

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL CLAIM NO. 299 OF 2003

BETWEEN:

P B NEUMATICO PARTNERSHIP

Claimant

v

**CHRISTIAN HOBARTH
JUDITH JOANNE HOBARTH NEE LEWIS
NATIONAL COMMERCIAL BANK**

Defendants

Appearances:

Ms. Nicole Sylvester with Mr. Richard Williams for the Claimant
Mr. Emery Robertson together with Mr. Joel Pitt for
the First and Second named Defendants
Mr. Graham Bollers for the Third named Defendant

2003: October: 9
2004: January 27
2004: March 22

JUDGMENT

- [1] **BLENMAN, J (Chambers):** This is an Application by Christian Hobarth, Judith Joanne Hobarth nee Lewis (the Hobarths) to discharge the injunction that was granted against them in favour of P B Neumatico Partnership. P B Neumatico has applied to have the injunction which it obtained continued until the hearing and determination of the substantive matter.

- [a] P B Neumatico has instituted proceedings against the Hobarths and the National Commercial Bank (the third Defendants) in which it seeks to enforce a judgment obtained in Austria against the first and second Defendants.
- [2] P B Neumatico contends that:
- (a) On or about the 12th day of June 2003 they obtained a judgment against the Defendants for the sum of US\$86,100.00 (E.C. equivalent of \$233,925.09) from the District Court for criminal cases in Vienna, 1080 Vienna, Landgerichtsstrasse 11, Vienna, Austria.
 - (b) The said Judgment is final and conclusive and constitutes an enforceable judgment.
 - (c) It also contends that the said proceedings arose from the fraudulent activities of the Defendants against the Claimants and for which the proceeds of the said fraud were transferred and are held at accounts presently at the National Commercial Bank, Bedford Street, St. Vincent and the Grenadines in the names of the Defendants.”
- [3] Accordingly it sought the following reliefs:
- (a) Damages in the sum of US\$86,100.00 (E.C. equivalent of \$233,925.09).
 - (b) An order that the National Commercial Bank transfers the sum of US\$86,100.00 (E.C. equivalent of \$233,925.09) held by them on behalf of the First and Second named Defendants.
 - (c) Alternatively, a mandatory injunction that the Defendants return the sum of US\$86,100.00 or it (E.C. equivalent \$233,925.09) to the Claimants forthwith.
 - (d) Costs to be assessed.
 - (e) Such further or other reliefs.
- [4] Meanwhile pursuant to Notice of Application dated 29th July 2003 P B Neumatico sought interlocutory relief that the Hobarths be restrained whether by themselves, their servants agents or howsoever otherwise from conveying, removing from the jurisdiction, selling, charging, pledging, mortgaging, transferring, or in any other way dealing with any of its assets both real and personal up to the value of US\$86,100.00 or its (EC Equivalent of

\$233,925.09) held at the National Commercial Bank, Grenville Street, Kingstown until final determination of the proceedings or until further order.

[5] On the 31st July 2003 interlocutory reliefs were granted to P B Neumatico namely:

- [a] That the Defendant be restrained whether by themselves, their servants agents or howsoever otherwise from removing from the jurisdiction, disposing of or otherwise dealing with in any manner their assets as the National Commercial Bank SVG Limited, within the jurisdiction, save insofar the as the value of the same exceeds the sum of US\$86,100.00 or its EC Equivalent of \$233,925.09 until the 25th day of September 2003.
- [b] That the Applicant be set down for further consideration on the 25th day of September 2003 on which date the injunction will terminate unless a further order is made.
- [c] The Defendant may cause this Order to cease to have effect if it provides security by paying the sum of US\$86,100.00 or its EC Equivalent of \$233,925.09 into Court to be held under the control of the Registrar at the National Commercial Bank, Grenville Street, Kingstown or makes provision for security in that sum by some other method agreed with the Plaintiff's Solicitor.
- [d] Liberty to the Defendants to apply on notice to the Claimant's Solicitors to set aside or vary this order.
- [e] That the Applicant serves the claim form and this application and all related documents on the defendants by way of personal service or substituted service by Federal Express or an alternative courier service at the Prison at Strafvollzugsanstalt Hirtenberg, Leobersdorferstrabe 16, 2552 Hirtenberg, Austria, Europe allowing 49 days for acknowledgement of Service.

- [6] On the 17th day of September 2003, P B Neumatico filed a Notice of Application seeking the continuation of the Injunction that was granted on 31st July 2003.

In support of the Notice of Application to continue the Injunction Mr. Richard Williams (Attorney-at-law) deposed to facts in his Affidavit and together with the following Exhibits:

Exhibit R.W. 1 – Titled affidavit by Arnold Gersha Lawyer

Exhibit R.W. 2 – Im Namen der Republic

Exhibit R.W. 3 – This appears to be a translation of Exhibit R.W. 2

Exhibits R.W. 4 and R.W. 5 – both of which are not written in English.

- [7] The Hobarths have become aware of the order and retained the services of Mr. Joel Pitt (Attorney-at-law) who has filed an application on their behalf seeking the variation or setting aside of an interlocutory injunction which was granted on the 31st July 2003. Alternatively they seek to have the court strike out the claim on the ground that it is an abuse of its process. They request that the court refuses or dismisses P B Neumatico's application for the continuation of the ex parte injunction on the basis that it was obtained based on suppressed facts or the non-disclosure of material facts.

- [8] In support of the Notice of Application filed on behalf of the Hobarths, Joel H. Pitt swore to an affidavit on the 22nd day of September 2003 together with exhibits.

In his affidavit Mr. Joel H. Pitt stated in paragraph 2:

"I received (1) a Claim form on the 23rd day of August 2003. I also received via Federal Express, from the First and Second-named Defendants, an authorization to act on their behalf in Claim No. 299 of 2003 together with a copy of a Claim Form, an Acknowledgement of Service and a Defence. See exhibited marked "J.P. 1"

It is observed that exhibit J.P. 1 authorizes Mr. Joel Pitt to be the defendants' attorney-at-law.

- [9] Mr. Pitt stated in paragraphs 6, 7, and 8 as follows -

"6. That the judgment upon which they purport to base their claim was a judgment obtained in a Foreign Court which judgment has not been registered in the State of St. Vincent and the Grenadines and is therefore not enforceable in the court of St. Vincent and the Grenadines.

7. I have been advised by Counsel and I verily believe the same to be true that there is no cause of action vested in the claimant – their rights, if any, having been merged in the criminal justice judgment in Austria.
8. The Order made on July 31 having been an ex parte interlocutory order was obtained by misrepresentation and suppression of material facts thereby causing the Court to fall into error when making the said order.
 - I). The Court acted on an affidavit by one Arnold GERSCHA, an Austrian lawyer, as the alleged affidavit which is exhibited as R.W. 1 was not sworn to nor notarized and is therefore inadmissible evidence and was the factual basis on which the court made its order. I was advised and verily believe the same to be true and that the affidavit did not comply with the Civil Procedure Rules Part 30.5(5).
 - II). In his affidavit he is declaring facts before no person and is therefore not admissible.
 - III). There is no proof that the funds held at the National Commercial Bank belong to the claimant or were derived directly or indirectly from any transaction involving them.”

[10] The Hobarths seek to have the injunction discharged on 4 main grounds namely:

- (1) There was material non-disclosure or suppression of facts by the Claimant
- (2) The judgment did not emanate from a superior court nor was final and conclusive
- (3) P B Neumatico’s failure to register the Austrian judgment was fatal to its enforcement in St. Vincent and the Grenadines.
- (4) Alternatively the Hobarths argue that they are entitled to have the order of July 31 varied so as to be able to withdraw the sum of \$43,000 alleged to represent legal expenses and costs.

The court proposes to address the four grounds in order to determine whether the injunction should be discharged or varied.

[11] **Material Non-disclosure or Suppression of Fact**

Counsel for the Hobarths submitted that the court should discharge the injunction due to the fact that P B Neumatico having misled the court into believing that exhibit RW1 was an affidavit. They contend that it was unsworn and therefore inadmissible.

- [12] P B Neumatico countered that it is not guilty of any suppression of any facts or of any non-disclosure. It asserts that in no way did it mislead the court nor did it ever try to give the impression that the document entitled Arnold Gerscha's Affidavit was an Affidavit. It submits that Richard Williams in paragraph 3 of his affidavit which was filed in support of his Notice of Application for the injunction stated:

"The facts supporting the original claim in Austria are set out in the written statement of Mr. Arnold Gerscha lawyer for the claimant's resident in Austria a copy of which is annexed hereto and marked "R.W. 1"

Both in its written and oral submissions P B Neumatico maintained that at no time during the hearing of the ex parte application did they assert that exhibit RW1 was an affidavit.

- [13] It is the law that the court could discharge an interlocutory injunction without going into its merits if there is evidence on the face of the record to indicate that the applicant in obtaining the ex parte judgment suppressed some material fact or was guilty of non-disclosure. *Brink's MAT Ltd. V. Elcombe* [1988] 1 W.L.R 1350. The Hobarths in seeking to rely on this ground assert that P B Neumatico by utilizing Exhibit R.W. 1 (the purported affidavit of Arnold Gerscha) relied on inadmissible evidence and further that it misrepresented the facts stated in there.

- [14] P B Neumatico in reply maintains there was no material non-disclosure or suppression of information since in the affidavit of Arnold Gerscha (Ex. RW1) though unsworn is clearly referred to in the Affidavit of Richard Williams as a statement. Having reviewed the evidence, I am of the view that while the exhibit cannot be regarded as an Affidavit since it does not conform to CPR 2000. It was never regarded by P B Neumatico nor treated by the court as an affidavit. I find therefore that there was no material non disclosure or suppression of facts based on the evidence of Richard Williams as presented in his Affidavit.

[15] **Non-registration of Judgment**

The applicable law is the Commonwealth Countries Judgment Enforcement Act Cap 82 and the Foreign Judgment (Reciprocal Enforcement) Act Cap. 87. Both parties agree that the Austrian Judgment was not registrable under the Foreign Judgment Reciprocal

Enforcement Act Cap 87 Laws of Saint Vincent and the Grenadines or the Commonwealth Countries Judgment Enforcement Act. Cap. 82.

- [16] The Hobarths however assert that any cause of action P B Neumatico may have had was merged in the judgment. Further, they contend that P B Neumatico's failure to re-register the judgment was fatal. Accordingly they contend that there is no course of action recognizable in St. Vincent and the Grenadines. Section 11 of the Foreign Judgment Reciprocal Enforcement Act provides; that except in so far as the Governor General may by order under this section otherwise direct, no proceedings shall be entertained in the High Court for the recovery of any sum alleged to be payable under a judgment given in a court of country to which this section applies. In the circumstances the Hobarths submit that the Austrian judgment is unenforceable in St. Vincent and the Grenadines. The Hobarths contend that the common law has no application to the matter since the common law is only applicable to England and her territories not to Austria.
- [17] P B Neumatico asserts that it is seeking to enforce the Austrian judgment based on its rights as common law since there are no reciprocal provisions between Austria and St. Vincent and the Grenadines by which the Austrian judgment can be enforced.
- [18] The point of divergence between the parties is that P B Naumatico submits that in the absence of the reciprocity provisions and since the judgment could not be registered it will nevertheless be able to sue on the debt at common law. There is no dispute that there is no legislation which recognizes the Austrian decision. In this regard, it referred the court to R.H Graveson – The Conflict of Laws 5th Ed. P543 which states that “a foreign judgment may be enforced in England in one of two ways wither by an action on the judgment in the English courts, or by simple registration of the foreign judgment in the appropriate English Court as a basis of execution”.
- [19] The court is satisfied that in the absence of any statutory provisions existing in the State of Saint Vincent and the Grenadines for the reciprocal registration and enforcement of Austrian judgment obtained the common law principles apply. I do not hold the view that

the Austrian judgment merged with the claim. P B Neumatico could properly assert its common law rights. Accordingly it was not obliged to re-register the judgment but could have properly sued on the judgment as it did. The Austrian judgment can be enforced in St. Vincent instituting a claim based on the judgment.

Judgment of a Superior Court

[20] The Hobarths argue that the Austrian Judgment could not be registered nor enforced since it did not emanate from a Superior Court. They contend that the word “Mag” in exhibit RW refers to the Magistrate. Further that Magistrate sits in District Court. As a consequence the learned judge erred in granting the injunction based on the Austrian judgment. P B Neumatico asserts that the Austrian decision emanated from a superior court of record and is therefore enforceable. From the evidence provided and the submissions of Counsel, I am unable to determine the level of Court from which this decision emanated.

[21] It is the law that only judgment of superior courts that are final and conclusive can be enforced. However the issue of whether or not the Austrian judgment emanated from a superior court could only be properly determined after a full ventilation of the matter at a trial. It may require the parties leading expert evidence on this aspect of the case. This is not a basis on which a Court I can properly discharge the injunction due to the fact that. I am unable to determine as a fact that the Austrian judgment that emanated for a District Court.

[22] A sub issue that arises for the court’s determination is whether the Austrian judgment is penal in nature and therefore unenforceable in St. Vincent and the Grenadines. The Hobarths contend that it is penal and therefore unenforceable. P B Neumatico denies that it is a criminal judgment and contends that it is enforceable.

[23] Yet again the court finds great difficulty based on the documents exhibited and the evidence led before me to determine whether the Austrian Judgment is penal or otherwise. At first blush it may appear to be so but in the absence of any evidence to assist the court on this issue, I am unable to determine as a fact that the Austrian Judgment is penal.

Accordingly, I am satisfied that this is not a basis on which the Court can properly discharge the injunction. Counsel's bare submission on this issue without the benefit of evidence was unhelpful to my determination of the issue of whether or not the judgment was penal in nature. I will say no more on this sub issue.

Variation of Order – Legal Costs

[24] Alternatively the Hobarths seek to have the Order dated 31st July, 2003 varied so as to enable the National Commercial Bank SVG Ltd. to release the sum of \$48,000 EC to them in order for them to meet their legal expenses and costs.

[25] Before examining the law, I should examine the evidence a little more. There are certain areas of evidence that were unfortunately not explored. For example there was no evidence before me to support the Hobarths contention that they need the monies to meet their legal expenses and costs other than their mere say so. The only evidence in this regard is one paragraph of Joel Pitt's Affidavit in which he requests that the sum of \$48,000 EC be released to pay the legal fees and expense. In addition no evidence was presented to the Court of the details of the legal costs and expenses involved. The only evidence presented to me was the same paragraph in Joel Pitt's Affidavit that merely requested the release of the funds. There were no compelling arguments before the Court to persuade the Court that the funds that are the subject matter of this action are the only funds available to the Hobarths. The Hobarths did not address this aspect of the case.

[26] In the month of January 2004 the Court was left with no alternative than to seek further assistance from Counsel on this aspect of the case. The Court accordingly invited Counsel to produce further submissions on the issue of the variation of the order to make provisions for the Hobarths legal expenses and costs. Learned Counsel for P B Neumatico submitted that the Hobarths have other accounts and monies in St. Vincent and the Grenadines. There was no evidence before me to support Counsel's assertion.

- [27] Counsel for P B Neumatico contended that if the Court is minded to grant a variation for the release of funds that the sum of \$10,000 EC as a reasonable figure for legal expenses. No evidence was provided by Counsel in support of his contentions. Counsel for the defendant submitted that the sum of \$30,000 EC is reasonable sum for the Court to release in order for the Hobarths to offset their legal expenses and costs. Similarly I was not provided with any evidential basis for Counsel's proposition.
- [28] An Order restraining a Defendant from disposing of or dealing with assets within the jurisdiction will be varied on the defendant' application if he swears an Affidavit showing that he needs money to meet bona fide expenses, or to pay the costs of contesting the litigation itself. The Courts have taken a firm line in upholding the rights of the defendant PCW (Underwriting Agencies Ltd. V Dyson) [1983] 2 All ER 158 at 164 of Lloyd J. said
- "I would regard him as being unjust if the defendant should be prevented from defending himself merely because the Plaintiff's says that in doing so he is using someone else's money".
- [29] The Hobarths must satisfy the Court that it is right for the payments to be made from the account in question. AVC [No.2] [1981] Q.B 961 is instructive on this point that is for the Defendant to show that they have no other free assets which can be used to make the relevant payments, but this is not an inflexible rule. They have not satisfied me that they have no other assets from which to meet their legal expenses and costs, even though I have no doubt that I can vary the order to enable them to discharge certain liabilities and expenses once they are bonafide.
- [30] A more liberal approach was taken by the Court of Appeal Campbell Mussels v. Thompson [1985] 8L LS Gaz 2140 the first defendant successfully made application to Bingham J, for a variation of an injunction to enable provisions to be made for the needs of his family and for his legal representation. The Plaintiffs appealed on the basis that apparently contrary to the dicta of Justice Goff J. in A v C [No. 2]. The Plaintiffs alleged that defendant had made insufficient disclosure of his assets. In dismissing the appeal, Sir John Donaldson MR said "what AVC was said to decide that although the court had power

to qualify a Mareva Injunction, such a qualification will not be made unless the defendant satisfied the court not merely that he owed money to someone but also that he did not have any other asset available out of which that debt would be paid” If AVC [No. 2] did so decide it decided it wrong. Every case had to be dealt with on its own merits. The Mareva injunction jurisdiction had never been intended to allow a plaintiff to put himself in the position of a secured creditor. A.V. C [No. 2] illustrated that judges should have a healthy skepticism in dealing with parties to whom Mareva Injunctions applied – Bingham J. had exercised his discretion when he made the variation.”

[31] I prefer the more liberal approach adopted by Sir John Donaldson M R. and applying that principle, I am of the opinion that the Hobarths are entitled to have the Order varied so as to be able to meet the costs of their legal fees.

[32] In the exercise of my discretion I am of the view that the sum of EC\$20,000 is a reasonable sum to be released to the Hobarths to meet their legal expenses and costs.

Conclusion

[33] In the exercise of my discretion and in the interests of justice, I am of the view that National Commercial Bank SVG Ltd. should release to Christian Hobarth and Judith Joanne Hobarth nee Lewis the sum of EC\$20,000 held in their account in order to enable them to meet their legal expenses and costs.

[34] In the premises I am of the view that the Order of 30th July 2003 should be varied so as to enable the National Commercial Bank SVG Ltd. to release the sum of \$20,000 EC, from the Hobarths accounts held at the National Commercial Bank SVG Bank Ltd. in order to meet their legal expenses.

[35] Accordingly, it is hereby ordered as follows - :

[1] Christian Hobarth and Judith Joanne Hobarth nee Lewis the first and second Defendants be restrained whether by themselves, their servants agents or

howsoever otherwise from removing from the jurisdiction, disposing of or otherwise dealing with in any manner their assets at the National Commercial Bank SVG Limited within the jurisdiction, save in so far the value of same exceeds the sum of US\$86,100.00 or its EC Equivalent of \$233,925.09 until the hearing and the determination of the matter.

[2] Notwithstanding paragraph 1 hereof Christian Hobarth and Judith Joanne Hobarth nee Lewis (the first and second Defendants) shall be entitled to draw down the sum of \$20,000 EC from their account to meet their legal expenses.

[3] The National Commercial Bank SVG Ltd. (the third named Defendant) is directed to release the sum of \$20,000 EC to the Hobarths Solicitors Mr. Emery Robertson in order to meet their legal expenses.

Provided however, that nothing in this order shall impose any obligation on any third party to enquire into the purpose or purposes for which the sum drawn by or on behalf the first and second named defendant are in fact used.

[4] Christian Hobarth and Judith Joanne Hobarth nee Lewis (the first and second Defendants) may cause this Order to cease to have effect if they provide security by paying the sum of US\$86,100.00 its EC Equivalent of \$233,925 less \$20,000 EC into Court to be held under the control of the Registrar at the National Commercial Bank, Grenville Street, Kingstown or makes provision for security in that sum by some other method agreed with the Claimant's Solicitor.

[5] The costs of this application shall be costs in the cause.

Louise Esther Blenman
High Court Judge