SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1997

SUIT NO: 421 OF 1990

Between:

SHELL ANTILLES AND GUIANAS LIMITED

PLAINTIFF

AND

B & D CONSTRUCTION LIMITED

DEFENDANT

Appearances:

Mr. Peter I. Foster and Mrs. Claire Greene-Malaykhan for the Defendant/Applicant

Mr. Anthony McNamara for the Plaintiff/Respondent

1997: DECEMBER 1 AND 9

JUDGEMENT

FARARA J (In Chambers).

The Application

This Suit is of some vintage. The matter for my determination is the Defendant's application by Summons filed 8th November, 1996 for an order staying execution, by writ of fieri facias, of the judgment in this matter pronounced by Matthew J (as he then was) on 2nd December, 1993 in favour of the Plaintiff for -

(1) the sum of $380,457.47 with interest thereon at the rate of 6 percent per annum from 16th December, 1990 until payment;

(2) costs to the Plaintiff to be agreed or otherwise taxed; and

(3) that the Defendant's counterclaim is withdrawn.

It is the third limb of the judgment which is of some significance in the present application.

The grounds on which the Defendant based its application, as stated in the Summons, is that the Plaintiff is liable to the Defendant for damages in the sum of $2,138,212.50 for the worthless and useless supply of bitumen as per the Defendant's claim in Suit No. 901/1994 which claim is a valid counterclaim and or set-off of the Plaintiff's claim herein for payment of the said bitumen.

The application is supported by the affidavit of Charles Daher, managing director of the Defendant company filed 14th January, 1997. The Plaintiff filed on 29th April, 1997 the opposing affidavit of Esther Greene-Ernest, the Solicitor having conduct of this matter on behalf of the Plaintiff.

Suit 421/1990

By Writ of Summons issued 19th December, 1990 indorsed with Statement of Claim, the Plaintiff commenced this action claiming the sum of $380,457.27 the balance as of 30th December, 1990 of the price of diesel, bitumen and other petroleum products sold and delivered to the Defendant between July 1989 and June 1990, interest and costs.

A Defence and Counterclaim was filed by the Defendant on 31st May, 1990. By way of defence to the claim, the Defendant pleaded that the bitumen sold to it by the Plaintiff was not reasonably or at all fit for the purpose of being used for road construction and was not of merchantable quality. I pause here to observe that the defence did not address the sale and purchase of diesel or other petroleum products except bitumen.

In its Counterclaim, the Defendant repeated the same allegations in the defence regarding the bitumen purchased from the Plaintiff, and claimed special damages in the aggregate sum of $2,138,212.50 being the pleaded cost of repair works which the Defendant alleged it had to carry-out to roads it had previously constructed using poor quality or useless bitumen purchased from the Plaintiff.

The defence to counterclaim filed 1st October, 1991 denied the allegations of unfitness and lack of merchantable quality of the bitumen sold to the Defendant and it was pleaded that each shipment of bitumen delivered to the Defendant had been previously tested and certified of proper quality by an independent inspector.

The issues were thereby joined for trial both on the claim and counterclaim and a request for hearing filed 14th February, 1992.

On 2nd December, 1993 the date fixed for the trial of this action, judgment was pronounced by Matthew J in favour of the Plaintiff on its claim with costs and the Defendant's counterclaim withdrawn. The judgment was filed and perfected on 9th December, 1993.

I do not have before me nor have I been provided with the notes of the proceedings before Matthew J on 2nd December, 1993. However, Learned Counsel for the Applicant in his submissions stated that, at the said proceedings, the Defendant's expert witnesses from overseas were not present and, as such, the Defendant was not in a position to mount its defence or substantiate its counterclaim as both were based on the same allegations and evidence. As a result, the Defendant being in danger of having its counterclaim dismissed by the court, took a tactical decision and applied to withdraw the counterclaim. Counsel emphasized that no evidence was given or taken by the court on 2nd December, 1997 and, apparently, the Defendant being unable to defend the action, judgment was pronounced for the Plaintiff on its claim and the counterclaim withdrawn.

Order 21 r. 3 of the Rules of the Supreme Court 1970 provides for the discontinuance of a claim or counterclaim and for the withdrawal of any particular claim with the leave of the court. Rule 4 dealing with the effect of such discontinuance or withdrawal, specifically provides -

> *"the fact that a party has discontinued an action or counterclaim or withdrawn a particular claim made by him therein shall not be a defence to a subsequent action for the same, or substantially the same, cause of action".*

A defendant may therefore commence a new action for the same cause of action or subject matter as in its counterclaim, to which the withdrawal would be no defence. However, discontinuance of an action or withdrawal of a action or claim may, in certain circumstances, be a bar to a further action or claim. **Supreme Court Practice** 1997 Vol. 1 para. 21/2 - 5/12 page 366.

In **The Kronprins** (1887) 12 App. Cases 256 Lord Herschell at page 262 distinguished between discontinuance and dismissal thus -

". . . not merely does the fact of the plaintiff discontinuing not operate in any way as a bar, but the judge's order to discontinue - unless it were made a condition of the discontinuance that no other action should be brought - would not operate as a bar".

No order barring the commencement of fresh proceedings by the Defendant for the same cause of action pleaded in the withdrawn counterclaim was made at the proceedings on 2nd December, 1993. And so, strictly speaking, the Defendant was free to commence a new action for the same claim or causes of action.

However, as I see it, the difficulty or hurdle which the Defendant may be faced with is twofold. Firstly, as the allegations in the defence and counterclaim were identical, and the Plaintiff having obtained judgment on its claim, which judgment is final and binding on the parties having not been appealed and there being no application to set it aside, the Plaintiff;s cause of action for the balance of the purchase price of petroleum products including bitumen was finally determined by a court of unlimited jurisdiction and that issue, including the defences thereto, may well be res judicata or have been merged in the judgment as expressed in the *Latin maxim "transit in rem judicatam".*
The Indian Endurance (1993) 1 AER 998.
Halstead v. Attorney General et al Civil Appeal No. 10 of 1993 (Antigua and Barbuda) and Privy Council Appeal No. 53 of 1996.

Secondly, the claims relating to losses suffered by the Defendant as a result of the purchase of the bitumen in 1990 may well be statute barred, since more than 3 years elapsed before the Defendant filed, as plaintiff, Suit 901 of 1994.

To complete the record of proceedings in Suit 421/1990 the Plaintiff, some 16 months after receiving judgment applied for an order for examination of the Defendant/Judgment Debtor as to its means of satisfying the judgment. On 5th April, 1995 an order was made by Matthew J for examination of an officer of this Defendant company on 17th may, 1995.

There have been several adjournments of that hearing,the last being 27th September, 1996. Apparently, no examination has taken place and on 8th November, 1996 the Defendant filed the application for stay of execution. Both applications were fixed for hearing before me on 1st December, 1997. Only the Defendant's application was in fact dealt with on that date.

Suit No. 901/1994

On 29th November, 1994 almost one year after the judgment in suit 421/1990 and the withdrawal of the counterclaim therein, the Defendant, in the latter action commenced a fresh action as plaintiff, in Suit 901/1994 based upon the identical causes of action and for the same special damages as in its counterclaim in Suit 421/1994. The defence filed to the claim in Suit 901/1994 is substantially the same as that filed to the counter-claim in 421/1990. A request for hearing was filed 10th March, 1995. An answer to interrogatories issued by the plaintiff was filed 3rd December, 1996 by the defendant in that action, following an order of d'Auvergne J made 13th November, 1996. That action is ripe for hearing, but no trial date has yet been fixed.

Applicant's Case for Stay

The Defendant's application for stay of execution of the judgment in Suit 421/1990 is made pursuant to Order 68 r. 1 (1)(a) of the Rules of the Supreme Court.

That limb of the rule gives to the court a discretion where, upon application, it is satisfied that there are "special circumstances" which render it inexpedient to enforce a judgment, to order a stay of execution of the judgment by writ of *fieri facias* either absolutely or for such period and subject to such conditions as the court thinks fit.

The application made by summons must be supported by affidavit stating the grounds of the application and the evidence necessary to substantiate them.

As stated previously, the grounds relied on by the Defendant in its application are that the Plaintiff is liable to the Defendant in the sum of $2,138,212.50 as claimed in Suit 901/1994, which is a valid counterclaim or set-off to the Plaintiff's judgment in this action Suit 421/1990. The Defendant seeks a stay until determination of Suit 901/1994.

In his submissions, Learned Counsel for the Defendant/Applicant asked the court to exercise its discretion in favour of granting a stay and to have regard to certain factors, viz -

(1) that due to circumstances beyond its control, the Defendant was unable to pursue its counterclaim and took a tactical step to withdraw that claim;

(2) it then filed and deligently pursued Suit 901/1994 based upon the same causes of action and claims as in the counterclaim;

(3) it would be unfair for the Defendant to have to pay the Plaintiff the judgment debt before the trial and determination of Suit 901/1994;

(4) if the Defendant was unsuccessful as plaintiff in Suit 901/1994, they would be penalized in interest on the principal sum in the judgment in Suit 421/1990, which is at a rate higher than prevailing bank interest rates on deposits;

(5) the Plaintiff would not suffer any undue hardship and none has been raised by them; and

(6) there are serious issues to be tried in Suit 901/1994.

In support of his submission, Counsel for the Defendant/Applicant cited **Schofield v. Church Army** (1986) 1 WLR 1328, where an employee, having been summarily dismissed, filed a claim for wrongful dismissal and was awarded damages. Upon further investigations by his employers into the allegations of embezzlement made at the time of his termination, other evidence or proof of the embezzlement came to light and the employers commenced an action in the High Court for the recovery of the sum embezzled.

The Court of Appeal granted a stay of execution of the plaintiff's judgment in the county court. Dillon LJ stated that an applicant for stay under Rules of the Supreme Court Order 47 r.1 (a) had to show something more than that which was required to stay execution of a summary judgment under RSC Order 14 r.3 (2); and there was sufficient material before the court to show "special circumstances", in that the defendant's High Court action raised a serious issue to be tried which had not so far been litigated because the industrial tribunal had no jurisdiction to entertain a counterclaim to the plaintiff's claim for unfair dismissal. The Court of Appeal accordingly ruled that the judge was wrong to order the payment out to the plaintiff of the money in court.

It is of some importance, that in the instant matter, the court's jurisdiction to entertain a counterclaim is beyond question and, indeed, the Defendant did file a counterclaim but apparently, was unable to pursue it at trial because of the unavailability of witnesses to prove the factual issues and causes of action raised in both the defence and counterclaim.

Furthermore, whereas in the *Scholfield* case, the cause of action giving rise to the potential counterclaim (embezzlement) was rather different from the judgment for wrongful dismissal, in the instant matter the defence and counterclaim were based on the identical facts, allegations and proof.

Learned Counsel for the Defendant/Applicant also cited **Axel Johnson Petroleum A.B. v. M. G. Mineral Group A.G.** (1992) 1 WLR 270. This case was not concerned with stay of execution of a judgment but with Order 14 summary judgment and entitlement of the defendant to leave to defend based on a set-off.

Straughton, L.J. at page 275 said,

> *"Indeed, there already exists a discretion in the court to stay execution on a judgment, pending trial of a counterclaim, which is sometimes used when the right to a legal or equitable set-off is in doubt."*

Of course, in this instant matter, the Defendant did file a counterclaim but withdrew it because of their inability at trial to adduce evidence in proof of it.

Plaintiff's Case Against Stay

Learned Counsel for the Plaintiff/Respondent, quite correctly, distinguished the *Axel Johnson* case from the instant matter and underscored that it dealt with Order 14 proceedings, where the existence of a bona fide counterclaim arising out of the same subject matter of the action and connected with the grounds of the defence would entitle the Defendant to unconditional leave to defend, as a counterclaim is to be treated as a defence for the purpose of Order 14, as contrasted with the court's jurisdiction in dealing with an Order 68 r.1 application where special circumstances must be shown to enable the court to exercise its judicial discretion to say execution of a judgment by writ of *fieri facias.* **Supreme Court Practice 1979, paragraph 14/3 - 4/12 page 143.**

What then constitutes *"special circumstances"* under Order 68 r.1(a)? While it is clear that the categories of special circumstances are not by any means closed, it has been authoritatively stated that such

circumstances must go to the enforcement of the judgment and not to its validity. Furthermore, the court's have an inherent jurisdiction to stay execution of proceedings, but only on grounds that are relevant to a stay and not to matters of defence in law or relief in equity which must be raised in the action itself **T.C. Trustees v J S Dawen [1969] 2 QB 295,** Per Curiam at 296 and Per Lord Denning, M R at 302 E - F.

I must ask myself the question whether, in this matter, the Plaintiff having obtained a judgment against the Defendant for the price of the very bitumen which the Defendant claims was not of merchantable quality and not fit for its intended purpose, the counterclaim and now the claim in Suit 901/1994 is not really a "defence" to that claim, in respect of which the Plaintiff has already received final judgment, and whether the claim in Suit 901/1994 is not really a challenge to the validity of the judgment, albeit in a different action.

Learned Counsel for the Plaintiff also cited **Wagner v Laubscher Brothers [1970] 2 QB 313 (CA)**. In that case the defendant in the English action sued and obtained judgment against the plaintiff as defendant in the German courts, which judgment withstood challenge by appeal and became a final judgment. The German judgment was registered in England for enforcement under relevant statute. After dismissal of the appeal in Germany, the unsuccessful defendant/appellant commenced an action brought in England raising the same issues as were decided by the Germany Courts. The plaintiff in the English proceedings applied for a stay of execution of the German judgment in England. The application was refused on the basis that, upon its registration, the German judgment became as effective as and was to be accorded the same status as an English judgment on the same issues, and there were no special reasons within the meaning of RSC Order 47 r.1(1)(a) why the judgment should not be enforced by execution.

Lord Denning, M R opined at page 317 D and E :

> *"I am afraid that I cannot agree with the judge's approach to this matter. He seemed to have regarded it as if there was a summons under RCS Order 14 in which the question is whether there is an arguable point . . . so here we should not stay execution in this German judgment simply because Laubscher's have brought a cross action in England against Wagner. . . The English action raises as far as I can see, the self same issues as have been determined in the courts of Germany adversely to Laubscher. It*

would be quite wrong to grant a stay of execution so as to enable Laubscher to fight the same issues all over again in England."

Counsel for the Plaintiff/Respondent concluded that no special circumstances had been shown by the Defendant/Applicant to enable the Court to exercise its discretion in staying execution by writ of fi.fa. Referring to the opposing affidavit, he submitted that the matters raised in Suit 901/1994 are the identical issues raised in the Defence and Counterclaim in Suit 421 of 1990, and the grounds on which the application for stay is made are matters which operate as a defence or defences in law or equity and therefore ought to have been raised and dealt with as such when Suit 421 of 1990 came on for trial in 1993. The Defendant did not diligently peruse his counterclaim and the withdrawal thereof is demonstrative of its lack of diligence. Further, the Defendant could have and ought to have advanced the same matters on which its claim in Suit 901/1994 is rooted, in the proceedings in Suit 421 of 1990. [Per Sachs LJ at page 318 F and H and Phillimore LJ at 319 D to F in **[Wagner v Laubscher (Supra)].** With these submissions I entirely agree.

CONCLUSIONS

As I see it, the Plaintiff has obtained final judgment for liquidated sum, that being the balance due and owing on the purchase price of various petroleum products including the bitumen. That judgment, which has neither been appealed or set aside, stands as a final judgment determinant of the issue of the liability of the Defendant for the price of the bitumen and other products including any defences thereto such as lack of merchantable quality and unfitness for its intended purpose. The Defendant was not able on that date to either defend the claim or substantiate its counterclaim and, as such, the Plaintiff would have been entitled to judgment on its claim and to have the counterclaim dismissed. Judgment on the claim was pronounced in favour of the Plaintiff and the counterclaim withdrawn.

In light of the judgment, the Defendant's ability to relitigate the same issues, which seem merged in the judgment, is at least questionable. It is not necessary for the purpose of deciding this application, for me to pronounce upon that issue. Suffice it said, however, that the counterclaim is to some extent inconsistent with the existing judgment and is, in essence, a challenge to its validity under the guise of a new claim.

The Defendant having had its opportunity to fully ventilate all issues for the Court's determination, now seeks a second opportunity to do, by way of a new action some four (4) years after the Plaintiff obtained judgment. I am not satisfied, for the various reasons given above, that and the Defendant/Applicant has not established any special circumstances going to the enforcement of the judgment such as to enable the Court to exercise its discretion to stay execution under Order 68 r.1(1)(a).

ORDER

I accordingly dismiss the Defendant's application. The Defendant to pay the Plaintiff's costs thereof to be taxed unless agreed otherwise.

GERARD ST. C. HARARA, Q.C.
HIGH COURT JUDGE **(ACTING)**