Baiduri Bank Berhad … **Appellant**

AND

L & L Engineering Corporation Sdn Bhd … **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 13 of 2008)

Power, P; Mortimer and Davies, JJ.A.
24th November, 2008.

Appeal against the Judge's decision to refuse to make a garnishee order absolute. Not in dispute that the necessary facts for this debt of the judgment debtor to be attached are established. The judge's approach in making his own decision on the evidence he heard is correct. A garnishee order absolute is discretionary. Judge exercised his discretion but his reasons were flawed. The court of appeal exercised the judge's discretion anew and ordered the garnishee order to be made absolute.

Mr Tang Weng Leong and Mr On Hung Zheng of Messrs. CCW Partnership for the Appellant.
Mr Selvanathan Subramaniam of Messrs. Fathan Rudi Lee & Associates for the Respondent.

Cases cited in the Judgment:

Chapman v Callis [1862] 6 LT 382 at 383.
Maimunah Bte Abd Gani v Hjh Suayah Bte Hj Kamis (Civil App.1 of 2008).

Mortimer, J.A.:

On 10 May, 2007 the Chief Registrar dismissed the Baiduri Bank's ("the bank's") application to grant a garnishee order absolute against L & L Engineering Corporation Sdn Bhd ("the company") and HSBC in respect of two sums owed by the company to Mr Alan Robin Widdows for services rendered totaling $96,337.50. Both the company and Mr Widdows are joint and several judgment debtors to the bank in the sum of $ 406,889.07.

The Registrar gave no reasons for the decision and the bank appealed to the single judge, Barnett JC, who, on 5 February 2008, dismissed the appeal and upheld the Registrar's order. The bank now appeals to this court.

The joint judgment debt was incurred when Mr Widdows was acting as judicial manager for the company. At the time all sums owed to the company from the government were assigned to the bank but Mr Widdows diverted two of them, amounting to the judgment debt, to the company so that it could complete the building contract for which the money was part payment. Because of the assignment the diverted money belonged to the bank.

Judgment for the debt was given in the bank's favour on 25 January 2007 by Findlay JC and upheld by this court 4 December 2007.

The debt which the bank seeks to attach is owed by the company to Mr Widdows in respect of work done for it by him as judicial manager between 1 October 2005 and 30 June 2006.

Barnett JC's decision

There was and is no dispute that the bank has established all the necessary facts under Order 49 of the RSC for it to be entitled to a garnishee order subject to the exercise of the court's discretion to make it absolute.

In submitting that the judge should exercise his discretion against granting the order the company put before him three matters.

First, that all the company's assets had already been assigned to the bank therefore the garnishee order attaching some of them was unnecessary and a waste of time. It was said that the company had no income or assets save those accruing under the government contract and all these were already been assigned to the bank.

The second point was that the court will not attach the debts of one joint judgment debtor to another. *Chapman v Callis* [1862] 6 LT 382 at 383 was cited as authority for this proposition. In that case Cockburn C.J. said, *"I further entertain great doubts whether the garnishee clauses apply to such a case is this"* when referring to the attachment of a debt of one joint judgment debtor to the other judgment debtor.

The third was that the court should not attach a debt unless the applicant can show that the garnishee is in funds to satisfy the debt.

Barnett JC considered these three submissions and found in each case that there was nothing in any of the points which inhibited him from making the order but in exercising his discretion he ruled as follows:

> *"I come to the conclusion therefore that there is nothing in principle to inhibit the making of an order absolute. The remedy is, however, discretionary and the question is whether discretion should be exercised in favour of the petitioner. The petitioner is naturally concerned that, if funds become available to the company from a source other than the government contract, the company might utilize those funds, or indeed any other assets which it may have available to it unknown to the petitioner, in order to pay Mr Widdows.*

> *Taken in isolation, none of the three issues I have discussed above presents any obstacle to the making of the order absolute. Taken together, however, they demonstrate an exercise that is inappropriate in all the circumstances. I understand why the register took the decision which she did. I am unable to say that she was wrong."*

A preliminary point - the Judge's approach to the appeal

It is suggested that the passage in the judge's reasoning where he said:

> *"I understand why the registrar took the decision which she did. I am unable to say that she was wrong."*

indicates that the judge approach to the appeal was flawed in that he undertook a review of the registrar's decision only and failed to make his own decision on a rehearing of the evidence before him.

As we said in *Maimunah Bte Abd Gani v Hjh Suayah Bte Hj Kamis* (Civil App.1 of 2008);

> *"A judge hearing an appeal from a registrar can, it is true, adopt the registrar's reasoning as his own but it is incumbent upon him, when doing so, to make his own decision on the evidence before him."*

Taken on their own the words of the judge could indicate the contrary but it is clear from a reading the whole of his reasoning that he did rehear the case and exercised his own discretion. His approach was proper and we turn to consider the rest of the appeal.

The Appeal

The main point taken by Mr. Tang for the bank is that the judge gave no reasons for exercising his discretion, or, if he did give reasons, they were inadequate as he took into account things he should not have taken into account. He submits that the judge rightly rejected each of the three matters put before him. Having found that none was a valid reason for not to making the order it was not open to him to say that taking the three together they amounted to a good reason to refuse the order. It is illogical and wrong.

Counsel for the company, Mr. Selvanathan, resisted this on the basis that taken together these points gave the judge a proper reason for refusing the order. He was in difficulty when asked to elaborate this submission. But he emphasized the discretionary nature of the order and strongly submitted that there were no grounds upon which this court can properly interfere.

The Judge's discretion.

We agree with Mr. Tang. The judge correctly rejected each of the three grounds as a proper basis for refusing the order. It is not open to him to refuse to make an attachment order simply because the bank already had an assignment of all the company debts from the government. It may receive income from another source.

Similarly, a debt owed by one joint judgment debtor to another can be attached. Chahmon's case cited above is no longer to be relied upon. As was pointed out by Mr. Tang, in 1862 at common law a joint debt was not a joint and several debt as this is. Even under the common law it was only doubtful whether such a joint debt could be attached. Where the obligation is both joint and several as here there is no difficulty.

Finally, the petitioner does not have to demonstrate that the garnishee is in funds to satisfy the debt. It is quite enough to establish the debt as it is the debt which is attached.

Having correctly satisfied himself that none of the grounds individually was a good reason for not making the order it was not open to him, and he was wrong, to say that taken together they provided a good reason.

The judge gave no other reason for his decision. It is trite to say that a judge must exercise his discretion judicially and give proper reasons. Of course, those reasons do not have to be elaborate, they may be brief and to the point. He gave no reasons adequate for either refusing or granting the order.

We are satisfied that the judge failed to exercise his discretion properly. His decision was flawed. It therefore falls to this court to exercise his discretion anew. To this we now turn.

The Judge's discretion exercised by this court

Mr Selvanathan and tried to point to reasons why we should now exercise this discretion anew in his favour and refuse a final order but for different reasons.

He first suggested that a final order would be unfair as Mr Widdows may not be able to recover the attached debt from the company but of this there is no evidence and we reject it.

More relevantly he suggested that the order would amount to depriving Mr Widdows of his priority to be paid this debt ahead of the bank. He suggests that under Section 149M (4) of the Emergency (Companies Act) (Amendment) Order, 1998 the debt to be attached has priority.

This subsection reads:

> *(4) any sums payable in respect of debts or liabilities of the company incurred while the Judicial Manager was in office, under contracts entered into by him*

> *or which he causes the company to enter into, or contracts (including contracts of employment) adopted by him, shall be charged on and paid out of any property of the company which was in his custody or under his control at that time, in priority to all other liabilities of the company except those liabilities, if any, referred to in section 149 E. (6).*

The liabilities in section 149E (6) are not relevant to this debt.

The difficulty faced by Mr.Selvanathan. in this submission is that the subsection above does not apply to Mr Widdow's remuneration for services rendered to the company. There are two reasons. First, the provisions only apply to contracts made by the judicial manager on behalf of the company. We are of the opinion that the judicial manager cannot contract with himself for his services. Secondly, a judicial manager is appointed by the court and the order makes provision under section 149L (1) (c) of the above statutory Order for his remuneration from the company during the period of his office. This was the position in this case. The remuneration which became this judgment debt was approved on Mr Widdow's application by an order of the court dated 12 December 2006. It became due on this order and not under any contract of service.

We are satisfied that the subsection relied upon as not apply to this debt.
All the reasons for refusing the order on the grounds that it is unfair or inequitable put forward before the judge below and this court are unsound. In all the circumstances before the court here and below there are no other reasons for so finding. There is no dispute that the necessary grounds for making the order absolute are established. There is no basis upon which the order would be unfair. Indeed this is a straightforward case. It is fair and just that the bank should be able to enforce its rights by attaching this debt.

Order

1. The appeal is allowed.
2. The Garnishee order is made absolute.
3. There will be an order nisi that the respondent shall pay the costs of the appeal. This order will be made absolute unless application is made before 9.00 am on Thursday 27 November 2008

Power, P

Mortimer, J.A. **Davies, J.A.**