THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

FEDERATION OF ST. CHRISTOPHER AND NEVIS

(CIVIL)

NO. 125 OF 1996

BETWEEN:

MICHAEL WEIR
and
IGNAT KANEFF Plaintiffs

-AND-

SIMANIC DEVELOPMENTS INC.
and
MICHAEL SIMANIC Defendants

Mr. J. Quinlan for the Plaintiffs

Mr. D. Kelsick for the Defendants

9th May and 30th May, 1997

JUDGMENT

SAUNDERS, J.

Litigation between the plaintiffs and the defendants has been going on for some time. It started in Ontario, Canada in 1988 when a company called Simanic Developments Inc. ("Simanic"), brought suit against Messrs. Weir and Kaneff, the plaintiffs herein. The Ontario Court of Justice dismissed that action. Simanic was ordered to pay costs.

The plaintiffs allege that the costs were duly assessed in Ontario at Can.$85,182.63. They are quite anxious to recover those costs. They have decided to go after Simanic in the Federation of St. Christopher and Nevis. They wish to enforce their Canadian award of costs. To this end they filed a specially endorsed writ in this jurisdiction in December, 1996.

There was some delay in the filing of a Defence. A judgment in default of defence was accordingly entered by the plaintiffs on the 3rd February, 1997. Simanic promptly applied to set aside this judgment. They argued that they had a good defence to the action. Their defence was that the alleged assessment of costs was never made. In any event, they claimed, the Canadian taxation proceedings were tainted because of certain irregularities. They are currently pursuing that matter in the courts in Canada.

The application to set aside the default judgment obtained in these courts was heard by the Hon. Mr. Justice Smith. His order was to the effect that the judgment of the plaintiffs will be set aside if Simanic pleaded in their Defence that they had applied in Canada to set aside the taxation of the costs. Such a Defence was duly filed. On the 21st March, 1997, the default judgment entered by the plaintiffs was set aside.

The plaintiffs are not satisfied. They consider that the Defence as filed has no merit. They have accordingly applied by summons to this court for an order that the Defence be struck out. They say that no proper defence in law to their claims is disclosed. It is this summons of the plaintiffs which came before me on Friday 9th May, 1997.

Mr. Quinlan for the plaintiffs conceded that a Motion had indeed been filed by Simanic in Ontario. It must be said however that this court would have been much better served if we had been given greater details about this Canadian Motion. At any rate it was agreed that the filed Motion was indeed pending between these

same parties and that the costs were thereby being challenged.

Notwithstanding the pendency of the Motion in Canada, Counsel for the plaintiffs insisted that the Canadian judgment is presently enforceable here. The learning, he states, clearly suggests that even where a foreign judgment is appealed or subject to appeal, it is still enforceable as long as there is no stay of execution. The Ontario taxation proceedings, he asserted, are "intrinsic to the Ontario Judgment and are accordingly clothed with its legal consequences i.e. enforceability in the jurisdiction even if liable to be set aside in Canada."

Counsel referred me to a number of authorities including **COLT INDUSTRIES, INC. vs. SARLIE (1966) 3 A.E.R. 85; BERLINER INDUSTRIEBANK vs. JOST (1971) 2 A.E.R. 1513;** and **HALSB. 4th Edn. Vol. 8 Para. 734.**

Mr. Quinlan obviously linked together as a single, indivisible package the order in Canada awarding costs to the plaintiffs and the alleged assessment that had been made of those costs. He did not quite put it this way but I understand his submission to be that this court ought not to concern itself with whether there has been any irregularity in the assessment procedure. Once the costs have been assessed, howsoever they may have been, they become an "intrinsic" part of the judgment at once fully enforceable in St. Christopher and Nevis.

The case of **NOUVION vs. FREEMAN (1889) 15 App. Cas. 1,** particularly the judgment therein of Lord Herschell, is regarded as one of the leading authorities on the principles governing the enforcement of foreign judgments. It is referred to by all of the authorities cited by Mr. Quinlan. It is a case of the House of Lords. I believe it would be salutary to quote at some length

from the judgment of Lord Herschell. At pages 9 to 10 he said this about foreign judgments which are sought to be enforced:

> "..it must be shewn that such a judgment ..... conclusively, finally, and for ever established the existence of the debt.....so as to make it res judicata between the parties. If it is not conclusive in the same court which pronounced it, so that notwithstanding such a judgment the existence of the debt may between the same parties be afterwards contested in that court, and upon proper proceedings being taken and such contest being adjudicated upon, it may be declared that there existed no obligation to pay the debt at all, then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt, and so entitling the person who has obtained the judgment to claim a decree from our courts for the payment of that debt.
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> The principle upon which I think our enforcement of foreign judgments must proceed is this: that in a Court of competent jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties, however much they have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists which cannot thereafter in that court be disputed, and can only be questioned in an appeal to a higher tribunal. In such a case it may well be said that giving credit to the Courts of another country we are prepared to take the fact that such adjudication has been made as establishing the existence of the debt or obligation".

Although that judgment was given over 100 years ago, it is still good law and I intend fully to heed Lord Herschell's observations.

It would seem to me that in light of the nature of the objections made against the assessment procedure in Canada, the Ontario award of costs is liable to be set aside by the very court whose judgment is sought to be enforced locally ie the Ontario Court of Justice (General Division). In the course of argument, Mr. Quinlan admitted that in light of the pending Ontario Motion, the plaintiffs would not now be able to enforce in Ontario the specific award of costs that were assessed. My understanding is that enforceability of the award in Canada will have to await the determination of the Motion.

If that award cannot be enforced in Canada, then how can it be enforced here? I would have thought that the efficacy and validity of the foreign judgment in the country in which it originated is a precondition to its enforceability in this jurisdiction.

It was sought to draw the analogy of a pending appeal where there has been no stay of execution. Undoubtedly, as pointed out by Lord Herschell, in such instances the foreign judgment may yet be enforced locally. Despite its challenge in a court of appellate jurisdiction in the foreign country such a judgment is still, pro tem, a final and conclusive judgment. The lower court that pronounced on it would have finally and conclusively determined the matter even though a **higher** tribunal may at some time in the future reverse the lower court. On this basis, provided that there is no general stay of execution, an action can be brought to enforce such a judgment during the pendency of the appeal. See ***COLT INDUSTRIES***.

This does not seem to be the case here. In one sense there is in some respects a final judgment. Costs to Messrs. Weir and Kaneff. But that judgment per se cannot be enforced until and unless those costs are first assessed. The assessment of the costs is itself a proceeding of a judicial nature. While that assessment remains inconclusive, as I apprehend to be the case, it cannot be said that every ingredient of the judgment which is sought to be enforced is "final and conclusive".

There is also another issue which was raised by Counsel for the defendants. He submitted that this application is an attempt to revisit the order made by Justice Smith and ought not to be entertained. There is some merit in this submission. The default judgment was set aside on the specific basis of the defendants filing a defence "showing that they have made a valid application to the relevant authorities in Canada to set aside the Taxation of Costs..." What good would Justice Smith's order be if I were now to turn around and strike out that very defence?

Finally, Counsel for the plaintiffs urged that in the event that the Defence was not struck out this court should order that the costs be paid into court.

I considered this submission at some length. If both counsel had agreed that the Canadian authorities at the end of the day would award costs of at least a certain minimum figure, then this submission would have been an attractive one. After all, ultimately the defendants will have to pay the plaintiffs some costs. But there was no such agreement and there is nothing before me which gives me any idea as to what those costs, properly taxed, are likely to be. They may remain at the current

figure or they may be varied.

In the final analysis, I believe that ordering the defendants to pay into court a sum that is being questioned would be inconsistent with my earlier reasoning. This is an action to enforce a foreign judgment. Such a cause of action would ordinarily be dismissed if it is proved that the foreign judgment is not final or conclusive. In my view, the judgment to be enforced is not yet in all respects final and conclusive. If I am right in this then there is at this point in time nothing to enforce save a general award of costs to the plaintiffs in the abstract. Until there is clarity from the court pronouncing the judgment in Canada as to precisely what those costs are, it is my view that this action should be stayed.

I would so order.

Adrian Saunders

Adrian D. Saunders
High Court Judge