[2018] EWHC 219 (QB)

Claims No. D96YJ258 & D920X446

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Before :

MASTER VICTORIA MCCLOUD

- -

Between :

CELADOR RADIO LIMITED

Claimant

-and-

RANCHO STEAK HOUSE LIMITED

Defendant

And Between :

MOHAMMED RIAZ

Claimant

-and-

DESIGNER COLLECTION EUROP LIMITED

Defendant

-and-

DEEZ YORKSHIRE LIMITED

Third Party

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JUDGMENT

Keywords

Equitable Interpleader - Enforcement – controlled goods – interpleader – equity – common law – Civil Procedure – Rules of Supreme Court – title to goods – third party – Writ - High Court Enforcement Officers

1. Unusually I am producing a written judgment on two enforcement applications made to me on paper, and I do so because it has been drawn to my attention by High Court Enforcement Officers that there is a difficulty with the current court rules relating to enforcement, in the circumstances of these cases and others like them, and that it would assist HCEOs to have a decision as to the proper steps to take when faced with the situation arising here, which I suspect is not a rare one.

2. In the relatively recent past an enforcement officer executing a Writ of fi. fa. would conventionally ask the court to determine any issue of ownership by way of an interpleader summons if there were rival claims to the seized goods. Those were summonses of a sort which junior barristers would cut their teeth on if they went to trial. These days, instead, we have the Civil Procedure rules with rather more bland language but, one would hope, aimed at solving much the same problems as have always arisen in the course of execution whether before or after the advent of the CPR. Nowadays the nearest we seem to have are Rules 85.4 and 85.5 of the CPR "Procedure for making a claim to controlled goods".

3. As its title suggests, it places emphasis on the person who is asserting the rival claim to title of the seized ('controlled') goods. This is somewhat different from the conventional interpleader where the party playing 'piggy in the middle' – typically the enforcement officer – would apply to court to resolve the question of title.

4. Nowadays, then, the CPR provide a mechanism whereby the person who claims he or she owns the goods is the person making the application to the court. The Rules say:

Procedure for making a claim to controlled goods

85.4

(1) Any person making a claim under paragraph 60(1) of Schedule 12 must, as soon as practicable but in any event within 7 days of the goods being removed under the exercise of an enforcement power, give notice in writing of their claim to the enforcement agent who has

taken control of the goods ('the notice of claim to controlled goods') and must include in such notice—

(a) their full name and address, and confirmation that such address is their address for service;

(b) a list of all those goods in respect of which they make such a claim; and

(c) the grounds of their claim in respect of each item.

(2) On receipt of a notice of claim to controlled goods which complies with paragraph (1) the enforcement agent must within 3 days give notice of such claim to—

(a) the creditor; and

(b) any other person making a claim to the controlled goods under paragraph (1) ('any other claimant to the controlled goods');

(3) The creditor, and any other claimant to the controlled goods, must, within 7 days after receiving the notice of claim to controlled goods, give notice in writing to the enforcement agent informing them whether the claim to controlled goods is admitted or disputed in whole or in part.

(4) The enforcement agent must notify the claimant to the controlled goods in writing within 3 days of receiving the notice in paragraph (3) whether the claim to controlled goods is admitted or disputed in whole or in part.

(5) A creditor who gives notice in accordance with paragraph (3) admitting a claim to controlled goods is not liable to the enforcement agent for any fees and expenses incurred by the enforcement agent after receipt of that notice by the enforcement agent.

(6) If an enforcement agent receives a notice from a creditor under paragraph (3) admitting a claim to controlled goods the following applies—

(a) the enforcement power ceases to be exercisable in respect of such controlled goods; and

(b) as soon as reasonably practicable the enforcement agent must make the goods available for collection by the claimant to controlled goods if they have been removed from where they were found.

(7) Where the creditor, or any other claimant to controlled goods to whom a notice of claim to controlled goods was given, fails, within the period mentioned in paragraph (3), to give the required notice, the enforcement agent may seek—

(a) the directions of the court by way of an application; and

(b) an order preventing the bringing of any claim against them for, or in respect of, their having taken control of any of the goods or having failed so to do.

Procedure for making a claim to controlled goods where the claim is disputed

85.5

(1) Where a creditor, or any other claimant to controlled goods to whom a notice of claim to controlled goods was given, gives notice under rule 85.4(3) that the claim to controlled goods, or any part of it, is disputed, and wishes to maintain their claim to the controlled goods, the following procedure will apply.

(2) The claimant to controlled goods must make an application which must be supported by—

(a) a witness statement—

(i) specifying any money;

(ii) describing any goods claimed; and

(iii) setting out the grounds upon which their claim to the controlled goods is based; and

(b) copies of any supporting documents that will assist the court to determine the claim.

(3) In the High Court the claimant to controlled goods must serve the application notice and supporting witness statements and exhibits on—

(a) the creditor;

(b) any other claimant to controlled goods of whom the claimant to controlled goods is aware; and

(c) the enforcement agent.

(4) In the County Court when the application is made the claimant to controlled goods must provide to the court the addresses for service of—

(a) the creditor;

(b) any other claimant to controlled goods of whom the claimant to controlled goods is aware; and

(c) the enforcement agent,

('the respondents'), and the court will serve the application notice and any supporting witness statement and exhibits on the respondents.

(5) An application under paragraph (2) must be made to the court which issued the writ or warrant conferring power to take control of the controlled goods, or, if the power was conferred under an enactment, to the debtor’s home court.

(6) The claimant to controlled goods must make the required payments on issue of the application in accordance with paragraph 60(4)(a) of Schedule 12, unless such claimant seeks a direction from the court that the required payment be a proportion of the value of the goods, in which case they must seek such a direction immediately after issue of the application, on notice to the creditor and to the enforcement agent.

(7) The application notice will be referred to a Master or District Judge.

(8) On receipt of an application for a claim to controlled goods, the Master or District Judge may—

(a) give directions for further evidence from any party;

(b) list a hearing to give directions;

(c) list a hearing of the application;

(d) determine the amount of the required payments, make directions or list a hearing to determine any issue relating to the amount of the required payments or the value of the controlled goods;

(e) stay, or dismiss, the application if the required payments have not been made;

(f) make directions for the retention, sale or disposal of the controlled goods;

(g) give directions for determination of any issue raised by a claim to controlled goods.

5. Para 60(1) of Sch. 12 to the Tribunals, Courts and Enforcement Act 2007 specifically relates to claims by a person who says he or she is entitled to the goods. That therefore does not include an enforcement officer. Hence the framework in rules 85.4 and 85.5 applies to the person who asserts the claim over the controlled goods. Essentially, he or she must give the notice required under r. 85.4(1) and then, if the claim is disputed the creditor or any other party with a claim to the goods must give the notice referred to in r. 85.4(3).
6. If the creditor or other claimant to the goods fails to give the notice required by 85.4(3), the HCEO may apply to the court for a directions as to what to do and for protection against liability.
7. We then see that where a notice is given under 85.4(3), the party claiming the goods must issue an application to the court for determination, under r. 85.5.
8. The problem, however, is that the rules omit to deal with the situation where a third party has given notice that they believe they are entitled to the goods, under r. 85.4(1), and a counter-notice is duly given by the creditor under r. 85.4(3), but the third party then fails to commence the application to the court which is required under r. 85.5. There is no provision in those circumstances for what steps must be taken by the HCEO who is holding the goods.
9. Furthermore the provisions of rule 85.5 impose no time limit by which the application under that rule must be made by the creditor or other party claiming an interest. Hence there is

no clear point at which the rule has been breached, and no provision within the rule for what should happen when no application is made.

10. I think with all respect to the draftsperson, the rule must be said to be deficient. It is silent as to those aspects and perhaps ought not to be. The HCEO cannot release the goods or dispose of them but may well be storing them at cost. The purpose of swift enforcement is thereby frustrated, and costs and expense wasted. Court time can be taken because on an ad hoc basis the HCEOs attend court seeking local solutions from judges without there being a clear procedure which they can rely on as the proper one to adopt.

11. The result is that, by this application I am informed that in the case of the particular solicitors representing the HCEOs in this case they have a practice of writing to the Third Party (claimant to the goods), giving them seven days to make their application under r. 85.5 and saying that if they do not, the HCEOs will make the application. If there is still no response then an application is made (notwithstanding that the rules in Part 85 do not cater for the situation) and I am told that these solicitors (who may or may not be typical of the general practice around the country) generally ask the judge to make an order allowing 21 days for the Third Party to issue their application and that thereafter the Third Party be debarred from making such an application or from bringing a claim against the HCEOs or any company with which the HCEO is associated if the HCEO (for example) sells the goods in execution.

12. It is obviously not ideal that an 'ad hoc' approach depending on the best of intentions by local lawyers should have to be relied on and indeed there could be a challenge as to the vires for a court to make an order protecting the HCEO or associated companies against liability where such is not catered for under the rules.

13. By this application I am asked to consider what to do in these two specific cases but I indicated that I would give a written decision given that the situation here is a recurring one.

The Riaz case

14. By a Writ of Control dated 30 June 2017 issued out of Oxford District Registry, the judgment creditor (Claimant) sought to enforce a County Court judgment debt owed by the Defendant to the Claimant in the sum of £15,431.94. Enforcement had been transferred to the High Court. Gary Bovan was the named HCEO.

15. On 21 July 2017 an HCEO attended the relevant premises but could not gain entry. On 27 July the HCEO attended other business premises of the Defendant and took control of 460 what are described as Asian style dresses, some clothes stands and attachments for them.

16. On the same day a Mr Khan, director of the Third Party asserted by phone that his company owned the seized goods. That was followed by notice of that assertion by email on 31 July. The HCEOs then notified the claimant (judgment creditor) of the Third Party claim, in accordance with CPR 85.4(2).

17. The Third Party claim was duly disputed by the claimant, and the HCEOs notified the Third Party that it had to make the application required by rule 85.5.

18. As at the date of the application before me, the Third Party had not made the application required by CPR 85.5. As already noted, the rule makes no provision for what the HCEO is to

do under those circumstances, which is surprising given that r.84.4(7) makes provision in the event that the notice required in that rule is not given.

The Celador Radio case

19. Celador obtained judgment in the county court and then sought and obtained transfer to the High Court for enforcement. A Writ of Control was issued out of Manchester District Registry. On attendance at the Defendant's property, an employee of the Defendant called for someone believed by the employee to be a director of the company. He was thought to be a Mr Rahman but there is some uncertainty as to that name. That gentleman alleged that the assets and fixtures of the business belonged to a third party but no proof of ownership was provided to the Enforcement Agent.

20. The Enforcement Agent did not accept the alleged third-party ownership absent proof, and the debt was thereafter paid by card.

21. On 10 October 2017 some solicitors acting for Southsea Leisure Limited and a Mr Ahmed wrote saying that the money had been paid to prevent a breach of the peace and was not payment on behalf of the Defendant. The receipt for the money paid gave the name of Mr Ahmed as the person paying.

22. The claim which is put forward by Mr Ahmed and Southsea amounts to a third party claim to the money held by the HCEOs, and the procedure in the CPR was followed up to the point where the onus fell on the Third Party to make an application. However no application has been made by the Third Party to date and the HCEOs need to resolve the question of whether or not to repay it and to whom.

Decision

23. By these applications the HCEOs ask me to make directions and indicate what procedure ought to be adopted. The HCEO's evidence is that he is 'in limbo' and storage charges are accruing in the case of Riaz. The draft order proposed is along the lines discussed above in terms of allowing the Third Party some further time to make the application in default of which it would be debarred from making the application and the Third Party would be ordered by me not to bring any future claim against the HCEO or its contractors in respect of the goods and money, and an order to permit the sale of the goods in Riaz.

24. In my judgment one has to be cautious about ostensibly ordering a party not to bring a claim whilst leaving the question of title undetermined. Such is in my judgment dubious, jurisdictionally, and might well not offer the protection which the HCEO might think it would. The solution which I am prepared to deploy goes back to the notion of the interpleader, and it finds favour with me because it determines the ownership of the goods and binds the Third Party: that in my judgment is a firmer foundation for protecting the 'middleman' HCEO than a purported *quia timet* form of injunctive relief which leaves title undetermined.

25. The notion of an interpleader action arises at common law but as so often happens, the rigidity of the interpleader as it was known to the law was mitigated by the superimposition of the court of equity. That is one analysis but views differ as to whether equity supplied an entirely *different* relief rather than merely expanding the common law form of action.

26. I shall not go too far into the history, much though doing so would be among the more pleasurable things a Master could do given that it would concern the decisions of my learned predecessors in the same judicial role but in essence an interpleader action at law was confined to cases of detinue. It was a form of action used in the fourteenth and fifteenth centuries where a person faced rival claims to goods in a detinue action brought against him. It appears to have survived into the eighteenth century but shrivelled to nothing by the nineteenth with the decline in the use of detinue as a form of action. A useful paper (Hazard, Geoffrey C. Jr. and Moskovitz, Myron, "An Historical and Critical Analysis of Interpleader" (1964) U. Penn. Faculty Scholarship. Paper No. 1069) sets out the some of the history and case law for the interested reader.

27. The more modern era of the Interpleader has its origins in the courts of equity. Where the equitable doctrine was applied it was not even necessarily identified as 'interpleader' by name. Be that as it may, a party faced with rival claims would either have to defend suits brought by the rival claimants or would have to pursue a Bill in Equity which would lead to equitable relief.

28. The modern era of a more codified approach to interpleader began with the Interpleader Act of 1831. The informative book "The Law of Interpleader as Administered by the English, American, Canadian and Australian Courts" (RJ MacLennan, 1901 pub. Carswell) describes the ensuing history at 14-15. In essence the attempts at statutory codification of the law of interpleader which began in 1831 in turn gave way, in the light of case law, to the court rules. Thus in ex p. Mersey Docks and Harbour Board [1899] 1 QB 546 at 551 AL Smith LJ said: "*The matter [ie, of interpleader] now depends upon the provisions of Order LVII, r.1*" and in Reading v the London School Board (1886) 16 QBD 686 at 690[1] per Wills J "*All the common law statutes as to interpleader are now repealed and the right to that class of relief is regulated by Order LVII, by which the old practice of the Court of Chancery is modified*".

29. Thus it was by the turn of the 20th Century that one looked to the rules for the interpleader procedure. Today, many lawyers will recall that the final form of the Interpleader before its disappearance from the rules was that of RSC Ord. 17 by which time our Victorian brethren's preference for roman numerals when identifying rules of court had passed into history in favour of the Arabic form, but the rule number remained the same. Order 17 in turn disappeared by deletion from the schedules to the CPR, when CPR Part 85 was enacted in this decade. A good reference to the authorities which applied to RSC Ord. 17 down the years can be found in the White Book 2013 edition in the footnotes to RSC Ord. 17 which at that stage was still a part of the CPR via Schedule 1 to the rules.

30. What we are left with, then, is the abolition of the statutory interpleader in the 19th century at the point when the court rules in the form of Order LVII came in to effect. In turn those rules were supplanted by CPR 85.4 and the demise of RSC Ord.17 (as Order LVII had by then become). I note also that The Tribunals Courts and Enforcement Act 2007 s. 65 abolishes "*common law rules about the exercise of the powers which under it become powers to use the procedure in Schedule 12*." It is I think doubtful that s.65 has effect in relation to any common law rights relating to interpleader brought by enforcement agents, since sch. 12 is silent as to such applications and arguably therefore not caught by s. 65. However the

[1] These citations helpfully appear in the footnotes in the White book to Order 17 in its final form before repeal.

analysis in *MacLennan* rather implies that interpleader at law had already been abolished by the advent of RSC Ord. 17 at the latest.

31. I do however take heart from the analysis in *MacLennan*, helpfully dating as it does to a time more proximal to the nineteenth century yet late enough to be a time where Order LVII was in force, at page 17 where the learned author considers whether the supplanting of the interpleader at common law with the interpleader governed by statute (which I read here as including the RSC) had any impact on the existence, in principle, of the equitable form of interpleader relief. His conclusion is as follows:

> *"Statute does not oust equitable remedy – Where courts of Chancery have existed separate and distinct from courts of law, the existence of an interpleader statute governing the proceeding in courts of law has been held not to oust or take away the concurrent jurisdiction of the court of Chancery. A court of equity if first resorted to would not refuse to entertain a bill of interpleader, although a court of law might have been resorted to on the facts stated. …* ***Where courts of law and equity are fused, and equitable principles are followed in the consolidated court, the rule is clear that interpleader statutes are not at all to limit or affect the equitable jurisdiction of the court to entertain an interpleader suit or action. Such statutes merely furnish another special, cumulative and concurrent remedy, summary in its operation, and they do not alter the settled doctrines concerning interpleader. The statutory remedy is a mere substitution for the equitable remedy, in the kinds of actions to which it applies."***

32. The author in my judgment correctly then notes that where there exists a codified system such as under statute (or rules, I add) then that should be used if it covers the situation at hand. In a manner which would find favour in the post-Jackson reform era, the author observes that where a statutory provision is convenient, an applicant who does not avail himself of it will not be allowed to impose greater costs on the fund or subject matter by using a different procedure. That perhaps is an early reference to the fairness of requiring proportionate means to be used in any application.

33. The above detour, which is offered with apologies to others no doubt appreciating the detail of interpleader history and the extent to which I have in the interests of brevity simplified matters, is by way of basis for my conclusion which is that the introduction of CPR 85 and revocation of RSC Ord. 17 does not in my judgment have the effect of abolishing the ability of a court of merged equitable and legal jurisdiction to render equitable relief where the black letter law offers none. A purist would interject that the equitable form of relief as it was known prior to the 19th century statutes may not have been aimed at resolving issues concerning sheriffs (enforcement officers) and that it was only in the 20th century that the notion of the sheriff's interpleader arose.

34. However, appreciating that as I do, where there is a need for sheriffs (enforcement officers) to access a court in an interpleader context, and the statutory and procedural law does not meet that need, yet where there has been historically a clear recognition of the existence of that need, Equity can still assist absent express statutory abolition of interpleader in Equity.

35. Therefore, my order is that:

(1) Unless by 4pm on a date 14 days from the date of service of this order the Third Party files and serves evidence setting out its basis for its asserted rival claim to title, it shall be debarred from relying on evidence of title to contradict that put forth by the HCEO.

(2) In the event that the Third Party is so debarred then without further hearing the HCEO shall be entitled to a declaration that the judgment debtor was at the material time the person with title to the seized goods and consequent upon that declaration the HCEO shall be entitled to dispose of them in execution and shall be entitled to his reasonable costs summarily assessed in the sum of *[£959.30 in Riaz, £681.50 in Celador*] being the sum claimed for this application.

(3) In the event that the Third Party serves and files evidence as above and is not debarred, the HCEO shall apply to this court for directions as to determination of the issue of title and as to management of the dispute and payment of the sums required by para 60(4)(a) of the Tribunals Courts and Enforcement Act 2007 Sch. 12, and for the application to proceed thereafter in accordance with CPR Part 85, and in that event costs shall be reserved.

(4) In the event that the Third Party serves and files evidence as above and is not debarred, any further evidence relied on by the judgment creditor in respect of the ownership of the [*goods, in Riaz money in Celador*] shall be provided by the Creditor, and the HCEO's witness evidence shall deal with enforcement steps taken insofar as not already detailed in the original application for this order.

36. In my judgment, whilst in these two cases I shall make the order in paragraph 4, there will be many occasions when the court could usefully, instead of requiring a further hearing per para. 4 so as to set a sum to be paid into court, simply make a decision as to the sum to be paid into court at the same time as it makes the above order, so as to obviate the need for the expense of dealing with that aspect separately and to discourage spurious claims.

37. It may be of use for HCEOs to adopt the approach in future cases of making an application to the court supported by evidence of the basis for seizure, and evidence from the Creditor of the basis for the Creditor's belief that the ostensible title to the goods is that of the judgment debtor, and seeking an unless order in the form broadly as above leading to a declaration in the event of default, which then should offer the degree of protection reasonably required by the HCEO as 'middleman'.

38. I do however endorse the approach in the text which I quoted above namely that such an application ought only to be made where the provisions of the CPR do not meet the case, such as the circumstances here.

39. Before formally handing down this judgment I gave leave to the Authorised Enforcement Officers generally to be made aware of the draft to enable them to make any observations which might assist the court given the specialist nature of this decision and of their expertise. The time limit of 14 days in para. (2) of my order was proposed by them and I consider that appropriate. Further, the suggestion on para. 32 was also one made by them and which I also consider sensible (that suggestion arises from a case which I understand was heard by Master Yoxall in which he fixed the sum payable in the manner which para. 33

proposes may be appropriate). Para. (4) of the order is, likewise, derived from a suggestion by them as to the proper evidence and witnesses in the application, which maintains the neutrality of HCEOs on an interpleader.

MASTER VICTORIA MCCLOUD

Handed down 16th February 2018