This is the difference in the requirements under those two pieces of legislation.

What we have therefore are two equally applicable principles from those two pieces of legislation. The question before this Court is which of those two principles is considered to be more appropriate. In my respectful view, the provisions relating to the winding up of companies is more pertinent. The analogy is more akin to that of a dissolution of a registered co-operative society and subsequent appointment of a liquidator.

The applicable principle therefore can be summed up as follows:

> **Where a creditor has issued execution against goods or immovable property of a registered co-operative society or has attached any debt due to the registered co-operative society, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator of the registered co-operative society unless he has completed the execution or attachment before the date of the cancellation of the registration of the co-operative society or the date of appointment of the liquidator. In the case of an execution against immovable property, it shall be deemed to be completed by making the judgment a charge on the immovable property.**

Application of the principle to the facts of this case.

The cancellation of the registration of the Solomon Islands Consumers Co-operative Society Limited was done by order of the Registrar of Co-operative Societies dated 18 October 1995. A liquidator was subsequently appointed by letter dated 19 October 1995. However, on 20th September 1995, an order charging the said fixed-term estate of the Defendant in Parcel No. 191-034-35 with the judgment sum, had already been made. For the purposes of the above principle, the execution would have been completed before the date of cancellation of the registration of the co-operative society or the date of appointment of the liquidator. In such circumstances there is no discretion involved, in my respectful view, and the Plaintiff is entitled to retain the benefit of the execution.

This brings me to consider the additional submission of Ms Corrin as to the question whether there is a discretion vested in the Court to revoke the charging orders made, on the grounds that the Defendant was insolvent or on the road to liquidation at the time the charging orders were obtained, and that had the Court been made aware of that fact, that it would have exercised its discretion against the making of such an order. Unfortunately, no evidence has been adduced, even in the hearings before this Court on 17 August, 1995, and 20 September 1995, despite the fact that the Defendant had been served with notice of those hearings. The Defendant did not even bother to make any appearance on those dates.

The only evidence before this Court is contained in the affidavit of Joseph Puaara filed on 22nd November, 1995. At paragraph 2, he deposed that on or about August 1995, he commenced an enquiry under section 34 of the Co-operative Societies Act into the working and financial condition of the Defendant. It was after he had done that, that he came to the conclusion that the Defendant Society should be dissolved. There is no evidence however, to show that as on the 20 September, 1995, any such findings or conclusions were ever communicated to the Plaintiff's Counsel. There was no evidence too of any communication having been made to the Plaintiff that the Defendant Society was insolvent or on the road to liquidation on or before 20 September, 1995.

In the absence of such evidence, I am satisfied that the charging order was properly made, and that there is no basis on which this Court should interfere, by revoking it at this stage.

A number of cases have been referred to by Ms Corrin. I will deal with these briefly. First, the case of **In re a Debtor (No. 39 of 1974), Ex parte Okill v. The Debtor (1977) 1 W.L.R. 1308.** The proceedings in that case related to the Bankruptcy Act, 1914. One of the issues raised in that case concerned the question whether the Appellant by virtue of his charging order on the debtor's property was a secured creditor under section 40 of the Bankruptcy Act, 1914; which section is almost identical to section 46 of The Bankruptcy Act, 1994. In both sections, execution is not completed until the judgment creditor obtains the appointment of a receiver. The Court found that the judgment creditor had not obtained the appointment of a receiver before he had notice of the presentation of the bankruptcy petition and accordingly, by virtue of section 40 he was not a secured creditor. As can be seen, the above case is distinguishable on its own facts.

In the second case referred to, **Re Overseas Aviation Engineering (G.B.) Ltd., (1963) Ch. 24,** it was decided by a majority of the Court of Appeal that the expression **"execution against land"** in section 40(2) of the Bankruptcy Act, 1914 included proceedings for a charge on land and that accordingly the creditor is not entitled to retain the benefit of the execution unless it had been completed by seizure of the land or the appointment of a receiver before the date of the receiving order. Again this is distinguishable to this case where the effect of a charging order is different to the requirement under the Bankruptcy Act.

Another case referred to was **Rainbow and Another v. Moorgate Properties Ltd (1975) 1 W.L.R. 788**. The Plaintiffs, Mr and Mrs Rainbow had obtained charging orders **nisi** against the Defendant company on the 11 of November, 1974. On 4 December, 1974, the matter came up before the district registrar for orders absolute to be obtained. The application however, was opposed by the Defendant company. In support of that objection, the Defendant company had filed an affidavit of Mr Weiss. In that affidavit, it was basically deposed to that the Defendant company was experiencing real financial difficulties. The district registrar was accordingly urged not to make the charging orders absolute because of the insolvent character of the Defendant company's situation, but he was not persuaded by that argument. On appeal to the Court of Appeal, the Court did take into account the insolvent character of the Defendant company inter alia, as a factor to consider in the exercise of its discretion whether to make the charging orders absolute. The Court also, did specifically point out that on the 3rd December, 1974 - the day before the orders were made absolute - the company had presented its own petition for winding up. This is important because if eventually a winding up order is made, then the Plaintiffs would not have been able to insist upon their charging orders, even if they had not been discharged by the Court. The Court however, made its decision based on the fact that it would not be proper in the circumstances of the case to make the charging order absolute.

The above case is again distinguishable on its facts to this case. As has been pointed out, there is no discretion involved, in this case where the charging orders had been made well in advance of the date of dissolution of the co-operative society. Also, at the time the charging orders were made, there was no evidence adduced to show that the co-operative society at that time may have been insolvent or on the road to liquidation. The appropriate application that should have been brought by the defendant in this case or may be the Liquidator, would have been to apply to have the charging orders set aside on stated grounds. However, that would not now be necessary as that issue has more or less been addressed in this application.

Another case referred to by Ms Corrin is the case of **D. Wilson (Birmingham) Ltd v. Metropolitan Property Developments Ltd and another (1975) 2 All ER 814.** The facts in that case briefly involved garnishee orders nisi having been obtained by the judgment creditor against the judgment debtor on 12 September, 1974. A firm date was then fixed for the hearing of the application by the judgment creditor to make those orders absolute on 1st November, 1974. In the interim period, on the 22nd October, 1974, pursuant to a special resolution of the judgment debtor company, that company presented its own petition for winding up. It is also pertinent to note that in that period, a number of correspondences passed between the parties and with the registrar. On the 1st November, the garnishee orders were made absolute by the registrar. The matter was then taken up on appeal by the judgment debtor company on the ground in essence that the learned registrar had been wrong in law in making the order having regard to the presentation on the 22nd October 1974 of the petition to wind up the judgment debtor company. In its judgment, the Court allowed the appeal,

and had the orders absolute discharged, as well as the orders nisi. The relevant statements of the Court are contained at page 819 of the judgment.

> **"I think we have got to bear in mind that where insolvent estates are to be administered it is the policy of the law that creditors should, so far as possible, be treated with equality, ..." (paragraph g-h).**
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> **The position is, I think, that a Court in considering whether or not to exercise its discretion to make absolute a garnishee order in circumstances such as this, must bear in mind not only the position of the judgment creditor, the judgment debtor and the garnishee, but the position of the other creditors of the judgment debtor and must have regard to the fact that proceedings are on foot, and were on foot at the time the garnishee proceedings were launched, for ensuring the distribution of the available assets of the judgment debtor company among the creditors pari passu."**

In the circumstances of this case, there was no evidence before the Court at the time the proceedings for the charging orders were launched that proceedings were on foot for the distribution of the available assets of the co-operative society among the creditors **pari pasu.** There was no evidence that the society was insolvent or that the society was on the road to liquidation.

CONCLUSION

I am satisfied that the charging orders were proper and valid and gave the Plaintiff the right to retain the benefit of the execution issued against the fixed-term estate in Parcel No. 191-034-35. The orders for sale of the said property are accordingly granted.

ORDERS OF THE COURT

1. Order that the fixed-term estate in Parcel No. 191-034-35 is to be put out for sale by tender in the open market.

2. At the close of tender, the Court's approval is to be sought as to the winning bidder.

3. The judgment sum, interest and costs are to be off-set from the proceeds of sale of the said property. Any remainder shall be paid to the Liquidator of the Co-operative Society.

ALBERT R. PALMER

A. R. PALMER
JUDGE