

ST. CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

HCVAP 2011/002

BETWEEN:

[1] FRANTISEK STEPANEK
[2] JAROSLAV ROKOS
[3] SOKOLOVSKA UHELNA PRAVINI NASTUPCS, A.S
Appellants

and

[1] AQUA INVESTMENTS LTD.
(Company number C27257)
[2] MORNING STAR HOLDINGS LIMITED
[3] MERIDIAN TRUST COMPANY LIMITED
[4] CONRAD I. SMITHEN
Respondents

Before:

The Hon. Mde. Ola Mae Edwards

Justice of Appeal

Appearances on paper:

Mr. Gerhard Walbank of Webster Dyrud Mitchell, Legal Practitioners
for the Appellants

Ms. Dahlia Joseph and Mr. Perry Joseph of Daniel Brantley & Associates
Legal Practitioners for the Respondents

2011: March 23.

DECISION

[1] EDWARDS, J.A.: This is an application on 7th March 2011, for leave to appeal and a stay of execution of the decision of Redhead J [Ag.] in his written judgment delivered on 18th February 2011, upon the respondents' application to strike out the applicants' fixed date claim form for "Norwich Pharmacal" and "Anton Piller" reliefs.

- [2] The applicant had on 10th December 2010, filed and served only a fixed date claim form without a statement of claim or an affidavit, contrary to CPR 8.1. This was done on the morning of the hearing by Moe J [Ag.], of the respondents' application to stay the execution of Moe J's without notice order previously made on 26th October 2010, on the applicants' without notice application. The without notice order required the fixed date claim form to be filed and served before the inter partes hearing date. The decision of Moe J [Ag.], resulting from this inter partes hearing is yet to be delivered by him.
- [3] Redhead J [Ag.] found that the filing and serving of a fixed date claim form in the existing circumstances was not a procedural irregularity; that the claim did not disclose any recognizable cause of action to be tried in the Nevis Court; and it is an abuse of the process of the Court. The judge struck out the fixed date claim form for non-compliance with Rules 8.1 and 8.7 in accordance with Rule 26.4(1) of CPR 2000. The judge awarded costs to the respondents on a fixed costs basis.
- [4] The applicants contend that Redhead J made several errors in his interpretation and application of the relevant principles governing "Anton Piller" and "Norwich Pharmacal" actions and his award of costs. They contend further that they complied with Moe J's without notice order which required the filing and service of "a Fixed Date Claim Form in respect of these Norwich Pharmacal/Bankers Trust discovery proceeding prior to the Return Date" pursuant to CPR 17.2(5); and that CPR 26.9(3) ought to have been applied by the judge to put matters right.
- [5] The respondents in their opposing Affidavit and Submissions contend that Redhead J did not err in finding that there was no allegation of wrongdoing against any of the respondents; and there must be a wrong alleged or a cause of action against a Defendant for a claim to be sustainable against that defendant. The respondents' counsel submitted that the applicable test is not the test for the grant of Norwich Pharmacal relief but rather whether there is a sustainable claim against the defendants. They also raise the matter of the application for leave to appeal

being filed out of time and not within the 14 day period from the date of the order, as is required by CPR 62.2.

- [6] In the seminal case of *Norwich Pharmacal Co. v Commissioners of Customs & Exercise* [1974] A.C. 133 it was held that a person who was innocently mixed up in the wrongdoing of another, so that he was more than a “mere witness”, could be compelled to disclose the identity of the actual wrongdoer, in order that proceedings could be taken by the victim against the appropriate defendant. At page 175 of the judgment, Lord Reid stated:

“They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.”

- [7] The *Norwich Pharmacal* order has been granted by the court in the following circumstances:

- (a) In *British Steel Corporation v Granada Television* [1981] A.C. 1096, the disclosure of information was ordered to enable the person wronged to identify a mole within the organization.
- (b) In *Bankers Trust v Shapira* [1980] 1 W.L.R. 1274 the order was made to trace assets which were taken without the alleged fraudsters being alerted.
- (c) In *Mercantile Group (Europe) AG v Aiyela* [1994] Q.B. 366 the court made the order to locate assets upon which a judgment could be enforced. The order was not confined to assisting in disclosing the identity of the wrongdoers, but also to obtain full information about what the wrongdoer had done with his assets.

(d) In *CHC Software Care Ltd v Hopkins & Wood* [1993] F.S.R. 241 the order was used to enable third parties to be identified who had themselves done nothing wrong but who had received letters containing allegedly false statements.

(e) In *Carlton Film Distributors Ltd v VCI Plc* [2003] F.S.R. 47 the order was made to facilitate information being obtained that was central to the contemplated claim, and which would show whether the applicant had a good cause of action against a named person.

(f) The case *CHC Software Care Ltd v Hopkins and Wood* [1983] FSR 241 underscores the point that the third party from whom the information is sought does not have to be an innocent party, he may be an innocent party, or he may be a wrongdoer also.

[8] Lord Woolf CJ observed in *Ashworth Hospital Authority v MGN Ltd.* [2002] 4 All ER 193 at paragraph [57] that:

“New situations are inevitably going to arise where it will be appropriate for the [Norwich Pharmacal] jurisdiction to be exercised where it has not been exercised previously. The limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy.”

[9] The Gibraltar Court of Appeal in *Secilpar SL v Fiduciary Trust Limited* [Civil Appeal No. 5 of 2004 (24th September 2004) (unreported)] upheld the decision of the Chief Justice who clearly explained the nature of a Norwich Pharmacal order in his reasoning as follows:

“I am satisfied that this [Norwich Pharmacal relief] is [an] interim relief. It does not conclude the proceedings. It is ancillary to proceedings ongoing in another jurisdiction and is in no way final in the sense that it determines liability or concludes those proceedings.”

[10] Though the applicants had 14 days within which to file the application for leave, under our Rules, this means 14 clear days which would have expired on Saturday 5th March 2011. CPR 3.2(5) states that where the period specified for doing any

act at the court office ends on a day on which the court is closed, the act is in time if done before close of business on the next day on which the court is open. The application was filed on 7th March 2011, which was the next day on which the court was opened. The application was therefore not filed out of time.

[11] Having assessed the judgment of Redhead J, the grounds for appealing disclosed in the application for leave, the submissions of both counsel, the affidavits filed in support of and in opposition to the application, and the law, I am of the view that the proposed appeal raises issues of public interest which should be examined and clarified by the court. I consider it prudent to stay the execution of the judgment pending the determination of the appeal. The court ought to see that the appeal if successful, is not rendered nugatory; and that the appellant if successful will not be deprived of the results of the appeal. I will therefore grant leave to appeal and also will stay the execution of his decision.

[12] **Order**

1. Leave is hereby granted for the applicants to appeal the decision of Redhead J [Ag.] delivered on 18th February 2011.
2. The appellants shall file and serve their notice of appeal and submissions in accordance with CPR 62.5(b).
3. The respondents shall file and serve their written submissions in opposition to the appeal within 14 days of receipt of the notice of appeal.
4. The appellants counsel shall file and serve a core bundle for the hearing of the appeal on or before 29th April 2011, which should contain the following documents –
 - (i) All of the application, orders, and affidavits (excluding affidavits of service) which were filed in the proceedings up to the date when Redhead J heard the application;
 - (ii) The fixed date form;
 - (iii) The notice of appeal;

- (iv) The order of the Court of Appeal;
 - (v) The submissions and authorities of counsel for the parties.
5. The appeal to be set down for hearing by the Full Court at the next sitting of the Court in St. Kitts and Nevis 4th to 8th July 2011.
 6. The parties are at liberty to communicate with the Chief Registrar to have the date of the hearing of the appeal rescheduled for an earlier date at their convenience.
 7. The execution of the judgment of Redhead J is stayed pending the hearing and determination of the appeal

Ola Mae Edwards
Justice of Appeal