SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

SLUHCV 2002/608

BETWEEN

CONSTRUCTION AND INDUSTRIAL EQUIPMENT LTD
Claimant/Respondent

AND

SOCIETE ANTILLAISE DE TRAVAUX PUBLIC
Defendant/Applicant

Appearances:
Mr. Hilford Deterville for the Claimant
Mr. Ramon Raveneau for the Defendant

……..

2005: October 12
November 15

……..

DECISION

MASON J

[1] This is an application for an inquiry to be carried out into damages alleged to have been suffered by the Applicant as a result of the Order given on the Claimant's/Respondent's

application for a freezing injunction and service thereof made by the High Court on 2nd July, 2002 and entered on 3rd July, 2002.

[2] The application also includes a claim for costs.

[3] I do not believe at this stage that the facts of the substantive claim are strictly relevant but the uncontroverted facts regarding the pleadings are as follows:

1. On June 28th 2002 the Claimant/Respondent (hereafter referred to as the Respondent) filed an application for an interim freezing injunction against the Defendant/Applicant (hereafter referred to as the Applicant).

2. This application was heard on 2nd July, 2002 and an order was granted and made returnable on 18th July, 2002. The Order included the usual undertaking on the part of the Respondent to pay any damages which the Applicant may or was likely to suffer as the result of the issuing of the injunction.

3. Affidavit of Service entering service of the Order on the Applicant was filed on 4th July, 2002.

4. On 16th July, 2002 the Applicant filed an Affidavit of Service indicating its intention to defend the claim

5. .The next day 17th July, 2002 the Respondent filed an Application seeking an extension of the Application. On the same date 17th July, 2002 the Applicant filed an application for:

    (a) 6rdischarge of the injunction and

    (b) for the Claim Form and Statement of Claim to be set aside and

    (c) that any further proceedings be stayed.

6. On 18th July, 2002 the injunction was discharged and it was entered on 19th July. The other 2 limbs of the application made by Applicant i.e. to set aside the Claim Form and Statement of Claim and to stay the proceedings were adjourned to 25th July, 2002.

7. However on 22nd July, 2002 the Respondent filed an application for an Order to discontinue the suit.

8. An order to discontinue the action was made on 25th July, 2002. thus rendering nugatory the adjourned part of the Order of 18th July, 2002 i.e. the application to set aside the Claim Form and the Statement of Claim and the staying of this proceedings.

[4] And there the matter rested until 27th April, 2005 when the Applicant made an Application for a judgment summons to be issued against the Respondent.

[5] That application was dismissed on 1st June, 2005. Perusal of the Court's file does not reveal the reason for the dismissal. I am not sure that the fact is relevant to our application however.

[6] The present application was filed on 28th June, 2005.

[7] The grounds for the application are:

(1) that the injunction was discharged by Order of the Court made …….on 18th July, 2002 and entered on 19th July, 2002

(2) that the ……..Respondent gave an undertaking to compensate the …….Applicant Company for any loss which it may have suffered should the injunction have wrongly been granted.

(3) that as a result of the unwarranted imposition of the said injunction the Applicant suffered loss and

(4) …….

[8] The parties have identified the issues for determination by the Court. These are:

(i) whether an inquiry into damages based on the undertaking given by the Respondent should be heard and granted or refused;

(ii) whether the Court should make an order for security for costs against the Applicant should an order for an inquiry be granted,

and there was a third issue identified by the Applicant:

(iii) whether the Applicant can show that loss was suffered as a direct result of the injunction.

[9] It appears to be the admission by counsel for the Applicant that the most glaring objection t o any enquiry would be the length of time that has passed since the discharging of the I Injunction.

[10] However he says, the undertaking as to damages is a promise of the Respondent to pay his opponent if he later fails to establish his right to the injunction. This undertaking is enforced by an inquiry into what loss the Applicant has suffered because of the injunction.

[11] The Applicant reiterates the principle regarding undertakings, that is, that the undertaking is given not to the Applicant but the Court which has a discretion whether or not to enforce it.

[12] Thus, notes Counsel, any loss sustained is occasioned not by a legal wrong but in consequence of an order of the Court. Therefore since there is no cause of action, there is no period of limitation either and so prejudice cannot be a factor in the court determining whether it should enforce the undertaking or not.

[13] I shall return to this later.

[14] Counsel makes the point that the court's discretion is to be exercised having regard to all the circumstances of this case, bearing in mind that since the injunction should not have been obtained, prima facie, the Respondent ought to bear the loss.

[15] Counsel then sets out to justify the delay in making the application: he speaks to the nature of the work carried on by the Applicant, to the Applicant being an international corporation which undertakes numerous governmental projects around the world, these projects lasting for a year at a time.

[16] In this particular instance, after completion of the project here in St. Lucia – the project which was the cause of the application of the injunction - the Applicant undertook other projects in other parts of the world, and its Managing Director, the only person with sufficient knowledge of this matter to initiate an inquiry into damages is not ordinarily in St. Lucia.

[17] In fact he has only been in St. Lucia on a few occasions and then only for a few hours at a time to meet the Government Officials before flying out again. Counsel states that he has only met with the Managing Director on two or three occasions over the past two years.

[18] According to Counsel, this is the first time since the discharging of the injunction that the Applicant has been in a position to request an inquiry into damages and that given the misrepresentation upon which the injunction was obtained in the first place, the Applicant should not be denied relief.

[19] [Counsel for the Respondent agrees with Counsel for the Applicant with regard to the principle on the undertakings, that is, whenever an undertaking as to damages has been given and it is established before trial that the injunction ought never to have been granted as in the present case an inquiry as to damages will be granted.

[20] However, this is s discretion inherent to the Court and the Court may refuse an inquiry based on special circumstances.

[21] The Court may refuse an application for an inquiry as to damages of it is likely to be fruitless, if the damages are too remote, if the loss and damage were caused as a natural and direct consequence of the injunction.

[22] An application may also be refused if there is great and unexplained delay in making the application and this may be so even where the applicant has shown a prima facie case.

[23] The Court may also refuse an inquiry in order to prevent an abuse of the process.

[24] A number of authorities have been provided by both sides, all quite relevant and helpful. They all reiterate the principle and provide guidance.

[25] I shall begin by quoting Bacon CJ – in the case of Exparte Hall. In Wood (1883) 23 Ch. D). 644 et 647.

[26] "This subject of undertakings to be answerable in damages whenever injunctions are granted is, no doubt, an important one. The Court has reserved to itself in exacting an undertaking, the power of dealing with the question of damages. It is not an undertaking to pay such damages as the party proceeded against may think he has sustained, but it is to pay such damages as the Court may think fit to award in respect of the injunction as in respect of the subject matter of the suit for injunction".

[27] Having established that the discretion is the Court's Peter Gibson CJ, in the case of Cheltenham & Gloucester Building Society V Ricketts (1993) IWLR ISIS at 1556, states It is clear that in ordinary circumstances if it should subsequently appear that the interlocutory injunction should not have been granted and that the respondent may have suffered loss in consequence, the Court will exercise its discretion in favour of enforcing the undertaking".

[28] And later "save for special circumstances the court will exercise its discretion in favour of enforcing the undertaking.

[29] Given these statements, the Applicant is prima facie entitled to have his application granted.

[30] But the authorities speak of "in ordinary circumstances", "save for special circumstances".

[31] What then are those circumstances which can cause the Applicant to lose this entitlement?

[32] Counsel for the Respondent referred to the question of delay in making the application. Opposing Counsel did not think it fatal because the delay could be explained.

[33] The Courts have been hesitant to say when the application should be made, that is, whether when the injunction is dissolved or at the trial.

[34] It seems that the only stipulation that the Court will make is that the application should be made within a reasonable time.

[35] In the words of Jessel M R in Smith and Day (1882) 21 Ch. D) 421 et 425"…… the time at which the application is made is material…….not entitled to say that the application for an inquiry must be made when the injunction is dissolved or at the trial. One of these must be the proper time ……the application is one which should be made speedily and not after the Court has forgotten the circumstances".

[36] Hear also Colton L. J. in the same case, p. 430 "As regards the time of the application, there is no doubt that the failure to apply earlier does not deprive the Court of its jurisdiction on the undertaking. It is certainly sensible that the application should be made either at the time when the injunction is dissolved or at the hearing of the cause…….I do not say that the Court ought to lay down any express limit as to time, still I think a long delay might of itself be fatal to the application".

[37] And also Millett L. J. in Barrett Manchester Ltd. Bolton Meterpolitan Borough Council and Another (1998) IWLR 1003 et 1012: "But the greater the delay the less the need to establish prejudice and the court should not hesitate to ……..dismiss the inquiry where there has been excessive and prolonged delay even though it cannot be shown to have occasioned any prejudice to the other party.

[38] The Court does not have to inquire whether the other party has been prejudiced by the delay. The only question is whether the applicant has behaved with reasonable dispatch.

[39] Can the Applicant in this case be said to have behaved with reasonable dispatch?

[40] For this we must have regard to the sequence of events and the time which elapsed from application to discharge and subsequent discontinuance of the action.

[41] There were five major events the sequence of which succinctly put is: application for injunction, injunction granted, application for discharge, discharge granted, discontinuance of action.

[42] From application to discharge a matter of four (4) weeks and one (1) more week to the conclusion of the case.

[43] It all happened in the space of five (5) weeks.

[44] It has been suggested by the Counsel for the Respondent that it was when the Order of discontinuance was granted that the application should have been made.

[45] As we saw from the authorities quoted earlier, there is no hard and fast rule as to when the application is to be made - whether or the discharge of the injunction or at the trial.

[46] The authorities seem to suggest that at the trial might be more appropriate because even if the application is made when the injunction is dissolved it possibly will be ordered to stand over to trial.

[47] Neill L. J. in the Cheltenham case stated (p.1551 G. et seq.): "Where an interlocutory injunction is discharged before the trial, the court at the time of discharge is faced with a number of possibilities:

(a) The Court can determine forth with that the undertaking as to damages should be enforced and can proceed at once to make an assessment of the damages.

(b) The court may determine that the undertaking should be enforced but then direct an inquiry as to damages in which issues of causation and quantum will have to be considered.

(c) The court can adjourn the application for the enforcement of the undertaking to the trial or further order or

(d) The court can determine further that the undertaking is not to be enforced.

[48] In the present case neither of these options obtained, because none was sought.

[49] In the instant case, there was no trial. The action ended, prematurely.

[50] In my opinion the appropriate time for the application could, would and should have been at the moment of discontinuance or as soon as possible thereafter.

[51] However that is not fatal to the application before us.

[52] Counsel for the Applicant made reference to the statement of Millett L. J. in the Barrett case and I quote it here: "Any loss which he may have sustained is occasioned, not by a legal wrong, but in consequence of an Order of the court. Since there is no course of action there is no period of limitation".

[53] It should be noted that Counsel stopped short in his quotation. The statement continues: "but the cross undertaking cannot be enforced without leave of the court, which may be withheld if not applied for promptly". And after quoting some authorities he goes on "As those cases show the court does not inquire whether the other party has been prejudiced by the delay. The only question is whether the applicant acted with reasonable dispatch".

I54] t is a reasonable presumption that a man who sleeps upon his rights has not got much right.

[55] The Applicant denies that this adage applies: it was the exigencies of its international commitments and the fact that the Managing Director was the only one competent enough to instruct Attorneys which prevented an earlier application .

[56] Paragraph 13.2 of the Affidavit in reply to the Respondent's answer (to the Application) deposed to by the Managing Director states:

[57] "That the reason for the Applicant's delay, which was not by design was quite unavoidable and is not based solely on the Applicant's overseas obligations, but is also heavily based on the fact that, due to the complex nature of the Applicant's affairs, it took quite a long time to assess the Applicant's total loss as can be seen from the date on which the Accountant Luc Genio's report is dated. Further original Counsel who had been completely instructed on the matter was no longer on the matter as she had moved on to the Government Service. The file was therefore passed on to the present Counsel whom I did not properly know and who had to familiarize himself with the complex and drawn out nature of the matter.

[58] None of this is convincing with regard to the three year delay.

[59] The Applicant would wish to have this Court believe, that it was at all times eager to canvass the court for an inquiry". That eagerness was apparently only an intention because it took three years to be translated into action.

[60] It is accepted as submitted by the Applicant that at the time of the discharging of the injunction, the Applicant was not in a position to adequately estimate its loss and that it took some time to fairly assess it.

[61] This argument can only be accepted at "face value" because nowhere is it stated or expected that an applicant has to wait until all his figures are in place before he makes his move to action.

[62] See paragraph 13.3 of the Managing Director's Affidavit referred to earlier. I think this paragraph is instructive, he deposes "Further I remember two distinct occasions on which I traveled to St. Lucia in 2002 to attend Court proceedings on this matter and the proceedings on each occasion were adjourned. At no time did the Applicant herein even intentionally steep on its rights in this matter. Matters at all times just seemed to proceed slowly".

[63] But yet the 2002 activities were concluded in five weeks.

[64] Is the deponent intimating that he had enough time because the wheels of justice grind so slowly and so there was no need to rush to the courts.

[65] One could almost speculate that in spite of its contention that there is no limitation period involved, that the Applicant still feared the possibility of being shut out by virtue of the fact that the three year prescription period was almost upon it, hence the date of the application.

[66] The court is minded to make reference to these days of technological advances and the possibility of instant messaging as a counter to the arguments of the Applicant for its tardiness.

[67] These days no one has to be present in person to give instructions to a professional, whether teacher, lawyer or even doctor.

[68] Even our Civil Procedure Rules of 2000 gave cognizance to the transaction of the Court's and legal business by facsimile.

[69] I am of the opinion that the Applicant in seeking to enforce the undertaking ought to have been more prompt in coming to the Court, that this unavoidably long delay has proved fatal to the application.

[70] Counsel for the Applicant had suggested that the Court should follow the Barrett case where, notwithstanding the fact that there had been inordinate delay, the Court chose to exercise its discretion and allowed the inquiry.

[71] That case in my opinion should be distinguished in that while the delays had been caused by difficulties experienced by Barrett in formulating and quantifying its claim, there were still months to go before the case could be heard and in any event no substantial prejudice could be said to have been caused to the other party.

[72] In our case the case was concluded. No further action was sought until 3 years later, when the Respondent was sure that time was nothing more happening or likely to happen.

[73] In dismissing the Application, no determination is made with respect to the question of security for costs.

[74] The Respondent will have his costs to be assessed.

Sandra Mason Q.C.

HIGH COURT JUDGE