

EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF ST. CHRISTOPHER AND NEVIS
NEVIS CIRCUIT

IN THE HIGH COURT OF JUSTICE
(CIVIL)

SUIT NO: NEVHCV2015/0143

BETWEEN:

Heritage Plantation Inc.
Mervin Grant

1st Applicant
2nd Applicant

and

Heritage Plantation Condominiums Ltd
Doche & Doche Inc.
Victor Doche
Rafik Doche

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent

Appearances: Dr. Henry L.O.S Browne Q.C, with Mr. John Cato for the Applicants.

Mr. Sylvester Anthony with Ms. Angelina Gracy Sookoo for the Respondents.

2016: July 7
2016: December 2

JUDGMENT

[1] **WILLIAMS, J.:** This matter commenced on the 16th December 2015 by an Application without notice and an affidavit in support of the Application without notice for a freezing order by the Applicants to restrain the Defendants from removing from the Federation of

St. Kitts and Nevis assets located within the said Federation of St. Kitts and Nevis up to the value of US\$89.5 million or in any way withdrawing, disposing or dealing with the stated amount.

[2] The Court upon hearing the ex-parte submissions of the Applicants granted the Application for a freezing order inter alia in the following terms:

1. That the Respondents be restrained from removing from the Federation of Saint Kitts-Nevis, or of disposing of dealing with or diminishing the value of its assets, whether in its own name or not whether jointly or severally owned, located within the Federation of St. Kitts and Nevis up to the value of \$89.5 million US dollars.
2. That the Respondents inform the Solicitors for the Applicants in writing within seven (7) days of the date of this order for the value, location and details of their assets within the Federation of St. Kitts and Nevis up to the amount of \$89.5 million US dollars.
3. That the Respondents, jointly or severally do produce authenticated copies of all documents/records in relation to any and all accounts held in the names of the Respondents jointly and or jointly with any other persons for the period between 21st July 2010 to present and allow the Applicants to inspect, take extracts, make copies and retain the same documents/records for as long as is reasonably necessary to make copies of them.
4. The Documents/Records should include but are not limited to the following:
 - i. Original signature card.
 - ii. Documentation of Accounts opening.
 - iii. Accounts, Leger cards
 - iv. Periodic Account statements

- v. Records (copied front and back) of all items, deposited, withdrawn, disbursed or transferred.
- vi. Wire Transfers.
- vii. Memoranda relating to Accounts held by the Respondents, severally and jointly and or jointly with any other persons.
- viii. Cheques issued and or deposited and documents sufficient to identify the current balance in the accounts.

[3] A further hearing in respect of the Order was scheduled for the 15th January 2016.

[4] On the 21st December 2015 the Defendants filed a Notice of Application to Discharge the Freezing Injunction seeking an Order that:-

- a) The said Order made on the 17th December 2015 be stated forthwith from having or being enforced pending the determination of the Application to discharge the said order.
- b) The Ex-Parte Order dated 17th December 2015 be discharged in its entirety.
- c) Costs of this application to be paid by the Claimants to the Defendants.
- d) An Inquiry be made as to Damages caused by the granting of the Ex-Parte Order.

[5] The Notice of Application was supported by three affidavits of the 4th Respondent Rafik Doche, a Director of the 1st and 2nd Respondents who deposed in his affidavit that the Freezing injunction should be discharged.

[6] The Claimants also filed an Affidavit in opposition to the Application to discharge the Freezing order on the 28th December 2015.

[7] On the basis of the Applications and submissions by both parties, the Court found that it was just and convenient that the Freezing order be discharged, and that the effect of a continuation of the Freezing Injunction would be unduly oppressive to the 1st Respondent's

business and would be an undue interference with the operation of its normal course of business and its ability to pay its lawful debts and expenses.

The Freezing order was discharged on the 28th December 2015 and the matter adjourned to the 8th January 2016 for report and further hearing. The matter was then further adjourned to a date to be fixed by the Registrar.

[8] On the 1st February 2016, the Applicants/Defendants Heritage Plantation Condominiums Ltd, Doche & Doche Inc et al. filed an application for the following orders:

1. A Declaration that having regard to the circumstances of the case, this Court will excuse its jurisdiction on the ground of Forum non conveniens.
2. A Declaration that the Saint Christopher Circuit of the Eastern Caribbean Supreme Court is the more natural and appropriate Forum for the trial of this claim.
3. An Order that the Claimants' claim is struck out on the basis that this Court will not exercise its jurisdiction on the ground of Forum non conveniens.
4. Alternatively in the event that the Application to strike out on the ground of Forum non conveniens is unsuccessful, an Order that the Claimants' claim against the 3rd and 4th Defendants, and the 2nd Claimant's claim against the Defendants is struck out on the ground that it does not disclose a reasonable ground for bringing the claim pursuant to CPR 23 (1) (b).
5. An Order that the Claimants pay the Defendants the costs of this Application.
6. Alternatively, in the event that any of the Applications to strike out are unsuccessful in whole or in part, an order for an extension of time to file a Defence within 28 days of the determination of this Application.

[9] The grounds of this Application are:-

Forum non conveniens

1. Pursuant to CPR 9.7(1) a Defendant who disputes the Court's jurisdiction to try the claim may apply for a Declaration to that effect and pursuant to CPR 9.7(2) (3), that the said Defendant must first file an Acknowledgment of Service and such application must be made within the time for filing a Defence.
2. Pursuant to CPR 10.3 (1) the period for filing a Defence where the Claim Form is issued in one Court and served in another is 42 days after the date of service of the Claim Form. In the case at Bar, the claim as served on December 21, 2015; the Applicants filed their Acknowledgment of Service on the 30th December 2015. The period for filing a Defence therefore ends on 2nd February 2016.
3. Pursuant to CPR 9.7 (6) (c) an order under Rule 9.7 that the Court may also strike out a Statement of Claim.
4. The Saint Christopher and not the Nevis Circuit is the most appropriate Forum for the trial of this action. The Saint Christopher Circuit has the most real and substantial connection to the subject claim, in the circumstances is and was always readily available to the Claimants, and has competent jurisdiction to deal with the issues raised in this matter.

No reasonable ground for bringing the claim

5. The Court under its inherent jurisdiction and Rule 26.3 (1) (b) has a discretion to strike out and or dismiss any proceedings which fail to disclose any reasonable ground for bringing or defending a claim.
6. The 2nd Claimant does not have the locus standi to bring or prosecute the subject claim in that he is not a party to any of the agreements allegedly breached by the Defendants and therefore cannot sue or enforce the same pursuant to the doctrine of privity of contract. As a result the statement of case no matter how complete and apparently correct it may be will fail as a matter of Law.

7. The 3rd and 4th Defendants cannot be prosecuted in the subject claim in that they are not parties to any of the agreements allegedly breached by the Defendants and therefore cannot be sued pursuant to the Doctrine of privity of contract. As a result the statement of case will fail as a matter of Law.

Extension of Time to file a Defence

8. Pursuant to CPR 9.7 (7) (b) the Court must make an order as to the period for filing a Defence if it does not make a Declaration on an application under Rule 9.7
9. Further or in the alternative, pursuant to CPR 10.3(2) the period for filing a Defence where the Claim Form is issued in one circuit and served in another is 42 days after the date of service of the Claim Form. In the case at Bar, the claim was served on the 21st December 2015. The period for filing a Defence therefore ends on 2nd February 2016 under Rule 10.3 (9) the Defendant may apply for an Order extending the time for filing a Defence.
10. Rule 26.1 (2) (k) gives the Court the power to extend the time for complying with any rule even if the application is made after the time for compliance has passed.
11. The Application for extension of time is made within the time for filing a Defence and in conjunction with the Application to strike.
12. The Legal principles indicate that an application to strike ought properly to be brought prior to the filing of a Defence as the Defendant who files a Defence on the merits in response to a defective claim is at risk of being denied its application as that application would be inconsistent with defending the proceedings.

The Claimants' response

13. In response to the Defendants application, the Claimants contend as follows:
 - i. That the Federation of Saint Christopher and Nevis comprises of a Supreme Court with two circuits, one in Saint Christopher (Saint Kitts) and one in Nevis.

Both statute and common Laws are equally applicable to and practiced in both circuits, and the Law and procedure in the two circuits are identical. St. Kitts and Nevis comprise one jurisdiction and there is one corpus of law applicable to both jurisdictions; there is no issue as to a Foreign jurisdiction and there is one set of Courts created by the Supreme Court Order 1967. A Judge in one circuit has like or equal authority or powers as in the other and it is only in recent times that there is one Judge in the Nevis Circuit and one in the Saint Christopher Circuit.

Historically Resident Judges in St. Kitts and Nevis interchanged and sat in either circuit as the situation demanded.

- ii. Forum non conveniens is a doctrine by which a Court may refuse to hear a dispute and grant a stay of proceedings where there is a more convenient Forum in a foreign court.
- iii. The question is not one of the convenience but of the suitability or appropriateness of the relevant Forum. The principle is that a case may be tried more suitably for the interest of the parties and the ends of Justice.
- iv. The trial of this case in the Nevis Circuit as opposed to the Saint Christopher Circuit does not provide any advantage to any of the parties. The subject matter of the dispute, are that the funds are lodged in an account at the Bank of Nevis Ltd, a Bank situated in Nevis.
- v. The burden of proof rests with the Applicants/Defendants to persuade the Court to exercise its discretion to grant a stay. They must show that the Saint Christopher Circuit is an available Forum and more appropriate. In any event all parties subjected themselves to the jurisdiction in this circuit and properly took several formal steps in these proceedings.

Time of the application

- vi. An application like this is founded on the **Forum non conveniens** doctrine.

Usually this Doctrine comes into play at the commencement of legal proceedings.

This application did not. The Respondents/Claimants contend that a challenge to the jurisdiction of the Court to try this matter or to exercise its jurisdiction over the parties to hear and determine the dispute, invariably acknowledge that the Applicants/Defendants will not be resident or incorporated within the particular jurisdiction. All parties to this dispute are resident and/or incorporated in Saint Christopher and Nevis.

- vii. The procedure under CPR 9.7 (3) provides that;

9.7 (1) A Defendant who disputes the Court's jurisdiction to try the claim may apply to the Court for a declaration to that effect.

9.7 (3) An application under this Rule must be made within the period for filing a Defence; the period for making an application under this Rule includes any period by which the time for filing a Defence has been extended where the Court has made an order or the parties have agreed to extend the time for filing a Defence. Acknowledgment of Service in this matter was filed and served. A Defence ought to have been filed within 28 days after acknowledgment of service and that even if the Court grants an extension of time, this does not affect the operation of CPR 9.7 (3).

The Issues

[10] The issues for determination by this Court are:

- a) Whether the Saint Christopher Circuit of the Eastern Caribbean Supreme Court is the appropriate Forum for the trial of this matter.

- b) Whether the Claim brought by the 2nd Claimant against the 3rd and 4th Defendants should be struck out as an abuse of process pursuant to Rule 26.3 (1) (c).
- c) Whether the Defendants should be granted an extension of time to file their Defence in this matter.

Issue No. 1

- [11] **Whether the Saint Christopher Circuit of the Eastern Caribbean Supreme Court is the more appropriate or natural Forum for the Trial of this matter- This scenario is unique to St. Kitts & Nevis.**
- [12] Rule 8.3 (2) states that “where proceedings relate to Land they may be commenced only in the Court office for the Member State Territory or **Circuit** in which the land is situated. Rule 8 (3) states that any other proceedings may be commenced only in the Court office for the Member State Territory or **Circuit** where either the-
- a) Cause of action arose; or
 - b) The Defendant resides or carries on business.

The Fundamental Principle

- [13] According to Goff L.J in the House of Lords case of **Spiliada Maritime vs Consulex Ltd.**¹
- “In cases where jurisdiction has been founded as of right (i.e.) where in this country the defendant has been served with proceedings within the jurisdiction, the Defendant may now apply to the Court to exercise its discretion to stay the proceedings on the ground which is usually called Forum non conveniens....
- I feel bound to say that the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction.

¹ [1986] 3 A11ER 853

In my opinion, having regard to the authorities like The Abidin Daver² and Trendtex Trading Corp vs Credit Suisse³, the law can at present be summarised as follows;

- a) The basic principle is that a stay will only be granted on the ground of Forum non conveniens where the Court is satisfied that there is some other available Forum having competent jurisdiction which is the appropriate Forum for the Trial of the action. (i.e.) in which the case may be tried more suitably for the interests of all the parties and the ends of Justice.
- b) The burden of proof rests on the Defendants to persuade the Court to exercise its discretion to grant a stay.
- c) Whether there is some other Forum which is the appropriate Forum for the trial of the action.

See: IPOC Intl Growth Fund Ltd vs LV Finance Group Ltd⁴

- [14] In applying the principles and the Rules of the CPR in particular Rule 8.3 and Rule 9.7 of the CPR, I note that in the Affidavit of Rafik Doche filed on the 1st February 2016 at paragraphs 4 & 5 it was stated that the Saint Christopher Court was the more appropriate Court in that it is more suitable for the interests of all parties.
- [15] Consequently the Defendants by invoking Rule 9.7 of the CPR have sought to challenge the jurisdiction of the Court on the issue of Forum non conveniens from the 1st February 2016.
- [16] When considering whether to grant a stay of proceedings or not, the Court will look to what is the “natural Forum” as was described by Lord Keith of Kinkel in the “Abidin Daver” “that which the action has the most real and substantial connection.”

² [1984] AER 470

³ [1981] 3 A11 ER 520

⁴ BVI Civil Appeal 18 No. 20/2003 & 1/2004

In this connection, the Court will be mindful of the availability of witnesses, the likely languages they speak, the Law governing the transactions or to which the frutification of the transactions might be subject. The list of factors is by no means meant to be exhaustive, but rather indicative of the kinds of considerations a Court should have in exercising its discretion.

[17] If the Court determines that there is some other available and prima facie more appropriate Forum then ordinarily a stay will be granted unless there are circumstances by reason of which Justice requires that a stay should nevertheless not be granted. Such a circumstance might be that the Claimant will not obtain Justice in the appropriate Forum; Lord Diplock in the Abidin Daver made it very pellucid that the burden of proof to establish such a circumstance was on the Claimant and that cogent and objective evidence is a requirement.

[18] The Defendants have cited Section 3 of the Registration and Records Act Cap 23.25 which recognizes that there are two separate circuits which divide the State:

- a) The Saint Christopher Circuit which shall comprise of the State, save and except the Island of Nevis
- b) The Nevis Circuit which shall comprise the Island of Nevis

At Section 7 of the said Act it provides as follows;

7 (1) “ Every deed shall be lodged in the Record office of the Circuit in which the land thereby affected is situate for registration within the time hereinafter limited.”

[19] The Defendants contend that the said Act provides that in relation to Land situated in Saint Christopher, these matters must be recorded or commenced in the Saint Christopher Circuit.

- [20] The Defendants further contend that the Claimant Company and the Defendants Companies conduct business within the Saint Christopher Circuit and that those companies were incorporated under the **Companies Act Cap 21.03** while limited liability companies operating in Nevis are incorporated under the **Nevis Limited Liability Company Ordinance Cap 7.04 (N)**.
- [21] The Defendants submit that these are the factors connecting these proceedings with the Saint Christopher Circuit jurisdiction not only as an available Forum, but as the only Forum with which the action has the most real and substantial connection.
- The Defendants contend that the Rules of Court and the governing legislation create an exclusive Forum as of right in the Saint Christopher Circuit.

Court's Analysis

- [22] The relevant test is that the Court must be satisfied that there is some other available Forum, having competent jurisdiction which is the appropriate Forum for the trial of the action (i.e.) in which the case may be tried more suitably for the interests of all the parties and the ends of Justice.

See: Spiliada Maritime Corp vs Consulex Ltd.

- [23] I have reviewed the Affidavit evidence of the Claimants and the Defendants and the Rules of the CPR 2000 in particular Rule 8.3 (2) and Rule 2.4 and I am fortified in my view that the intention of the CPR Rules is that the Saint Christopher Circuit and the Nevis Circuit of the High Court are to be treated as two separate and distinct fora and are to be viewed as independent of each other.
- Further under Rule 10.3 (2) it states;
- “If a Claim Form is issued in one Member State, Territory or Circuit and served in another, the period for filing a Defence is forty two days after the date of service.”

- [24] On a perusal of the Claim Form and Statement of Claim filed by the Claimant on the 16th December 2015, I have observed that the Claim revolves around a contract dated 21st July 2010 between the Claimants and the Defendants to enter into a Joint Venture agreement to construct Condominium Units on lands owned by the Claimants in Saint Christopher. The Claim alleged Breach of Contract by the Defendants and demands accountability for sales of Condominium Units at Scotch Bonnet, Southeast Peninsula being land situated in Saint Christopher and monies received by the Defendants and/or the Bank of Nevis.
- [25] I have therefore concluded that the funds at the Bank of Nevis Ltd. is not a matter of dispute and the Bank of Nevis Ltd is not a party to this action.
- [26] I have also perused the Affidavit in opposition to discharge the ex-parte order filed by Mr. Mervin Grant the 2nd Applicant/Claimant on the 28th December 2015; at paragraphs 4, 5, 6 & 7 Mr. Grant deposes as follows:
1. That the 1st named Applicant is a limited liability company incorporated under the Laws of Saint Christopher and Nevis with its registered offices situate at **Bladen Housing Development Bay, St. Kitts.**
 2. That the 1st named Respondent is a limited liability company incorporated under the laws of Saint Christopher and Nevis with its registered office situate at the Law offices of Sylvester Anthony, Unit C16, Sands Complex. Bay Road, Basseterre, St. Kitts.
 3. That the 2nd named Respondent is a limited liability company incorporated under the Laws of Saint Christopher and Nevis with its registered office situate at the Law offices of Sylvester Anthony, Unit C16, Sands Complex. Bay Road, Basseterre, St. Kitts.
 4. That the 3rd and 4th named Respondents are individuals resident in the Island of Saint Christopher.

[27] Having regard to this Affidavit evidence, I am satisfied that the Claimants and the Defendants all conduct business within the Saint Christopher Circuit and all reside in the Saint Christopher Circuit.

[28] In my considered opinion, the legal authorities and the Civil Procedure Rules establish with clarity, a burden of proof on the Defendant and the nature and quality of what is to be proved.

I unreservedly adopt the reasoning of the learned Justice of Appeal Edwards in the case

Management Services Ltd vs Cukurova Holdings AS (2) Cukurova (BVI) Limited⁵

The learned Justice of Appeal stated “It seems sufficient that the authorities merely emphasise the requirements that the Defendant is to prove, and inferentially what conclusion the Court should arrive at from such evidence in order for the proceedings to be stayed. (i.e.) The Court should be able to conclude that another available Forum is clearly or distinctly more appropriate. The Defendants’ duty is to adduce evidence which fulfils the criteria established by the authorities.”

[29] I am therefore satisfied on a review of the submissions, the authorities and the Rules of Civil Procedure, that the Defendants have fulfilled the duty to adduce evidence, and have provided ample proof that the jurisdiction of Saint Christopher is the Forum conveniens for this matter to be tried and further that it is not only the available Forum, but is the Forum with which this action has the most real and substantial connection.

Secondly, I am of the view that a cause of action alleging Breach of Contract arose out of Land transactions in Saint Christopher and that all of the Defendants reside and carry on business in Saint Christopher.

⁵ HCVAP2007/0025

[30] **Issue No. 2**

Whether the Claim brought by 2nd Claimant against the 3rd and 4th Defendants should be struck out as an abuse of process pursuant to Rule 26.3 (1) (c).

[31] In light of my findings on **Issue 1** that this Court is not the Forum with a “real and substantial connection to this Claim, it would be highly unjust and unfair to both parties if this Court would seek to pronounce on this issue and I am of the respectful opinion that the Saint Christopher Circuit Court is the proper Forum to determine this Issue.

[32] **Issue No. 3**

Whether time should be extended to the Defendants to file a Defence

[33] Rule 9.7 (7) (a) of the CPR states that if the Court does **NOT** make a declaration under this Rule that it does **NOT** have jurisdiction it must make an order as to the period for filing a Defence.

[34] This Court has made a finding that it is not the Forum which has a real and substantial connection to this matter and is of the further opinion that the Saint Christopher Circuit Court will determine this issue of the extension of time to file the Defence in this matter which was filed on the 3rd February 2016.

[35] The Claimants have also filed on the 24th March 2016 a request for entry of Judgment in default of Defence pursuant to CPR 12.8 (3) and this issue will have to also be determined by the Saint Christopher Circuit Court, which has the real and substantial connection to this matter.

Conclusion

[36] In summary therefore, I am satisfied on the totality of the evidence that;

- 1) The Jurisdiction of the Saint Christopher Circuit Court is the correct Forum for this action and the Forum with which this action has the most real and substantial connection and this Court will decline jurisdiction in this matter.
- 2) The Defendants' Application to strike out the Claimants' Statement of Claim on the basis of Forum non conveniens is denied and the matter is to be discontinued, refiled and determined by the High Court of the Saint Christopher Circuit.
- 3) The Defendants' application for an extension of time to file a Defence is to be heard and determined by the Saint Christopher Circuit of the High Court of Justice of the Eastern Caribbean Supreme Court.
- 4) Costs to the Defendants to be agreed on or assessed in accordance with Part 65.5 of the CPR 2000.
- 5) That a stay of proceedings in this matter is granted in the Nevis Circuit Court on the ground that this matter is to be discontinued in the Nevis Circuit and refiled in the Saint Christopher Circuit.

[37] I wish to thank learned Counsels on both sides for their research and helpful submissions on this novel Legal argument.

Lorraine Williams

High Court Judge.