IN THE COURT OF APPEAL OF NEW ZEALAND

CA52/2014
[2014] NZCA 399

BETWEEN	MEHDI JAFFARI AND TRACY JAFFARI Appellants
AND	LIVIA GRABOWSKI Respondent

Hearing: 31 July 2014

Court: Harrison, Goddard and Andrews JJ

Counsel: Appellants in person
B M Pamatatau and M D Whitlock for Respondent

Judgment: 15 August 2014 at 12.30 pm

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence is dismissed.

B The appeal is dismissed.

C The appellants are ordered to pay the respondent costs on a Band A basis for a standard appeal together with usual disbursements.

REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] Mehdi and Tracy Jaffari appeal against the judgment of Rodney Hansen J delivered in the High Court at Auckland,[1] first, dismissing an application to set aside a judgment entered against them in the District Court of New South Wales in favour of Livia Grabowski for the sum of AUD 186,480.83 (the liability judgment)[2] and, second, granting Ms Grabowski leave to register a costs judgment against them for AUD 73,077.37 (the costs judgment).

[2] The Jaffaris, who were represented by counsel in the High Court but not on appeal, apply also for leave to adduce further evidence. Ms Grabowski opposes the application.

Background

[3] The liability judgment was registered in the High Court of New Zealand under the Reciprocal Enforcement of Judgments Act 1934. Shortly afterwards, Ms Grabowski applied to register the costs judgment. The Jaffaris' application to set aside the liability judgment and resist registration of the costs judgment is based on the ground that both judgments were obtained by the same fraud.[3] So we will focus on the liability judgment because our decision on the Jaffaris' appeal relating to it will necessarily determine the result of their appeal on the costs judgment. They stand or fall together.

[4] There is no dispute that in determining the Jaffaris' application to set aside, Rodney Hansen J correctly summarised the proper approach as follows:[4]

> [11] On an application to set aside the registration of a foreign judgment, the Court may direct that an issue between the judgment creditor and the judgment debtor must be stated and tried and to give such further directions as may be necessary: r 23.20(2) High Court Rules. In the leading New Zealand case of *Svirskis v Gibson*,[5] the Court of Appeal said[6] that the *power to direct an issue is discretionary* and in deciding whether it should be exercised, the Court is entitled to have regard to all the circumstances of the

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1 *Grabowski v Jaffari* [2013] NZHC 3417 [*Grabowski* HC].
2 *Grabowski v Jaffari* DCNSW Sydney 2009/338914, 15 July 2011 [*Grabowski* NSW].
3 Reciprocal Enforcement of Judgments Act 1934, s 6(1)(d).
4 Emphasis added.
5 *Svirskis v Gibson* [1977] 2 NZLR 4 (CA).
6 At 10.

> case, *including whether the judgment debtor is merely seeking to try again on substantially the same evidence issues already adjudicated on in the overseas court*. The Court of Appeal went on to refer to *Syal v Heyward*[7] where it was said that the Court is not bound to direct an issue and should not do so in the case of an application based on alleged fraud *unless satisfied that a prima facie case of fraud on the foreign court is established.* …

[5] In brief summary, Ms Grabowski's mother, Ms Cato lived in New South Wales. She had been a successful businesswoman. She had a lifelong interest in alternative healing therapies. Towards the end of her life she developed emphysema. She engaged the services of Mr Jaffari, who was described as a leech therapist. In the year before she died Ms Cato advanced the Jaffaris two separate sums of AUD 50,000 and then AUD 100,000. As executrix of her mother's estate, Ms Grabowski sought to recover these advances from the Jaffaris. They denied liability on the ground that the payments were gifts and not loans.

[6] Ms Grabowski issued a proceeding in the District Court of New South Wales, seeking judgment for AUD 150,000 together with interest and costs. The Jaffaris opposed and the claim went to an intensely contested trial. In what Rodney Hansen J described as a comprehensive 50 page judgment, the trial judge, Judge Gibbs, entered judgment for Ms Grabowski. As Rodney Hansen J summarised it:

> [8] The Judge [Judge Gibbs] characterised the key issue as "one of credit". She said:
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> > Either I believe the documentation and the evidence of the daughter/executor and her brother (the son of the late Ms Cato), or I believe the defendants (jointly or severally).
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> She was blunt and uncompromising on that issue. She described Ms Grabowski as:
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> > … direct, frank, open and honest to the point of being a model witness. I found her to be both honest, indeed painfully so in the context, and reliable. I accept her evidence without any reservation at all.

[7] Judge Gibb rejected unreservedly the evidence given by the Jaffaris that the advances were gifts or had been forgiven. She did not accept that they were credible or reliable witnesses.[8]

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7 *Syal v Heyward* [1948] 2 KB 443 (CA).

8 *Grabowski* NSW, above n 2, at 4.

[8] In the High Court the Jaffaris' counsel identified five specific issues which he submitted should be directed for trial because they gave rise to "a feeling of uneasiness" about the liability judgment and the basis on which it was obtained.[9] We shall refer briefly to those issues after considering the Jaffaris' application for leave to adduce further evidence.

Application for leave to adduce further evidence

[9] The Jaffaris have applied for leave to adduce further evidence,[10] in the form of: (a) a bank statement recording the date of clearance of the AUD 100,000 cheque; (b) photographs of leech therapy with clear visual illustrations; (c) Mr Jaffari's medical report showing his ill health prevented him from visiting Ms Cato in the last months of her life; (d) a voluntary polygraph test performed by a clinical examiner upon Mr Jaffari; (e) a two and a half minute DVD of an interview with Ms Cato speaking about the benefits of the treatment given by Mr Jaffari; and (f) a licensed private investigator's report of an interview with a nurse who cared for Ms Cato in her later life.

[10] All the documents are said to show that Ms Grabowski's evidence at trial was fabricated. The Jaffaris' application seeks to expose to this Court that Judge Gibbs erred in portraying Ms Grabowski in her judgment as "direct, frank, open and honest to the point of being a model witness … and reliable".[11]

[11] The test for adducing new evidence on appeal is well settled. To be admissible the evidence must be fresh – in the sense that it was unavailable at trial – credible and cogent.[12] The Jaffaris have not attempted to establish that the new evidence satisfies the first requirement of freshness. There is nothing to suggest that the evidence was unavailable when Ms Grabowski's claim was tried in 2011. The application must fail on that threshold ground.

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9 *James Meikle Pty Ltd v Noakes* HC Auckland A823/80, 28 July 1983 at 8; *Richards v Cogswell* (1995) 8 PRNZ 383 (HC) at 386; and *Dymock v Bilbie* (1998) 13 PRNZ 158 (HC) at 164.

10 Court of Appeal (Civil) Rules 2005, r 45.

11 *Grabowski* NSW, above n 2, at 4.

12 *Erceg v Balenia Ltd* [2008] NZCA 535 at [15].

[12] In any event, we are not satisfied that the evidence is either credible or cogent. The bank statement, photographs of leech therapy, Mr Jaffari's medical report, a short DVD recording of an interview with Ms Cato before she died and an investigator's report – which was not produced – of an interview with a nurse who cared for Ms Cato are individually and collectively irrelevant to the question of whether the monies were advanced by Ms Cato as gifts or loans or were later forgiven or whether the Australian judgment was obtained by fraud.

[13] We refer particularly to the DVD recording. It appears that the Jaffaris raised its existence in support of an unsuccessful application to the Court of Appeal of New South Wales for an extension of time to file a notice of appeal against the liability judgment.[13] When giving reasons for dismissing the application, Barrett JA noted:

> [17] … The suggestion here seems to be that the DVD containing evidence of a close relationship between persons found to have been debtor and creditor would have some bearing on the finding with regard to the debt claim and defences to it. That cannot be so. There are many debtors who have close relationships with their creditors. There are many creditors who have close relationships with their debtors. There are many people in close relationships who do not make gifts to one another. One could go on with examples that show that this ground is of very little utility.

[14] We note also that Barrett JA dismissed the application on the ground that the Jaffaris' delay of more than a year in seeking an extension of time to appeal was of a "significant, even gross" nature.[14]

[15] Finally, the polygraph test is of no assistance. Ms Grabowski was seeking to enforce a written loan agreement, the terms of which were unequivocal and uncontested at trial, pursuant to which two advances were made. The first instalment of AUD 50,000 was made by electronic transfer on 10 October 2007 and the second of AUD 100,000 was paid by cheque on 1 April 2008.

[16] As Judge Gibbs noted, the dispute over repayment should have been very simple but for the defences raised by the Jaffaris that, despite the clear terms of the loan agreement, the two advances were gifts or alternatively the first instalment at least of AUD 50,000 was forgiven. Judge Gibbs made her findings after seeing and

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13 *Jaffari v Grabowski* [2012] NSWCA 425.
14 At [8].

hearing the witnesses under examination at a closely contested trial where credibility and reliability were at the forefront of consideration. The results of a polygraph test have no bearing on whether the Judge's strong credibility findings against the Jaffaris might be unsafe.

[17] We are satisfied that the proposed further evidence fails to meet the orthodox test for admissibility. The application for leave to adduce it is dismissed.

Appeal

[18] In the High Court the Jaffaris' counsel, Colin Henry, identified a number of specific issues which he said gave rise to a feeling of uneasiness about the basis for the judgment and should be stated for trial. As Rodney Hansen J noted,[15] Mr Henry was careful to accept that none of the issues by themselves would be sufficient to generate a cause for concern. Instead, his argument was that together they were sufficient to cast doubt on the basis of the judgment.

[19] Rodney Hansen J was not satisfied that any or all of the issues gave rise to a feeling of uneasiness that the liability and costs judgments were obtained by fraud.[16] On appeal the Jaffaris, who presented their submissions with clarity and courtesy, advised that the essence of their argument was that the Judge's decision on each of the five issues was wrong. We shall address the same issues.

(a) Letter of demand

[20] Ms Cato died at 5 am on 30 October 2008. By what Judge Gibbs described as "a sad coincidence of fate" her solicitors sent later that same day a letter of demand for repayment of the debt to the Jaffaris.[17] Ms Grabowski's evidence was that shortly before she died her mother had expressed unease about the Jaffaris' intentions to repay the loan. Ms Grabowski instructed her solicitors accordingly but these instructions were not performed immediately. The Jaffaris' proposition is that Ms Grabowski lied about these instructions; and that they were not given before but on the date of and immediately following Ms Cato's death.

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15 *Grabowski* HC, above n 1, at [14].
16 At [34].
17 *Grabowski* NSW, above n 2, at 6.

[21] Rodney Hansen J's finding on this point is worth repeating:

> [17] A reading of the trial transcript establishes that counsel for the Jaffaris was not prevented from cross-examining Ms Grabowski on when she gave instructions to the solicitors. In the absence of a pleading of fraud, the Judge ruled that counsel could not allege that Ms Grabowski lied when she told the solicitors she was conveying instructions on behalf of her mother. But the question of what her mother said to her and whether she instructed the solicitors at her mother's instigation was fully canvassed in cross-examination. The precise timing of the instructions was not an issue at trial. It was not raised until Mr Jaffari wrote to the solicitors over a year later asking for:
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> > Your logged details of the time on 30th October 2008 when you were instructed by the plaintiff, Livia Grabowski on behalf of the late Ms Cato, to issue the letter of demand.
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> The solicitor was under no obligation to respond to the letter and nothing can be taken from the failure to do so.

[22] The Jaffaris are seeking to raise in New Zealand an issue of credibility which could have been raised at trial but was not. Rodney Hansen J was satisfied, and so are we, that the Jaffaris' counsel had every opportunity to cross-examine Ms Grabowski on the date she gave instructions to her mother's solicitors. Counsel apparently considered that the point was irrelevant and should not be pursued at trial. It is now too late to revisit this question.

[23] We add that, even if Ms Grabowski gave instructions to the solicitors after her mother's death, it has little relevance to the questions of whether the advances were gifts or were later forgiven.

(b) Terms of will

[24] The Jaffaris' argument in the High Court and again on appeal was to the effect that Ms Cato would have included a provision in her last will if she intended the funds to be treated as a loan on the premise that she would have recorded its existence to ensure that its terms were enforced. We agree with Rodney Hansen J that a will is not the usual vehicle for conveying a testatrix's instructions of this nature.[18] The obvious answer to the Jaffaris' contention is that a testamentary

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[18] *Grabowski* HC, above n 1, at [19].

reference to the loan was unnecessary where the terms of the agreement were clearly and unequivocally documented.

(c) Perjured evidence

[25] The Jaffaris allege that Ms Grabowski committed perjury about the circumstances of a telephone call from an officer at her mother's bank on 4 April 2008 seeking authority to cash the cheque for AUD 100,000 which had been presented for payment. Ms Grabowski's evidence was that on receipt of this telephone call, which she received while at her son's wedding, she phoned Ms Cato. Her mother advised that she had agreed to increase the loan to the Jaffaris. The sum of AUD 100,000 had in fact been debited to Ms Cato's account the previous day. On this basis, the Jaffaris allege, Ms Grabowski's evidence was fabricated.

[26] This allegation was traversed at trial. The fact that the payment was debited on the day prior to Ms Grabowski's telephone discussion with the bank employee was not decisive. As Rodney Hansen J noted, the bank may have taken that step in advance of a decision on whether to pay out on the cheque.[19] And as he also noted, Judge Gibbs would have taken this factor into account when assessing the credibility of Ms Grabowski's evidence.[20]

(d) Untested evidence

[27] At trial Ms Grabowski successfully sought leave to admit affidavit evidence from her brother, Roy Francescato, on a subject which was relatively tangential – that Ms Cato's family was close. There was evidence that Mr Francescato was receiving medical treatment for a bipolar condition and diabetes. The Judge ruled some of the contents of the affidavit inadmissible. The balance was admitted but with the concurrence of the Jaffaris' counsel. We agree with Rodney Hansen J that this point is irrelevant and that "[t]he Jaffaris cannot seek to make use of evidence which was excluded from consideration at their request".[21]

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19 At [21].
20 At [22].
21 At [27].

(e) Conduct of trial

[28] Finally, it was asserted in the High Court and before us that the conduct of the trial and the terms of the liability judgment indicated that Judge Gibbs was biased. However, while as Rodney Hansen J noted the Judge expressed her findings in trenchant terms and pulled no punches in finding that the Jaffaris lacked credibility, her conclusions were supported by a meticulous examination of the evidence and counsel's submissions.[22] And in an application to review Barrett JA's refusal to grant an extension of time to appeal, two judges of the New South Wales Court of Appeal, in answer to this express point, concluded that there was nothing in the trial Judge's conduct to support a complaint of pre-determination or bias.[23]

(f) Miscellaneous

[29] Judge Gibbs' decision is, as we have noted, very comprehensive. It confirms that many of the grounds of defence raised by the Jaffaris at trial were irrelevant and without merit, and in some instances counterproductive. One example is an affirmative defence to the effect that the Jaffaris lied to Ms Cato about the security available to meet their repayment obligations on the loan.[24] It is difficult to follow the legal purpose of a defence whereby the Jaffaris impugned their own credit and provided support for the Judge's credibility finding. Moreover, its existence served as affirmation that the monies were advanced by way of a loan. For all these reasons, we are fortified in our view that this appeal must be dismissed.

Result

[30] The application for leave to adduce further evidence is dismissed.

[31] The Jaffaris' application to set aside registration of the liability judgment and challenge the costs judgment was an attempt to try again on substantially the same evidential issues adjudicated in New South Wales in the District Court and again on appeal. They have failed to establish a prima facie case of fraud or any uneasiness about the circumstances in which the judgments were obtained. Rodney Hansen J

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22 At [30].
23 *Jaffari v Grabowski* [2013] NSWCA 114 at [74] and [106].
24 *Grabowski* NSW, above n 2, at 36–40.

was correct in finding that the Jaffaris had failed to show that an issue or issues should be stated for trial. The appeal is dismissed.

[32] The Jaffaris are ordered to pay Ms Grabowski costs on a Band A basis for a standard appeal together with usual disbursements.

Solicitors:
Whitlock & Co, North Shore for Respondent