SAINT LUCIA

res judicata

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO 969 OF 1998

BETWEEN

SASIRATANA ANNA VIDHAYASIRINUN

Plaintiff

And

FRANK C. KELLER

Defendant

Appearances
Miss Isabella O. Shillingford for the Plaintiff
Mr. Primrose Bledman and with him Mrs Augustin for the Defendant

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1999 September 30
November 12

JUDGMENT

[1] **d'AUVERGNE J**,: On the 7th day of October 1998 the Plaintiff filed a Writ of Summons endorsed with a Statement of Claim wherein she claimed that by means of promissory notes and cheques issued in California USA on or about the month of May, 1986, she loaned the sum of U.S $125,000.00 equivalent to EC$332,500.00 to the Defendant which has not been repaid and was therefore requesting the Court to make an order that the Defendant do pay her the said EC$332,500.00, the interest on the said sum at the rate of 10% per annum from 12th May 1986 until payment and the costs of the proceedings.

[2] An appearance was entered on the 16th of October 1998 and on the 9th of November 1998 a defence was filed on behalf of the Defendant.

[3] On the 19th day of January 1999 the Defendant filed a Summons for an order to strike out Plaintiff's statement of claim or to stay the proceedings. That Summons was supported by an affidavit of the Defendant in which he deposed that the present Cause of Action "is the same Cause of Action as the Cause of Action in Case No.67WEC 137021 previously instituted against me in the Superior Court of California."

[4] He further deposed that the Solicitors in Case No 67 WEC 137021 were Mallery, Stern and Howington; that on the 3rd day of March 1992 that case was dismissed by the Superior Court of California on the ground that "there being no appearance or written opposition filed after service by U.S. mail of the above notice" - the said notice being a "Notice of intention to dismiss on Court's Motion."

[5] The hub of Defendant's affidavit is that at the time of the alleged issue or execution of the loan both the Plaintiff and Defendant were ordinarily resident in California, that the currency issued was United States Currency and that the Plaintiff never alleged in her statement of claim that the loan was or is repayable in St Lucia therefore the proper law for the alleged contract of the loan should be Californian Law.

[6] More importantly he deposed that he had never subscribed to any promissory note in favour of the Plaintiff but that he had been advised that the loan alleged in the Plaintiff's statement of claim purports to be an inference drawn from financial transactions between himself and the Plaintiff's former husband Mr Thomas Jerome Greco who ordinary resides in California and who along with other witnesses would be essential to the effective defending of the present action and therefore would necessitate

incurring much expense for travel, hotel accommodation and subsistence of those witnesses.

[7] The Defendant also deposed that on the 17th day of September 1997, the Plaintiff instituted an action, case No. SC019517 against Mallery and Stern and Howington in the Superior Court of California where it was alleged on her behalf

"Defendants, and each of them, willfully and intentionally abandoned plaintiff's interests and ceased all representation of her in connection with the Keller action. Moreover, defendants willfully concealed their abandonment from plaintiff, and never advised her that defendants did not intend to continue representation of plaintiff in the Keller matter, or that plaintiff should seek other counsel to represent her in connection with the Keller matter. Additionally, while defendants remained as attorney of record in the Keller matter, and after the statute of limitations had expired on plaintiff's claims against Keller, defendants willfully permitted the Keller action to be dismissed by the court for failure to prosecute, without ever alerting the plaintiff of the fact of the motion for dismissal, and without appearing on plaintiff's behalf. Defendants thereby precluded plaintiff from pursuing her claim to recover $125,000 admittedly owed by Keller."

[8] In their defence Mallery and Stern and Howington allege *inter alia:* "Plaintiff, herself, admits in her deposition of February 17, 1994 (Exhibit 1, page 528, lines 2 –12, Exhibit la, page 498, lines 2 – 25) that the funds provided to Mr. Keller were not her personal property were not community property of her former husband, but were funds belonging to her family. Thus, the alleged debtor, Frank Keller, Sr., would have been entitled to the defense in the action claimed to have been abandoned by Defendants; that the Plaintiff was not entitled to a judgment against him

because she was not a party having a legal interest in the funds themselves."

[9] Defendant concluded his affidavit by deposing that based on the facts noted above the central issue in case SC 019517 was the same as the central issue in this action namely whether the Plaintiff herself ever loaned any money to him the Defendant, that Case NO SC 019517 was still pending in a developed stage in the Superior Court of California and therefore should the present case be allowed to proceed to trial and judgment there would be a grave danger of conflicting judgments by the High Court in St Lucia and the Supreme Court of California.

[10] He deposed that based on the above the Forum Conveniences or the most appropriate Court for the trial of the issues in the Statement of Claim was the Supreme Court of California. The Defendant also exhibited a copy of Case 67 WEC 137021 and Case No SC 019517 of the Superior Court of California (mentioned in his affidavit).

[11] On the 29th day of December 1998 the Plaintiff filed a request for particulars of the defence.

[12] On the 14th day of April 1999 Barbara Myers a legal Secretary attached to the Chambers of Messers Cenac and Company filed an affidavit headed **Affidavit in reply to affidavit in Support of Summons for an order to strike out the Plaintiff's statement of Claim or to Stay the Proceedings.**

[13] In that affidavit she deposed that as Legal Secretary at the above mentioned firm she was acquainted with the present suit and was conversant with the facts and therefore state that on the 6th day of June1998 the Defendant deposed in a deposition (exhibited) taken down

by Cheryl L Perkins for the Central District Court of California, that he had borrowed monies from the Plaintiff in the sum of US$125,000.00, that the dismissal of the Suit by the Superior Court of California was not based upon its merits, that the Defendant was resident in St Lucia and continues to be so resident and is sole manager of Kentucky Fried Chicken, that in his defence the Defendant stated that he had obtained permanent residence in St Lucia in October 1995

[14] The said Barbara Myers further deposed that the Plaintiff denies that Case SC 019517 is still pending. She also deposed that the Plaintiff does not admit that there could be conflicting judgments in the said cases nor does she agree that the Court in California is the Forum Convenience for the trial of the issue in the present action.

[15] On the 9th of July 1999 the Plaintiff filed a **Reply to Summons by Defendant** in which she explained that though she admits that the matter in the California namely Suit 67 WEC 13701 and the present suit were and are for the repayment of monies loaned by her to the Defendant totaling U.S $125,000.00 the said writ or notice of it was never served on the Defendant and therefore the dismissal was not on the merits of the case.

[16] She further deposed that because of the behaviour of her Attorney Stern who was the last in her employ, she filed a Suit for damages and negligence against him in the Superior Court of California which was settled by a consent order, and that though not alleged in the Statement of Claim, the claim is repayable in St Lucia since it is the most convenient place.

[17] She gave the reason for the non production of cheques and promissory notes, namely, because Attorney Stern had not returned them to her lawyer save a cheque of U.S$30,000 which was exhibited.

[18] She further deposed that the funds in question belonged partly to her and partly to her family and that she controlled the funds.

ARGUMENTS

[19] The matter was heard in chambers on the 30th of September 1999 and skeleton arguments were tendered and argued.

[20] Learned Counsel for the Defendant/applicant said that the Plaintiff's statement of claim should be struck out under the inherent power of the court (order 18 Rule 19) for it was an abuse of the process or procedure of the Court. She argued that the Plaintiff had every opportunity of litigating the issues in Case No. 67 WEC 137021 in the Superior Court of California Los Angeles U.S.A and secondly that the Superior Court of California and not this Court is the Forum Convenience or most appropriate Court for the trial of this action.

[21] In support of the first limb of her argument, she quoted **Halstead v Attorney General (1995) 50W1R98 per Sir Vincent Flossiac CJ** as he then was.

"There can be no doubt that the High Court has an inherent power and is under a duty to exercise the power to strike out any pleading which is an abuse of the process or procedure of the court. That power (which is confirmed by Rules of the Supreme Court 18, rule 19) is exercisable whenever the circumstances of the pleading are such that the entertainment of the pleading would result in manifest injustice. These circumstances (which are various) include (but are not confined to) the circumstances which make it appropriate to apply the principles of **res judicata** and merger in judgment and other related principles.

In Hunter v Chief Constable of the West Midlands Police [1981] 3 ALL ER 727 at page 729, Lord Diplock said:

"My lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.

[22] She quoted

Yat Tung Investments Co Ltd vs Dao Heng Bank Ltd and Another 1975 AC Page 581 at 590 where Lord Kilbrandon quoted from the Judgment of **Mc Mullin J.** on the application of doctrine of estoppel namely Res judicata who in turn quoted from the judgment of **WigranV-C in Henderson v Henderson 1843 3 Hare 100, 115** where the judge said

"...Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence,

or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

[23] In support of the second limb of her argument she quote **de Dampierre v de Dampierre 1987 2A LLER Page 1 at page 10** which reads

"Under the principle of forum **non conveniens** now applicable in England as well as in Scotland, the court may exercise its discretion under its inherent jurisdiction to grant a stay where 'it is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of the parties and for the ends of Justice."

[24] She also quoted **Spiliada Maritine Corp v Cansulex Ltd (1987) 1AC460(HL) per Ld goff** at page **478 (A) to (B).**

[24] **Amin Rasheed Corpn v Kuwait Insurance (1984) 1AC50 (H.L) per Lord Diplock at page 60 (E) to (F).**

[25] **Halsbury's Law of England (Fourth Edition 1996) Vol 8 (1) pargraphs 859, 861, 863 and 864.**

[26] Learned Counsel for the Plaintiff contended that the Defendant borrowed money from the Plaintiff therefore he has a contractual obligation to repay that money to the Plaintiff and he has not done so.

[27] She conceded that the case against the Defendant was dismissed in the Californian Courts but said that it was not dismissed on its merits, that there was no case presently pending in the Californian Courts, that there was only one case in existence, the present case. She argued that this being the case Forum Conveniens does not arise. She urged the Court to exercise its discretion and grant a stay.

[28] She quoted the case of **Spiliada Maritime Corp v Cansulex Ltd 1986 3 ALL ER Page 843** where it was held that the court should choose that forum in which the case could be tried more suitably for the interests of all the parties and for the ends of justice. She argued that there was no provision by the laws of St Lucia for the enforcement in Saint Lucia of a judgment obtained in Californian or any other part of the USA.

CONCLUSION

[29] **Order 18 rule 19(1)** provides

"The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action or anything in any pleading or in the indorsement, on the ground that .....

(d) it is otherwise an abuse of the process of the Court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly as the case may be."

[30] As I see it the issues to be decided are (1) Did **Case 67 WEC 137021** previously instituted by the Plaintiff in the Superior Court of California in the United States of America concern the same subject matter and same parties as the Suit 969 of 1998? An analysis of all the affidavit evidence indicate that both suits demand the repayment of a loan of U.S$125,000.00 allegedly made to the Defendant by or on behalf of the Plaintiff. The first Suit to be filed was 67 WEC 137021 in the Supreme Court of California

where the issues of the alleged loan and the alleged non payment should have been determined. It was determined. The matter was dismissed. The Plaintiff has laid much emphasis that the matter was not dismissed on its merits. In my considered judgment the Plaintiff should try and reliltigate the issue in California U.S.A. If it is not possible to re-litigate the matter in California why should it be possible to re-litigate the matter in St Lucia?

[31] In my judgment the Supreme Court of California is the Forum conveniens. Having regard to all relevant factors it appears that the California 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.

[32] In **Panacom International Inc vs Sunset Investments Ltd and Another 47WIR Page 139.** At page 146 Sir Vincent Flossiac C J discussed what the connecting factors that the Court must look for, "not only factors affecting Convenience or expense (such as availability of witnesses), but also other factors such as law governing the relevant transactions.... and the places where the parties respectively reside or carry on business." In this case all the witnesses reside in the United Stated of America and the Defendant has made it abundantly clear the he can and will travel to the USA when served.

[33] If it is not possible to re-litigate the matter in California because the matter is Res judicata the same principle applies and the Plaintiff will be estopped.

[34] As I see it the principle laid down in **Henderson v Henderson** requoted by **Lord Kilhandon in Yat Tung Investments Co Ltd vs Aao Heng Bank Ltd & Another [Supra]** is applicable, namely, that a Court of

Competent jurisdiction "requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been bought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence inadvertence, or even accident, omitted part of their case.

[35] In my judgment this is not a 'special Case'. The Plaintiff in her affidavit of 7th July 1999 (page 5 para 16) deposed that the suit for negligence against her attorney Stern for damages and negligence has been settled by a consent order. I take it that Plaintiff is referring to **Case SC019517** where her attorneys in that defence alleged *inter alia* that Plaintiff, herself, admits in her deposition of February 17th 1999 (Exhibit 1, page 528, lines 2-12 Exhibit La page 498 lines 2-25) "that the funds provided to Mr Keller were not her personal property, were not Community property of her former husband, but were funds belonging to her family."

[36] The logical conclusion to be arrived at is that this aspect of the case which is the central issue in suit 969/98 has been settled.

[37] Based on the above findings I conclude that **Suit 969/98** is Res Judicata. I therefore apply the inherent power which the court possesses under **Order 18 Rule 19** and dismiss this case.

[38] My order is as follows.

The case 969/1998 is dismissed.

Plaintiff to pay costs to the Defendant to be agreed or otherwise taxed.

Suzie d'Auvergne
High Court Judge