

BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 21 OF 2005

BETWEEN:

ENZO ADDARI

Claimant/Respondent

and

EDY GAY ADDARI

Defendant/Applicant

Before:

The Hon. Mr. Michael Gordon, QC
The Hon. Mr. Denys Barrow, SC
The Hon. Mr. Hugh Rawlins

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Clyde Williams for the Defendant/Applicant
Mr. John Carrington for the Claimant/Respondent

2005: September 19, 23

JUDGMENT

[1] **RAWLINS, J.A.:** This matter came on an application by Mrs. Addari for leave to appeal against the Order that the High Court made on 26th July 2005, with a written Judgment following on 23rd August 2005. In that Order, the Court struck out the application that Mrs. Addari made to stay the proceedings in Claim No BVIHCV 2003/0209 on the grounds of *forum non conveniens*.

[2] In her application, Mrs. Addari had urged the Court to stay or dismiss the proceedings in this Territory on the ground that the courts of Zurich, rather than this Court, is the appropriate forum for the trial of the case. Mrs. Addari also applied for a stay of the proceedings pending the outcome of the Appeal.

- [3] At the time of the commencement of the Claim, the subject matter was money that stood in an account in the name of Mrs. Addari at HSBC Guyerzeller Bank Limited ("the HSBC Bank BVI"), which merged with Handelsfinanz-CCF Bank, Zurich ("Handelsfinanz Bank"), in June 2002. HSBC Guyerzeller Bank AG of Zurich is the parent Bank of the HSBC Bank BVI. Mr. Addari claims that although the monies on the account at the HSBC Bank were in Mrs. Addari's name, he is the beneficial owner, and she holds them in trust for him. He seeks, inter alia, a declaration to this effect.

Before the High Court

- [4] On the application for the stay before the High Court, Mr. Carrington, Learned Counsel for Mrs. Addari, contented that this Territory is not now the appropriate forum for the trial because the subject matter of the claim, namely Russian Notes that Mrs. Addari purchased in 1998 from monies from her account in Zurich, which were in the account at the HSBC Bank BVI are no longer located here. Those monies now stand in an account in Mrs. Addari's name at BCI Suisse, Zurich, as a result of an Order that the High Court in this Territory made on 28th July 2004 permitting its transfer. Mr. Carrington submitted that the court in this Territory is not now the appropriate forum for the trial because neither of the parties resides or has ever resided in this Territory. However, both parties have resided in Antigua, which is within the jurisdiction of the court. They have had business interests there over a period of years and are presently parties to proceedings there.
- [5] Mr. Carrington noted that a central issue in the proceedings is the ownership of the funds in the account at BCI Suisse, Zurich, at the time of the purchase of the Russian Notes. He said that principles of the laws of this Territory are not relevant to this issue, because the transaction took place in Switzerland between persons who had no connection with the jurisdiction of our court at the time of the transaction.
- [6] Mr. Carrington further contended that the BVI Court is not the appropriate forum for the case because the declaration that Mr. Addari seeks will not be enforceable in Switzerland without

re-litigating the merits of the case in Switzerland. He also contended that the costs of litigation here would be prohibitive because it will involve bringing some 25 witnesses, interpreters and witnesses to this Territory. He repeated these contentions before this Court. He submitted, further, the courts of Zurich will provide the more appropriate forum for the trial because the issue whether Mr. Addari has any interest in the monies should be decided in accordance with the law of the place where the Russian Notes were acquired and where the account is now held. According to Mr. Carrington, the principles of Swiss law would determine the ownership of the monies in the account and the Swiss Court will have jurisdiction since the account is now located there. He informed this Court that Mrs. Addari has now commenced proceedings against the Bank in Zurich which now holds the funds, and that Mr. Addari has indicated an interest in joining those proceedings.

[7] As far as the logistics and expenses of the trial are concerned, it was contended that none of the witnesses who will be called in the case is from this Territory. He said that all but 3 of them, who live in Antigua, live in Europe and are within 3 hours by air, rail or road from Zurich, while travel to this Territory would involve many hours. He asked this Court to note that the un-controverted evidence of Mrs. Addari is that the costs of bringing each witness here would be about \$8,500.00. He said that this does not take account loss of income for self-employed persons and further expenses for the services of interpreters. Mr. Carrington further asked this Court to note that almost all of the witnesses are native Italian speakers and that Italian is one of the major languages of Switzerland.

[8] Mr. Williams, Learned Counsel for Mr. Addari, asked the High Court to strike out Mrs. Addari's application on the grounds that it was an abuse of the process of the Court, which was likely to obstruct a just disposal of the matter. He asked this Court to strike out the application on the ground that the Appeal has no real prospects of succeeding because Mrs. Addari has waived her right to rely on *forum non conveniens*.

Before this Court

- [9] Mr. Carrington submitted that this Court should grant leave to appeal the decision of the Learned Judge on the ground that she failed to exercise her discretion properly or at all determining the application. He said that the Judge erred in that she decided the application for the stay on the basis of Part 9.7 of the Eastern Caribbean Supreme Court Civil Procedure Rules, 2000 ("the Rules"), whereas the application was made under the inherent jurisdiction of the court.
- [10] Mr. Carrington submitted, additionally, that the Judge did not properly consider the fact that the presence of the funds in this Territory constituted the only connection between this jurisdiction and the claim and that the removal of the account to Zurich was a material change in circumstances, which has now made the court in this Territory an inappropriate forum for the determination of the dispute. He also submitted that the Judge also erred because she did not consider the facts relating to expense and inconvenience; the statement in the expert's opinion that a Judgment in this Court will not be enforced in Switzerland without a re-trial; and that the Courts of Zurich, where the Notes are currently located, have jurisdiction over the proceedings. Mr. Carrington insisted that the learned Judge further erred when she held or appeared to have held that Mrs. Addari was estopped from relying on *forum non conveniens* or had abused the process of the court because she made her application only shortly before the commencement of the trial and had previously participated in proceedings without reservation.
- [11] Mr. Williams repeated the submissions that he made before the High Court. I shall consider the merits of Mrs. Addari's application for leave and for a stay in the proceedings against a brief outline of the applicable principles.

The Application Principles

- [12] It is trite principle, often repeated in this court, that leave to appeal will be granted if this court is of the view that the appeal has a realistic prospect of succeeding or if there are other compelling reasons why the appeal should be heard.
- [13] As far as a stay is concerned, the court has always had an inherent jurisdiction to grant a stay of proceedings on grounds of *forum non conveniens* or while an appeal is pursued. The court also has an inherent jurisdiction to dismiss a claim on the grounds of *forum non conveniens*. The jurisdiction is discretionary. It is exercisable where the court thinks that it is just and convenient to make such an Order, in order to prevent undue prejudice to the parties or is an abuse of the process of the court. The court is entitled to exercise the power upon such terms as it determines. The court is likely to grant a stay on appeal if the appeal would otherwise be rendered nugatory or the appellant would suffer loss which could not be compensated in damages. (See **Wilson v Church (No. 2)** [1879] 12 Ch. 454, at page 459.).
- [14] This court will only entertain an appeal from a matter, which is within the plentitude of the discretion of a Judge, in certain circumstance. The applicant must satisfy this court that in the exercise of the discretion, the Judge made a mistake of law, disregarded principle, misapprehended the facts, took into account irrelevant material, ignored relevant material or failed to exercise the discretion. The applicant may also convince this Court that the conclusion which the Judge reached, was “outside the generous ambit within which reasonable disagreement is possible”. (See **Quillen and Others v Harney, Westwood & Riegels (No. 2)** (1999) 58 WIR 147, at page 150j -151a.).

This application

- [15] I agree with the submission that Mr. Carrington made that the inherent jurisdiction, which the Court has to grant a stay of proceedings, is concurrent with, but mutually exclusive from its jurisdiction under Part 9.7 of the Rules. The Judge noted that Part 9.7(5) of the Rules

provides that a defendant who files an acknowledgement of service and who does not apply to stay the proceedings within the period for filing the defence is to be treated as having accepted the jurisdiction of the court to try the claim. By this reference, the learned Judge seems to have suggested that Mrs. Addari cannot bring a forum challenge at this stage of the proceedings.

[16] In paragraph 17 of the Judgment, the Judge expressed the view that it would be inimical to the overriding objective of the Rules to deal with cases justly and in a timely manner, for the court to grant a stay at this late state in the proceedings. However, the application was not made under the Rules. Additionally, an application under the inherent jurisdiction of the court would usually require the Judge to consider the connecting factors and make a determination whether, as in the case, the court in this Territory or the court in Switzerland will provide an available and competent forum in which this case may be tried more suitably for the interest of all the parties and for the ends of justice. The Judgment does not show that the learned Judge considered this principle in its entirety. At paragraph 12 of the Judgment, however, she considered the expenses and inconvenience of having the proceedings stayed here in favour new proceedings in another jurisdiction. She concluded that to start new proceedings in Switzerland or elsewhere would cause exceptional hardship to all of the parties, especially to Mr. Addari who is ailing. The circumstances in these proceedings support that conclusion.

[17] The fact that the Judge did not consider the main principle which relates to *forum non conveniens* in its entirety, and referred to Part 9.7 of the Rules when the application was made under the inherent jurisdiction of the court is not, however, the end of the matter. This court must nevertheless, before granting leave to appeal, consider whether the appeal would have a realistic prospect of success.

Realistic prospect of success

[18] Mr. Williams relied on **Smay Investments Limited and Another v Sachdev and Others** [2003] EWHC 474 (Ch.) to support his contention Mrs. Addari's conduct of these proceedings amounts to a waiver of her right to raise the forum challenge at this stage.

He submitted that Mrs. Addari could not now challenge the jurisdiction of this Court having participated in extensive disclosure, exchange of witness statements and the process of adducing extensive expert evidence. He submitted further, that the filing of the application a mere 6 weeks before the commencement of the trial was meant to obstruct the trial at a time when the parties have already met expenses and made provision for witnesses and interpreters to come to the Territory for the trial. In her Judgment, the learned Judge referred to some of these matters. She also noted that Solicitors for the Parties have filed skeleton arguments and that all things were in place for the commencement of the trial.

[19] Mr. Williams also exhorted this Court to note that at the *inter partes* Hearing on various application on 4th March 2004, Mr. Carrington informed the High Court that Mrs. Addari was not proceeding with her forum challenge application and that she was quite satisfied to have the matter tried here eventually. In paragraph 8 of her judgment, the learned Judge noted that there was also a statement to this effect in the written skeleton arguments.

[20] Mr. Carrington submitted that waiver does not apply in this case because the removal of the funds from the Territory by the Order of 28th June 2004 created a fundamental change of circumstances in that it removed the only substantial connection with this Claim had with this jurisdiction. He submitted, further, that while it is clear that waiver applies in cases under Part 9.7, it is not clear that it applies where an application is brought under the inherent jurisdiction of the court.

Findings

[21] Waiver is based on conduct. It is my view that waiver applies in all aspects of proceedings, including the proceedings in the present case. A court could find that a party in a case has so conducted the proceedings that, that party is estopped from denying that a counter-party, having acted in accordance with that conduct, is entitled to rely on that conduct in relation to the proceedings.

- [22] It is my view that Mrs. Addari's conduct of these proceedings, which is referred to in paragraphs 18 and 19 of this judgment, amounts to waiver, when considered in the light of the fact that Mrs. Addari's forum challenge under the inherent jurisdiction of the Court was instituted about 1 year after the account was transferred to the Bank in Zurich. The transfer of the funds forms the bedrock of Mrs. Addari forum challenge. It was put forward as the quintessential fundamental change of circumstances, which triggered her application. Proper proceedings required the application to be made with some dispatch. Mr. Addari could not have expected that after the funds were transferred, he would have gone through all of the preparatory stages to the threshold of the commencement of the trial here, only to be met with an application with challenges the jurisdiction of the court in this Territory.
- [23] For the foregoing reasons, I find that Mrs. Addari's conduct of these proceedings amounts to waiver in a manner that she is estopped from asserting her right to mount a forum challenge at this stage.
- [24] I do not think, as a matter of law, the transfer of the funds to Zurich severed the connection that there was between the Claim and the jurisdiction of this court. The Order of 28th June 2004 was made because the High Court was informed that the HSBC Bank BVI was closing and it was necessary to transfer the funds to the parent Bank in Zurich. The funds remain under a freezing Order issued by the court here. The parent Bank made various related undertakings, including an undertaking to submit to the jurisdiction of the Court here for the purpose of enforcing the undertaking. As far as this Court is concerned those funds remain under the jurisdiction of the court in this Territory until it makes an Order to the contrary. The nature of the proceedings, which Mrs. Addari commenced in Zurich in relation to the funds, was not made clear either in the written submissions or at the hearing before this court. The fact that Mr. Addari might have indicated an interest in those proceedings has no significance as far as my decision on the application herein is concerned.

Order

[25] In the foregoing premises, the application which the Defendant/Applicant, Mrs. Addari, made on the 10th day of August 2005 for leave to appeal against the Order which the Judge issued herein on the 26th day of July 2005, and for a stay in the proceedings pending the determination of the application is hereby dismissed. The Defendant/Applicant shall pay the costs of Claimant/Respondent, Mr. Addari, on this Application in the sum of \$4000.00.

Hugh A. Rawlins
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Denys Barrow, SC
Justice of Appeal