IN THE SOLOMON ISLANDS COURT OF APPEAL

NATURE OF JURISDICTION:	Appeal from Judgment of The High Court of Solomon Islands (Keniapisia J)
COURT FILE NUMBER:	Civil Appeal Case No. 19 of 2021 (On Appeal from High Court Civil Case No. 417 of 2006)
DATE OF HEARING:	29 September 2022
DATE OF JUDGMENT:	4 November 2022
THE COURT:	Goldsbrough P Gavara-Nanu JA Faukona JA
PARTIES:	WILLIAM FREDERICK OLSSON & OTHERS -V- SOLOMON TIME LIMITED & OTHERS
ADVOCATES: APPELLANTS: RESPONDENT:	 In-Person Sullivan J KC & Soma E
KEY WORDS:	Enforcement order renewal: debtor in liquidation: following directors in person: limitation act
EXTEMPORE/RESERVED:	RESERVED
ALLOWED/DISMISSED	DISMISSED
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JUDGMENT OF THE COURT

Background to the appeal

1. William Frederick and Gloria Elizbeth Olsson (the Appellants) obtained a judgment against Solomon Time Limited (1st Respondent) which at that time was run by Pamela Lorraine Kimberly (2nd Respondent). That judgment was obtained on 6th November 2009 against Solomon Time Limited in the sum of SB$ 1,990,000, interest until payment, and costs together with the return of personal items left behind. The Appellants had been employed by that company under various contracts of employment over time. The matter was appealed by the 1st Respondent, but that appeal was unsuccessful. The judgment sum remains outstanding. The 2nd Respondent was not a party to either the original claim or the appeal. She was a director of the 1st Respondent until it went into voluntary liquidation and a liquidator was appointed.

2. The 2nd Respondent was joined as a party to enforcement proceedings in 2010 before the 1st Respondent went into liquidation. That order was made following an application (3rd August 2010) on 27th August 2010. The decision to enter into liquidation was made by the 1st Respondent on 12 October 2010 and a liquidator was appointed shortly thereafter. Whilst the 2nd Respondent never had personal liability for the judgment debt, after the liquidation her role was even further reduced as she lost any control that she may have had over the assets of the 1st Respondent.

3. After liquidation, it was necessary to seek leave to enforce the judgment debt under the Companies (Insolvency and Receivership) Act 2009, Schedule 5 (6). If it was ever the intention to pursue the 2nd Respondent personally for the enforcement debt due from the 1st Respondent, an application would have to be made and succeed under Schedule 7 Division 5 (21) of the same legislation.

4. An application was made for an enforcement order which resulted in the first enforcement order being made on 6 July 2010. After that, in December 2011 the High Court purported to make orders granting leave to enforce the judgment debt against the 1st Respondent and joining two further related companies in which the 2nd Respondent had an interest as parties in the enforcement proceedings. Those

orders of 9 December 2011 were set aside on appeal. At the same time, the Court of Appeal also set aside the orders of 19 April 2012 that had been made by the same judge in the High Court concerning the same enforcement joinder. The effect of that appeal decision on page 38 of the appeal book *Kimberly v Olsson* [2012] SBCA 24 was to quash orders made on 9 December 2011 and 19 April 2012 joining the two related companies and granting leave under Schedule 5 to continue enforcement. The reason was simple, for at the time the High Court granted that leave, the enforcement order had already expired; there was nothing left in force the amend or vary or extend. The Court of Appeal pointed out two significant features of the case on appeal, that an enforcement order made under Rule 21.11 of the Solomon Islands Courts (Civil Procedure) Rules 2007 (CPR) cannot last for longer than one year and that any application for an order under Schedule 7 Division 5 (21) could only be made in proceedings commenced under that legislation and not within enforcement proceedings.

5. The enforcement order made on 6th July 2010 would expire at the latest on 6th July 2010. The application by the Appellants was filed after it had expired.

6. There is no bar in seeking a new enforcement order after the expiration of an earlier order, but that will be a new order and cannot be an extension of the earlier order unless an application to renew had been made before the expiration of the first one. See Rule 21.12 and 21.13 CPR and decision in *Olsson v Solomon Time* [2018] SBCA 8 at paragraph 12. In seeking a new order, regard must be had to the applicable limitation provisions.

7. A further order had been sought in December 2012 but only granted on 15 April 2016. It appears on pages 43 and 44 of the Appeal Book. By that order, leave was granted to continue enforcement despite the 1st Respondent being in liquidation. Later in 2016, the same judge was asked to consider extending the enforcement order and including in it the same two related companies referred to earlier. That application was refused. The order that he had made in April 2016 was not put before the judge by counsel and his subsequent judgment reflected that omission. He concluded that there was nothing he could vary or extend. Of course, he was wrong in that but followed the material supplied (or not supplied) to him by counsel and acted accordingly.

8. By the time of the hearing of the appeal against that decision of 8 September 2016, the enforcement order granted on 15 April 2016 itself had expired although a further application for renewal had been filed before that expiration. Assuming that the application was considered and granted by the Registrar it would have the effect of ensuring that a further order would be in force until 15 April 2018. If the Registrar had not determined the application the enforcement would have come to an end on 15 April 2017. There is no evidence on this appeal either way. We will return to this point later.

9. In May 2018 the appeal against the 8 September 2016 decision was heard on appeal. The mistake made by the judge at the initial hearing was noted. It was clear from the material now presented by the Appellants that when he heard the application there indeed had been an order in force. This Court did not send the matter back to the judge for him to continue to hear the matter. Nor did this Court make any order for enforcement, renewed or otherwise. It simply noted that the proceedings were in any event flawed by the same error made by the Appellants earlier identified by this Court that to chase individuals or related companies, the proceeding must be under the relevant legislation and not brought as part of the enforcement procedure under CPR.

10. The 2018 decision of the Court of Appeal appears on pages 49 to 55 of the Appeal Book.

11. As a final piece of background to this appeal, the Registrar of the High Court, on 25 July 2018 purported to grant leave under the Companies (Insolvency and Receivership) Act 2009, Schedule 5 (6) and a further enforcement order. The terms differed from the 2016 order in that it included the power to enforce against not only the Enforcement Creditor (1st Respondent) but also "the Respondent" meaning the 2nd Respondent to this appeal.

The appeal

12. This appeal is against the decision of the High Court delivered on 9th July 2021 following the hearing of an application to stay the order of the Registrar of 25th July 2018. That application was filed on 8th October 2018 and heard initially on 9th October when a stay was ordered. After that stay order, which had been made to postpone an advertised sale of the 2nd respondent's property by the Sheriff, an

application to have the stay removed and the application for it dismissed as showing no cause of action. That application was made by filing an application on 25th October 2018 returnable for 5th February 2019 and appears on pages 85 to 89 of the Appeal Book.

13. The hearing was protracted as interlocutory orders were sought, including an order seeking the recusal of counsel for the 2nd respondent, ultimately dismissed and not the subject of an appeal.

14. The decision of 9th July 2021 contained the following orders: -

The application for stay orders of the July 2018 E0 is granted as follows: -

a. The enforcement order dated 25 July 2018 be stayed.
b. The enforcement of the Olsson judgment debt against K's property be suspended.
c. The proposed sale by public auction by the Sherriff 0f land parcel, Nos. 192-004-829, 192-004-830, 192-004-831, and 192-004-832 (collectively "the Land") advertised to be held at the High Court on Friday 12th October 2018 at 10 am be stayed until further order.
d. The Enforcement Order dated 25th July 2018 and Seizure Order dated 31 August 2018 be set aside, or alternatively be set aside insofar as it purports to bind K whether pursuant to a judgment of the Court of Appeal or otherwise.
e. The Notice of Seizure pertaining to the Land and issued by the Sherriff and dated 31st August 2018 be set aside.
f. Thereafter the said proposed sale of the Land be stayed permanently.
g. The Olsson pay K's costs of and incidental to the application to be assessed if not agreed.
h. The Olsson to pay the Sherriff's cost of and incidental to the proposed sale of land to be assessed if not agreed.
i. Current renewed enforcement order that will lapse on 25th February 2022, if the effect is to recover money or property from K under S.21 at the Act are stayed.
j. Any restraint on K's property is also set aside.

15. K was used in the judgment to identify the 2nd Respondent and Olsson to identify the Appellants. Whilst for convenience the orders are displayed with a. to j. in this judgment, in the original judgment they are numbered 41.1 to 41.9.

16. By Notice of Appeal filed on 17th August 2021, the appeal against the whole of the decision is brought on the grounds that the judge lacked jurisdiction, acted outside his powers and made egregious errors.

Notice of Motion

17. Before discussing the appeal, it is necessary to turn to a Notice of Motion filed by the Appellants on 12 October 2021 and heard and determined by the Registrar. It sought various orders and came after the Registrar had made the usual order for security for costs on 30 September 2021 in the sum of SB$50,000 against the appellants, the non-payment of which had seen this appeal stayed. The first order sought was for the Sheriff to proceed with execution against the 2nd Respondent or in the alternative the 2nd Respondent to deposit $400,000 as security for the Appellants' costs. The Registrar decided to hear the matter herself and handed down her decision on 1 July 2022.

18. An application is made for that decision to be brought before the Full Court as may any decision made by either the Registrar or a single judge. The parties to this appeal all agree that the Notice of Motion should not have been heard and determined by the Registrar and so we heard no argument on that. Suffice it to say that we agree that the Registrar should not have dealt with this Notice of Motion. Whilst the Registrar may determine matters as set out in the Rules made under section 39 of the Court of Appeal Act in particular under Rule 12 (security for costs) and Rule 11 (imposition of special conditions), this application involved as its subject matter an order made by the Registrar which had been called into question. There is also an impression, according to the Appellants, that the matter was to be determined by a single judge.

19. We, therefore, agree that in this instance the Registrar should have referred the matter to the President of the Court of Appeal for a decision. But it has been determined by the Registrar and history cannot be changed. It is now before the Full Court, and we can review the decision as we could the decision of a single judge.

20. The parties have agreed that the review of the decision of the Registrar and the substantive appeal should both be heard and determined at the same time to avoid any further costs. They agreed to the preparation of all necessary material and just

as soon as submissions are complete on the Notice of Motion, the appeal proper will be heard.

21. Because of that, most of the relief sought in the Notice of Motion falls away. The property of the 2nd Respondent against which enforcement is sought has been the subject of an undertaking given by her which undertaking has not been breached. That secured the property until now. The Sheriff has not executed the stayed order and given that the appeal is now to be heard without delay, there is nothing to be gained in considering an order against him at this stage. His role will become clear with the determination of this appeal.

22. We have not been told that the Appellants have paid the security for costs. If that order has not been complied with, this appeal should remain stayed and eventually be placed before this Court for an order of formal dismissal. But the actions of the parties in agreeing to prepare submissions which are now available suggest that the better course would be for this court to waive the order for security at this stage and hear and determine the substantive appeal. To do otherwise would no doubt invite further submissions when the matter is listed for formal dismissal and the potential to reopen a matter that can be disposed of during this sitting.

23. We, therefore, make no order on the Notice of Motion filed on 12th October 2021. Given that the Registrar declined to make any orders on the Notice of Motion and made no order for costs, there is nothing that this Court needs to quash.

Discussion on the substantive appeal

24. With the background set out, we turn to the substantive appeal. Both here and in the court below, the matter turns on whether the order made by the Registrar on 25 July 2018 was properly made. It was that order which was the subject of the hearing in the High Court when the court was asked to stay its effect. The terms of the order made by the Registrar of the High Court are: -

> UPON RULING by the Court of Appeal in Civil Case Appeal number 33 of 2016 in its judgment dated 11th May 2018;
>
> AND UPON reading the Application and Sworn Statement filed by the Enforcement Creditors following the said Court of Appeal judgment;
>
> IT IS HEREBY ORDERED THAT:

1. Leave be granted to the Enforcement Creditors, pursuant to clauses 4 and 6 of Schedule 5 of the Companies (Insolvency and Receivership) Act 2009, for the Enforcement Creditors to continue to exercise or enforce the right to recover the judgement debt, interest and costs from the Enforcement debtor or Respondent notwithstanding the appointment of a liquidator.

2. The following Enforcement Orders are hereby granted . . . . .

25. The order made raises several questions. On its face, it was made in response to an application and sworn statement in support. Those documents were made available to this court from the High Court file and those additional documents were themselves the subject of additional submissions filed by the parties after the hearing. They show that the order sought was a renewal of the 2016 Enforcement Order which itself had expired either on 15 April 2017 or 15 April 2018. That is referred to in paragraph 8. Before the order of 2016 expired, an application was made for its renewal. An assumption could be made that the Registrar on receipt of that application simply renewed the order without a hearing as provided for by Rule 21.14. That would bring the application for renewal to an end.

26. On this appeal, it has not been possible for that renewed order from 2017 to be exhibited. That allows the Appellant to present an alternative view that when the Registrar made the order she did on 25 July 2018 she was relying on that 2017 application that remained dormant in her office. If that is the case, the Appellants submit, the order was a renewal of the 2016 order and not a new order and it could be a renewal of the 2016 order because the application for it was filed before expiry.

27. There are several flaws in that argument. Firstly, the Registrar required an application to be filed by the Appellants, and an application was indeed filed. That application did not refer to any earlier filed renewal application pending. It did not recite anything about being a replacement for the already filed 2017 application seeking renewal of the 2016 order. It asked for an order following the 2018 decision of the Court of Appeal. It was on the basis of that application, not any earlier application that the Registrar made her order.

28. Secondly, the order sought had changed from the 2016 order which had not previously included "or Respondent" in paragraph 1 of the order. We reject the submission that this change makes no difference.

29. Thirdly, the order made was expressed to be made following a ruling of this Court in May 2018. It is recited that the sworn statement in support sought an order following the decision of the Court of Appeal. A reading of that judgment of this Court does not support any submission that this Court on the hearing of that appeal "allowed the renewal of the enforcement order". That notion appears frequently and repeatedly in submissions for the Appellant and, quite simply, is not supported by the decision on the appeal. To paraphrase a submission of the Appellants from a different context, if this Court had intended to renew the enforcement order, it would have said so.

30. Without reference to what the Appellants say was an outstanding renewal application from 2017 made when the 2016 enforcement order was still in force, the application filed in July 2018 was too late. No renewal could take place based on it, for it came after the enforcement order had expired. As set out in the 2012 judgment of this Court and repeated, the application to renew must be made before the expiration of the first order.

31. It is of note that the application does not seek leave to continue to enforce the judgment debt after liquidation, which is an express term of the draft order filed with it.

32. Finally, the order of 2016 was made by a judge of the High Court. Only a judge of the High Court can grant leave under the relevant company legislation to allow enforcement to continue after liquidation. The Registrar has the power to renew an enforcement order, but the order sought here was first leave and second enforcement.

33. It is important to decide if the purported enforcement order was correctly made before dealing with other matters which arose at the hearing of this application to stay. If the order is invalid, it should be set aside or at the very least stayed. It was not an order made by the Court of Appeal and even if it had been (which it was not) it would have been made on an appeal from the High Court and thus enforceable as

a decision of the High Court, not the Court of Appeal. Thus, any notion that the High Court did not have jurisdiction to consider the application for a stay must fail.

34. We conclude that the power of the Registrar does not extend to granting leave under Schedule 5 of the Companies (Insolvency and Receivership) Act 2009. We further conclude that the enforcement order sought was a renewed application, not an application to renew a previous order because it was filed after any existing order had already expired. The renewal came outside the six years allowed by the provisions of the Limitation Act with no request for consideration of condonation under section 39. For all of those reasons, the Registrar of the High Court was in error when she purported to grant the order.

35. Having concluded, as we have, that the order purported to be made on 25 July 2018 was an order of the High Court and was itself invalid from the start, we do not accept the submission of the appellant that the High Court lacked jurisdiction to deal with the application placed before it by the 2nd Respondent. Nor can the submission that the judge acted outside his powers succeed. It is not much more than saying he lacked jurisdiction. That submission must fail.

36. This leaves making "egregious errors". This necessarily involves a submission from the Appellants that the decision was strikingly bad. We have considered the reasons for judgment and do not reach that conclusion. We note, though, how frequently the Appellants resort to extreme positions when the case does not go their way. In particular, in paragraph 23 of the judgment, a suggestion that there should be a Commission of Inquiry into the 2012 Court of Appeal. Other examples are contained in submissions elsewhere, suggesting that where any authority or individual does not agree with their submissions, there is evidence of official corruption that must be investigated.

37. Whilst the vast majority of the reasons given for his decision this Court finds to be both sound and valid, we do not agree with his finding that the 2012 Court of Appeal must have struck out the order to join the 2nd Respondent as a party to the enforcement proceedings. It is not supported by the reasons given for the decision and, as we have set out earlier, was not a necessary order given the effect of the order for joinder, which, regardless of the submissions from the Appellants, did not make the 2nd Respondent personally liable for her company debts. Our disagreement

on that point, however, is not something which should detract from the thorough and detailed analysis given by the judge of the factual matrix and the effect of various orders and procedural steps which he had to consider.

38. As referred to earlier, the decision to seek the joinder of the 2nd Respondent to the Enforcement proceedings could not and did not have the effect of making her personally liable for the debts of the 1st Respondent. It is thus wrong to suggest that she is or ever was personally responsible. The route through which a company director may be held personally liable for the debts of the company in liquidation is that prescribed in Schedule 7 Division 5 section 21 onwards of the Company (Insolvency and receivership) Act 2009. The procedure under that Act was not followed through even though in 2012 this Court recommended an action be brought under that legislation, as opposed to within enforcement proceedings. If followed, and if successful, it may have resulted in funds being repaid into the liquidated company or even directly to the applicant creditors. But it was not and the responsibility for that rests with the Appellants and those who have advised them.

39. We note the repeated plea that the Appellants no longer have the benefit of legal representation on this appeal. We also note that at all the relevant times they did have the benefit of legal representation. To the extent that it is permissible, allowances have been made for the present lack of representation, beginning with the relaxation of the rule about payment of security for costs and ending with no comment being made on several scandalous submissions. We see the same allowances made by the trial judge in the Court below.

40. Allowances for the lack of representation cannot, though, lead to an incorrect decision just as any sympathy that there may be for the plight of the Appellants in their simple quest to reap the fruits of their judgment cannot dictate the course of an appeal. If sound advice had been followed, their position might have been different. There is nothing to be gained in speculating as to why that advice was not followed.

41. It follows from our decision on the order of 25th July 2018 that any subsequent renewal itself is invalid. For the sake of clarity, we set out that there is no current enforcement order or valid leave to enforce this judgment debt after liquidation. As the debt became enforceable in 2009, the relevant limitation period has already expired. Whilst that does not extinguish the right of the appellants to the debt, it

does preclude further enforcement. There is no need for consideration of whether the same may apply to an application brought under the Company (Insolvency and receivership) Act 2009 as none has ever been brought and we have heard no argument on the hypothetical question. Regardless, it could not make this judgment debt capable of enforcement once again.

DECISION

42. This appeal is dismissed.

43. We were asked to order costs against the Appellants on an indemnity basis. The reason for this was submitted to be the conduct of Appellants within this appeal, and the repeated interlocutory applications increasing the cost of the proceedings to the 2nd Respondent. Whilst we agree that this has been the case, we come back to the position that the 2nd Respondent, throughout the history of this claim, has been intent on maintaining the corporate veil rather than accepting responsibility for the actions of her company, for she was the only effective operator within that organisation. Whilst we would not necessarily adopt the same language as the High Court judge when he described the 2nd respondent as intent on escape from liability, it remains an accurate description of the 2nd Respondent's conduct. For that reason, we regard an order for costs on an indemnity basis as inequitable.

44. Costs of and incidental to this appeal will be paid by the Appellants on a standard basis, to be agreed upon or assessed.

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Goldsbrough (P)

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Gavara-Nanu (JA)
Member

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Faukona (JA)
Member