

HALLIDAY

v.

HIGH PERFORMANCE PERSONNEL PTY. LTD. (in liq.)

JUDGMENT  
(oral)  
8 July 1993

DAWSON J.

HALLIDAY

v.

HIGH PERFORMANCE PERSONNEL PTY. LTD. (in liq.)

On 8 May 1992 this Court refused an application by the applicant for special leave to appeal against a decision of the Supreme Court of Victoria. The application was refused with costs. A bill of costs was taxed and the applicant now seeks directions as to the means by which he may apply under s.6 of the *Judgment Debt Recovery Act* 1984 (Vict.) ("the Act") for an order that the taxed amount be paid by instalments.

Section 5(1) of the Act provides that a court, in giving judgment, may order that a judgment debt be paid by instalments. Section 6(1) provides that a judgment creditor or judgment debtor may at any time after judgment is given apply to the proper officer of the court for an order that the judgment debt be paid by instalments. The proper officer may accede to or refuse the application. If he or she refuses it, the court may make an order. Provisions follow for the variation and enforcement of instalment orders

including provision for examination of the judgment debtor by the court.

Section 3 of the Act defines "Court" as "the Supreme Court, County Court or Magistrates' Court". "Proper officer of the court" is defined, so far as is relevant, as "in relation to the Supreme Court, such officer or officers of the Supreme Court as is or are prescribed in relation to the provisions of this Act in question of the Supreme Court". "Action" is defined as "a civil suit action or proceeding" and "Judgment" is defined as "a judgment or order for the recovery or payment of money made or given by a court in an action". Under 0.61.02 of the Rules of the Supreme Court, a Master is the proper officer of the court for the purpose of the Act.

The applicant relies first upon s.79 of the *Judiciary Act* 1903 (Cth) to invoke the provisions of the Act. Section 79 provides:

"The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable."

There are, I think, a number of difficulties which confront the applicant in his attempt to rely upon s.79. But there is one which appears to me to be fatal and I turn immediately to it.

It is true, as Mason J. observed in *John Robertson & Co. Ltd. v. Ferguson Transformers Pty. Ltd.*<sup>(1)</sup>, that the mere fact that a State law is directed to a State court does not mean that it is inapplicable under s.79. Indeed, s.79 is intended to pick up State laws which are otherwise inapplicable and apply them to a court exercising federal jurisdiction<sup>(2)</sup>.

But s.79 is not without limits. It speaks of the laws of a State being binding on courts exercising federal jurisdiction "in all cases to which they are applicable". I have serious doubts whether a State law could ever be applicable to govern the remedies or procedures available in this Court exercising an appellate jurisdiction by way of appeal from a State court.

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(1) (1973) 129 C.L.R. 65, at p.95.

(2) See also per Gibbs J. at p.88.

However, in this case, there is a more basic objection. Even if the order for costs, which is relied upon as the judgment debt, was made in the case, or *lis*, between the parties, the order which the applicant ultimately seeks under the Act would not be. It would be a consequential order and the law which authorizes it would not be picked up by s.79 so as to be binding upon this Court.

In *Commissioner of Stamp Duties (N.S.W.) v. Owens*<sup>(3)</sup> this Court held that s.6 of the *Suitors' Fund Act* 1951 (N.S.W.), which authorized an appellate court to grant an indemnity certificate entitling a respondent to an appeal which succeeds on a question of law to be reimbursed its costs, did not by force of s.79 apply to the High Court. In explaining why s.6 lay outside the scope of s.79, the Court said<sup>(4)</sup>:

"The purpose of that section is to adopt the law of the State where federal jurisdiction is exercised as the law by which, except as the Constitution or federal law may otherwise provide, the rights of the parties to the *lis* are to be ascertained and matters of procedure are to be regulated.

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(3) (1953) 88 C.L.R. 168.

(4) *ibid.*, at p.170.

Whether or not s.79 applies to the appellate jurisdiction of this Court, it is no part of its purpose to pick up, so to speak, a provision of State law imposing on State courts such a function as that assigned to them by s.6(1) and convert it into a provision imposing a like function on federal courts. The circumstance that an application for a certificate of indemnity is made consequential upon the litigation does not alter the character of that proceeding and certainly is not enough to bring it within s.79."

For similar reasons I do not think that s.79 is available to the applicant in this case.

The applicant also relies upon s.77M(1) of the *Judiciary Act*, a section which is to some extent predicated upon the view which I have just expressed. That sub-section provides

"Subject to the Rules of Court, a person in whose favour a judgment of the High Court is given is entitled to the same remedies for the enforcement of the judgment in a State or Territory, by execution or otherwise, against the person, or against the property of the person, against whom the judgment is given, as are allowed in like cases by the laws of that State or Territory to persons in whose favour a judgment of the Supreme Court of that State or Territory is given."

Again, I think that the applicant strikes an immediate difficulty. He is a judgment debtor, not a judgment

creditor, and is seeking relief against the immediate enforcement of the judgment debt rather than to enforce it. He simply does not fit within the wording of the sub-section. True it is that a judgment creditor may also seek an order for payment by instalments under the Act. He may wish to do so because the Act provides remedies for the enforcement of such an order which would not otherwise be available. But that does not, I think, convert the order ultimately sought by the applicant into a remedy for the enforcement of a judgment and, in any event, s.77M(1) only confers an entitlement upon "a person in whose favour a judgment of the High Court is given".

For this reason the applicant's submission under s.77M(1) must fail.

It follows that I must refuse the application for directions which the applicant seeks.