

SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 14 OF 1992

BETWEEN:

PANACOM INTERNATIONAL INCORPORATED

Appellant

and

[1] SUNSET INVESTMENTS LIMITED

[2] THE ARABIC REPUBLIC OF LIBYA

Respondents

Before: The Rt. Hon. Sir Vincent Floissac -Chief Justice

The Hon. Mr. C.M. Dennis Byron -Justice of Appeal

The Hon. Dr. N.J.O. Liverpool -Justice of Appeal

Appearances:

Mr. K. T. Hudson-Phillips Q.C. and Mr. H. Matadial for the

Appellant

Mr. S.K. John and Mr. R. Howard for the Respondents

1994: July 19 & 20

September 19

JUDGMENT

SIR VINCENT FLOISSAC, C.J.

By two contracts in writing executed in Paris, France on 7th January 1975 and bearing numbers 121274 and 121274B, Panamanian Armament Company (PAC) agreed to sell and instal and Libya (The Arabic Republic of Libya) agreed to purchase and accept certain equipment and appliances for the contract price of US\$15,282,000.00. On 15th December 1981, PAC purported to assign to the appellant PAC's rights under the two contracts and on 11th October 1983, Roxanne Moller-Fernu (professing to act on behalf of the appellant) purported to assign the appellant's assigned rights to Sunset (Sunset Investments Limited).

On 18th March 1988 and on 27th September 1988, Singh J (sitting in the High Court of Justice of Saint Vincent and the Grenadines) made two successive orders (the 1988 Orders}. By the first order, the appellant was granted leave to serve notice of a writ indorsed with a Statement of Claim against Libya and to effect service on Libya out of the jurisdiction. Under the Statement of Claim the appellant claimed (inter alia) a declaration that the assignment to Sunset was a nullity and a declaration that Libya was indebted to the appellant in the sum of US\$13,500,000.00 with interest thereon at the rate of 10% per annum from 13th April 1987 until payment. By the second order, the appellant was authorised to enter judgment against the respondents (Sunset and Libya) as prayed for in the Statement of Claim.

By judgment dated 2nd December 1992, Hewlett J (Ag) (sitting in the said High Court) set aside the 1988 orders and thereby set aside {1} the leave granted to serve notice of the writ on Libya

out of the jurisdiction {2} the service of the notice and {3} the judgment entered against Libya. The appellant is dissatisfied with the judgment and has appealed against it. Libya is also dissatisfied with the judgment and has filed a notice contending that the judgment should be varied in so far as it declares that Libya had submitted to the jurisdiction of the court and had thereby waived its right to foreign state immunity.

The issues which resurfaced in this appeal are [1] whether Libya enjoys foreign state immunity in respect of the claims made against it in the appellant's Statement of Claim [2] whether the first 1988 order [whereunder the appellant was granted leave to issue and serve notice of the writ out of the jurisdiction] was irregular and [3] whether the default judgment entered by virtue of the second 1988 order was properly set aside.

(1) Foreign State Immunity

The vast majority of the nations of the world adopt the restrictive doctrine of public international law relating to the immunity of foreign states [including heads, governments and departments of the governments of foreign states] from the jurisdiction of local or national courts. Under that doctrine, the immunity of a foreign state is restricted to claims arising out of acts performed or properties held by the foreign state '*jure imperii*' [i.e. under public law and in the exercise of the foreign state's sovereign authority]. The immunity does not extend to claims arising out of acts performed or properties held by the foreign state '*Jure gestionis*' [i.e. under private law and within or in the course of the foreign state's commercial or mercantile activities with private individuals or otherwise than in the exercise of sovereign authority].

In **Philippine Admiral v Wallem Shipping** (1977) A.C. 373 at 397, Lord Cross [delivering the judgment of the Privy Council] said:

"There is no doubt - as was indeed conceded by counsel for the appellants - that since the Second World War there has been both in the decisions of courts outside this country and in the views expressed by writers on international law a movement away from the absolute theory of sovereign immunity championed by Lord Atkin and Lord Wright in *The Cristina* towards a more restrictive theory. This restrictive theory seeks to draw a distinction between acts of a state which are done *jure imperii* and acts done by it *jure gestionis* and accords the foreign state no immunity either in actions in personam or in actions in rem in respect of transactions falling under the second head."

In view, of the prevalence of the restrictive doctrine of foreign state immunity, unless a state expressly disavows the doctrine and does so by treaty, legislation, official statement of policy or otherwise, the state must be presumed to have elected to adopt the doctrine. In **Trendtex Trading Corp'n v Central Bank** [1977] 1 A E R 881 at 888, Lord Denning M.R. said:-

"Each country delimits for itself the bounds-of sovereign immunity. Each creates for itself the exceptions from it. It is, I think, for the courts of this country to define the rule as best they can, seeking guidance from the decisions of the courts of other countries, from the jurists who have studied the problem, from treaties and conventions and, above all, defining the rule in terms which are consonant with justice rather than adverse to it. That is what the Privy Council did in

Philippine Admiral (Owners) v Wal/em Shipping (Hong Kong) Ltd, and we may properly do the same."

The State of Saint Vincent and the Grenadines has not officially repudiated the restrictive doctrine. It evidently has not done so by treaty, legislation or official statement of policy. It must therefore be presumed that the State has joined or is content to be associated with the family of nations in adopting the restrictive doctrine. Accordingly, the question to be decided is whether the restrictive doctrine of foreign state immunity immunizes Libya from the claims made against it in this case.

The claims against Libya arise out of contracts which were commercial contracts in that they were contracts for the sale of goods [i.e. equipment and appliances]. The contracts were not transactions between a foreign state and another state but were transactions between a foreign state and a private company. Consequently, the claims arise under private law and not under public law. Libya's governmental or political reasons for entering into these commercial contracts or transactions cannot convert these contracts or transactions from private acts under private law to public acts under public law.

In **I Congreso del Partido** (1981) 2 AER 1064 at 1082 & 1083, Lord Bridge

said:

"It does seem to me that two propositions can be derived from the relevant authorities which may often, and do in this case, provide a useful guide in deciding whether or not a claim to sovereign immunity can be sustained. First, if a sovereign state voluntarily assumes a purely private law obligation, it cannot, when that obligation is sought to be enforced against it, claim sovereign immunity on the ground that the reason for assuming the obligation was of a sovereign or governmental character. Example: State A, orders uniforms for its army from a supplier in State B; when sued for the price in the courts of State B, State A cannot claim immunity on the ground that the maintenance of its army is a sovereign function. This is really elementary. But it leads on logically to the second proposition that, having assumed a purely private law obligation, a sovereign state cannot justify a breach of the obligation on the ground that the reason for the breach was of a sovereign or governmental character. Example:,... State A, having ordered uniforms for its army from a supplier in State B, repudiates the contract; when sued in the courts of State B for damages, State A cannot claim immunity on the ground that, since the placing of the contract, a government of a new political complexion has made a sovereign decision, pursuant to a policy of total disarmament, to disband its army".

In my judgment, Libya's contracts or transactions [out of which the appellant's claims against Libya arise] were private commercial contracts or transactions or private acts performed "jure gestionis". Under the restrictive doctrine of foreign state immunity, Libya does not enjoy any immunity from the jurisdiction of the courts of Saint Vincent & the Grenadines with respect to those claims. In this case, no question arises as to waiver of immunity by submission to the jurisdiction of the local court because there is no immunity to waive.

[2] The leave to serve notice of the writ extra-territorially

The grant of leave to serve a writ or notice of a writ out of the jurisdiction is governed by our R.S.C. {Rules of the Supreme Court} Order 11. Rules 1 & 2 of that Order prescribe the jurisdictional grounds for such extra-territorial service. There are 16 such jurisdictional grounds which are based either on the qualifications of the plaintiff or on the procedural vulnerability of the defendant or on the nature of the subject matter of the action or on the nature of the cause of action or on the nature of the relief or remedy sought.

Order 11 r 4[1] provides that:-

"An application for the grant of leave under rule 1 or 2 must be supported by an affidavit stating the grounds on which the application is made and that, in the deponent's belief, the plaintiff has a good cause of action, and showing in what place or country the defendant is, or probably may be found."

The application in the present case was supported by an affidavit sworn by Mr. H. Matadial on 16th March 1988. Paragraph 3 of the affidavit reads:

"The last named defendant resides within the jurisdiction and the 2nd named defendant is a sovereign state and is a necessary and proper party to this action."

Paragraph 3 of Mr. Matadial's affidavit indicates that the jurisdictional ground upon which the appellant relied for service outside the jurisdiction is a ground based on Libya's procedural vulnerability. That ground is prescribed by Ord 11 r 1 U] which provides that:

"Subject to rule 3, service of a writ, or notice of a writ, out of the jurisdiction is permissible with the leave of the Court in the following cases, that is to say....._
....."

..... U] if the action begun by the writ being properly brought against a person duly served within the jurisdiction, a person out of the jurisdiction is a necessary or proper party thereto....."

Counsel for the respondents contended that this jurisdictional ground for extra-territorial service was not available to the appellant because the action was not properly brought against a person duly served within the jurisdiction. According to counsel, that person was Sunset and there is no proof of service of the writ on Sunset within the jurisdiction. Hewlett J however concluded that "Perhaps one is expected to presume that the Writ was served because Sunset entered an appearance on the 29th March 1988....."

I will assume that the jurisdictional ground prescribed by Order 11 r I U] for extra-territorial service was available to the appellant and that the appellant has therefore satisfied one of the preconditions of the grant of leave to serve notice of the writ out of the jurisdiction. There is however another precondition of the grant of such leave. That precondition is stipulated in Ord 11 r 4[2] which reads:-

"No such leave shall be granted unless it shall be made sufficiently to appear to the court that the case is a proper case for service out of the jurisdiction under this Order."

A case is not a proper case for extra-territorial service if the local court is not the forum conveniens. A local court should not be held to be the forum

conveniens unless, having regard to all relevant factors, it appears that the local

court has a real and substantial connection with the action and is the most appropriate court for the trial of the action in the interests of all parties and the ends of justice.

In **Spiliada Maritime Corp v Consulex Ltd** [1987] 1 AC 460, Lord Goff

[delivering the leading judgment of the House of Lords], said [at pp 477 & 478]: "Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in *MacShannon's* case [1978] A.C. 795, 812, as indicating that justice can be done in the other forum at "substantially less inconvenience or expense." Having regard to the anxiety expressed in your Lordships' House in the *Societe du Gaz* case, 1926 S.C. (H.L.) 13 concerning the use of the word "convenience" in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in *The Abidin Daver* [1984] A.C. 398, 415, when he referred to the "natural forum" as being "that with which the action had the most real and substantial connection." So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see *Credit Chimique v James Scott Engineering Group Ltd.*, 1982 S.L.T. 131) and the places where the parties respectively reside or carry on business."

In the present case, the indications are that France is the most appropriate forum for the trial of the action in the interest of all parties and the ends of justice. The most significant indication is the fact that French law is the proper law of the contracts in issue. This is admitted in paragraph 7 of the appellant's Statement of Claim which reads as follows:

"The above mentioned contracts were made in France and payment was to be made in France. On the hearing of this action the Plaintiff will contend that a proper law of the contract is French."

By contrast, there is no real or substantial connection between this action and the State of Saint Vincent & the Grenadines. This State is the virtual hinterland of the contracts upon which this action is based. In these circumstances, there can be no justification for instituting these proceedings in this

State.

said:-

In **MacShannon v Rockware Glass Ltd** [1978] A.C. 795 at 831 Lord Keith I

"The position is, in my opinion, that the plaintiff in this case has shown no reasonable justification for bringing his action in England when the natural forum is Scottish. There would be no injustice to him in requiring him to go back to his own court. But there would, in my opinion be some injustice to the defendants in requiring them to continue with the English action. The affidavit of their English solicitor in effect states that this would involve them, to a substantial degree, in unnecessary inconvenience and expense. That is what one would naturally expect in the circumstances. While these considerations are to some extent a matter of degree, I do not consider it to be in general reasonable or just, when a plaintiff has no good reason for suing in England, to require the defendant to incur the extra inconvenience, in the shape particularly of working days lost by witnesses in his employment, with greater or less disruption of productive work, and the extra expense of transporting and accommodating witnesses, involved in litigation in an unnecessarily remote tribunal."

Further, on 22nd July 1992, Colonel Muftah Dakhil [a Colonel in the Libyan

Armed Force] swore an affidavit, paragraphs 19 to 21 of which read as follows:

"19. Panamanian A. Company and its representative Mr. Starckmann brought suits before the Tribunal de Commerce de Paris CCF and The Banque Paribas in relation to the subject contract. The said actions resulting in adverse judgments against the claims of both Panamanian A. Company and Mr. Starckmann. Copies of these judgements dated 10th February 1988 and 30th March 1990 are exhibited marked "MD 12" and "MD 13" respectively.

20. During one hearing before the Tribunal de Commerce Paris, Panamanian A. Company affirmed that the Agreement for the assignment between Panamanian A. Company and Panacom International which purportedly forms the basis of the Plaintiff's claim herein has been cancelled as the same is indicated on Page 9 of the judgement exhibited herewith dated 10th Feb. 1988.

21. The Libyan Armed Forces brought civil suit against Panamanian

A. Company Mr. Strackmann and CCF Panacom and Owens Bank LIMITED before the Tribunal de Commerce de Paris, France. This being the court which both parties to the contracts abovementioned intended at the time of the negotiations between myself and Mr. Starckmann, should have jurisdiction to adjudicate over any disputes arising out of or in connection with the said contracts. The next hearing before The Tribunal de Commerce de Paris is scheduled for 16th September 1992. At this hearing the court will consider the merits of The Libyan Armed Forces claim for recovery of the above mentioned such as against the said Defendants."

Colonel Dakhil's Affidavit [which was not refuted] proves that at the time of the grant of leave to the appellant to serve notice of the writ on Libya out of the jurisdiction, the causes of action sought to be litigated here were being litigated in France and judgments had already been obtained there on some of

those causes of action. The Affidavit also establishes that when it was sworn, the '

litigation was still pending in the French Courts. The question therefore arises as to whether the litigation in France negates justification for litigation in Saint Vincent and the Grenadines.

In **The Abidin Daver** [1984] I A C 398 at 411 & 412, Lord Diplock said:

"Where a suit about a particular subject matter between a plaintiff and a defendant is already pending in a foreign court which is a natural and appropriate forum for the resolution of the dispute between them, and the defendant in the foreign suit seeks to institute as plaintiff an action in England about the same matter to which the person who is plaintiff in the foreign suit is made defendant, then the additional inconvenience and expense which must result from allowing two sets of legal proceedings to be pursued concurrently in two different countries where the same facts will be in issue and the testimony of the same witnesses required, can only be justified if the would-be plaintiff can establish objectively by cogent evidence that there is some personal or judicial advantage that would be available to him only in the English action that is of such importance that it would cause injustice to him to deprive him of it."

In **de Dampierre v de Dampierre** [1987] 2 A E R I at 10, Lord Goff said: "But if, for example, genuine proceedings have been started and have

not merely been started but have developed to the stage where they have had some impact on the dispute between the parties, especially if such impact is likely to have a continuing effect, then this may be a relevant factor to be taken into account when considering whether the foreign jurisdiction provides the appropriate forum for the resolution of the dispute between the parties."

Regrettably, when the appellant applied for leave to serve notice of the writ on Libya extra-territorially, the appellant did not draw the attention of the court to the pending legal proceedings in France. The result was that vital information which was necessary to enable the court to exercise its judicial discretion judiciously was inadvertently or otherwise withheld from the court.

In my judgment, this is not a proper case for service of a writ or notice of a writ outside the jurisdiction. The local court is not the forum conveniens or the most appropriate forum for the trial of the action in the interest of all parties and the ends of justice. No cogent or other evidence has been adduced of any personal, judicial or juridical advantage which the appellant could derive by bringing or continuing the action locally and which is of such importance that

deprivation of it could cause injustice to the appellant. The facts that the proper law of the contracts is French law, that legal proceedings were initiated in France and that justice can evidently be done at substantially less inconvenience and expense in France than locally clearly indicate that the forum conveniens is a French Court and not the High Court of Saint Vincent and the Grenadines. The leave granted to serve notice of the writ on Libya out of the jurisdiction was therefore properly set aside. The result is that the default judgment entered against Libya on the basis of that leave should also be set aside.

These conclusions should be sufficient to dispose of this appeal. However, since the default judgment has been impugned on other grounds, the most important of these grounds should at least be considered.

[3] The default judgment

Counsel for Libya disputed the default judgment on the grounds that [1] the extra-territorial service of the writ was effected in breach of the provisions of the English R.S.C. Order 11 rule 7 and [2] the default judgment was entered in breach

20. **10** - of the provisions of the English R.S.C. Order 13 rule 7 **A**.

Order 11 rule 7 is entitled "Service of process on a foreign State" and Order 13 rule 7 A is entitled "Judgment against a State". Both rules were designed to accommodate the English State Immunity Act 1978. This is clearly indicated in the first sub-rules of both rules. Order 11 rule 7[1] reads: "Subject to paragraph [4] where a person to whom leave has been granted under Rule 1 to serve a writ on a State, as defined in section 14 of the State Immunity Act 1978, wishes to have the writ served on that State, he must lodge in the Central Office - [a]....[b]...[c]..." Order 13 rule 7 A[1] reads: "Where the defendant is a State, as defined in section 14 of the State Immunity Act 1978 ["the Act"] the plaintiff shall not be entitled to enter judgment under this Order except with the leave of the Court".

Our R.S.C. contain no such provisions. However, counsel contends that the English R.S.C. Order 11 rule 7 and Order 13 rule 7 A are incorporated in our rules by section 11 of the Eastern Caribbean Supreme Court Act No 8 of 1970 which provides as follows:

"The jurisdiction vested in the High Court in civil Proceedings, and in Probate, Divorce and matrimonial causes, shall be exercised in accordance with the provisions of this Act and any other law in operation in Saint Vincent and rules of Court and where no special provision is therein contained such jurisdiction shall be exercised as nearly as may be in conformity with the law and practice administered for the time being in the High Court of Justice in England."

Section 11 of the Supreme Court Act relates solely to the manner of the exercise of the jurisdiction of the High Court. It is therefore an intrinsically procedural provision. The words "provision", "provisions", "law" and "law and practice" appearing in section 11 are evidently intended to be references to procedural (as distinct from substantive) law.

The English law intended to be imported by section 11 is the procedural law administered in the High Court of Justice in England. In enacting section 11, the legislature of Saint Vincent and the Grenadines could not have intended to import English substantive law or English procedural law which is adjectival and purely ancillary to English substantive law. The English State Immunity Act 1978 is substantive law and the English R.S.C. Order 11 rule 7 and Order 13 rule 7A are procedural laws adjectival and purely ancillary to that substantive law. These procedural English laws are therefore not caught by the Supreme Court Act. Consequently, the objections to the extra-territorial service and the default judgment on the grounds of breaches of these English procedural laws are untenable.

A tenable objection to the default judgment is the fact that it was entered for an amount in excess of the amount actually due at the time of the judgment. In paragraph 6 of its Statement of Claim, the appellant stated that "The said goods were delivered to the 2nd named Defendant but the 2nd named Defendant has only paid (US) \$10,697,400.00 leaving a balance of (US) \$4,584,600.00 together with the guarantee bond making a total of (US) \$5,334,600.00." Yet, the appellant proceeded to enter default judgment by way of "A declaration that the Defendant

is indebted to the Plaintiff in the sum of (US) \$13,500,000.00 with interest at the rate of 10% per annum from the 13th day of April, 1987, until payment." The default judgment was therefore excessive and irregular. On that ground alone, Libya was entitled as of right or ex debito justitiae to have the default judgment set aside.

[4] Conclusion

In my judgment, Libya does not enjoy foreign state immunity from the jurisdiction of the courts of Saint Vincent and the Grenadines with respect to the appellant's claims against it. However, for the reasons which I have given, the leave granted to serve notice of the writ on Libya extra-territorially, the extra territorial service of the notice of the writ on Libya and the default judgment entered by the appellant against Libya were all irregular and were all correctly set aside.

- I would accordingly dismiss this appeal with costs to the Arabic Republic of Libya.

SIR VINCENT FLOISSAC

CHIEF JUSTICE

I concur

C. M. DENNIS BYRON

JUSTICE OF APPEAL

I concur

DR. N.J.O. LIVERPOOL

JUSTICE OF APPEAL