SAINT LUCIA

IN THE COURT OF APPEAL

HCVAP 2008/004

BETWEEN:

CARIBBEAN GENERAL INSURANCE CO. LTD.

Appellant

and

THE ST. LUCIA COCONUT GROWERS ASSOCIATION LIMITED

Respondent

Before:
The Hon. Mde. Ola Mae Edwards — Justice of Appeal (Ag.)

On written submissions of:
Ms. Diana M. Thomas of Peter Foster and Associates for the Appellant

No written submissions from:
Mr. Dexter Theodore on record for the Respondent

2008: May 6,16.

Civil Procedure – interlocutory injunction – nature of undertaking in damages – res judicata

An interlocutory injunction which contained no undertaking as to damages was granted in favour of the respondent/claimant ("the respondent") on 22nd February, 1984. Upon the appellant's application and in the absence of the respondent, the court amended the order by inserting an undertaking. On 25th September 2006, the respondent filed a notice of discontinuance and the appellant sought to enforce the undertaking. The learned judge refused to enforce the undertaking on the ground that the respondent was absent when the order was made; against this decision the appellant has appealed.

Held, dismissing the appeal and making no order as to costs:

(1) An undertaking in damages is an undertaking given to the court. The court does not however become a party to the injunctive order under which the undertaking is given, neither does it create a contractual relationship between the parties which gives rise to any cause of action based on the undertaking itself. The principle of res judicata cannot therefore apply.

Cheltenham & Gloucester Building Society (Formerly Portsmouth Building Society) v Ricketts and Others [1993] 1 WLR 1545 applied.

(2) The court cannot compel an applicant for an interlocutory injunction to furnish an undertaking as to damages although it can refuse the application for injunctive relief if no such undertaking is given. The court, in the exercise of its equitable discretion, must not however enforce an undertaking where it is clear that such an undertaking was never given.

F. Hoffman-La Roche & Co. A.G. v Secretary of State for Trade and Industry [1975] AC 295 applied.

(3) The undertaking in the amended order, having been granted in the absence of the respondent, would not be enforced by the court.

JUDGMENT

[1] **EDWARDS, J. A. [AG.]:** On the 16th October, 2007 the appellant who is the second defendant in this matter filed an application for an order for the enforcement of an undertaking and inquiry as to damages. This undertaking exists in an order dated 22nd February, 1984 as amended pursuant to an order dated 29th November, 1999. Cottle J on the 13th February at a contested hearing heard the application and refused it on the ground that "there is no record of any undertaking as to damages having been made by the claimant." The learned judge awarded $1000.00 as costs to the respondent/claimant and granted leave to appeal his decision.

[2] By notice of appeal filed on the 27th February, 2008 the appellant has challenged the findings of fact and law: that the order of the High Court filed on the 29th December 1999 did not amount to an undertaking in damages by the Claimant. The grounds of appeal are:

> "3.1. The Learned Judge erred in that he had no jurisdiction to look behind the Order filed on the 29 December 1999 since the matter regarding whether or not an undertaking had been made [was] *res judicata* and was now incapable of contradiction, having not been appealed against or set aside.
> 3.2. The Learned Judge erred in that he effectively overturned the order of the Honourable Justice Indra Hariprashad-Charles made on 29 November 1999 and filed on 6th December 1999.
> 3.3. The Learned Judge erred when he failed to consider that the Respondent had been duly served with the Summons to amend the Order and the Notice of Adjourned hearing but had failed to attend the hearing. The Respondent was therefore estopped from challenging the Order of Justice Charles dated 29 November 1999."

[3] The respondent/claimant was served with the notice of appeal and written submissions of the appellant and has not filed any submission in opposition despite the case management directions given.

Background

[4] The evidence before Cottle J revealed the following background facts. The respondent/claimant filed suit against Park Estates (1962) Limited ("Park Estate") who is not a party to this appeal, on the 10th January, 1984 for specific performance of a sale contract concerning 1246 ordinary shares in the company, Copra Manufacturers Limited. The appellant in July 1983 had bought the said shares from Park Estates having paid $137,148.00 to Park Estates for them. The respondent/claimant upon learning of this, filed the suit so as to prevent the share transfer certificate that Park Estates had executed in favour of the appellant from being registered. The appellant was not a party in the suit.

[5] On the 10th February, 1984 after a defence was filed, the respondent/claimant through its counsel Mr. P.J. Husbands filed a summons for interlocutory injunction. The High Court has power to grant an injunction by an interlocutory order in all cases in which it appears to the court to be just or convenient to do so; and the injunction may be granted either unconditionally or upon such terms and conditions as the court thinks just.[1] On the 22nd day of February, 1984 a judge in chambers heard counsel for the respondent/claimant on the application. The learned judge granted the injunction which restrained Park Estates from effecting any transfer or dealings with the shares described by serial numbers in the order, until after trial of this action.

[6] The injunctive order entered on the 22nd February, 1984 did not contain an undertaking by the respondent/claimant as to damages. An undertaking in damages is usually required by the court when an interim injunction is granted, subject to some limited exceptions. By the undertaking the claimant is required to compensate the defendant during the currency of the injunction if it later appears that the injunction was wrongly granted. Its purpose is to provide a safeguard for the

[1] See section 16 of the Eastern Caribbean Supreme Court (Saint Lucia) Act Chap,2.01, Revised Laws of Saint Lucia 2001.

defendant who may be unjustifiably prevented from doing something it was entitled to do.[2] As stated in **Wakefield v Duke of Buccleuch,**[3] this assists the court "...in doing that which was its great object, viz. abstaining from expressing any opinion on the merits of the case until the hearing". None of our rules codify the practice of providing undertakings as to damages.

[7] The respondent/claimant filed a summons for directions on the 16th March, 1984 and after disclosure of documents, filed a Request for Hearing on the 15th November, 1984. The case remained unprosecuted for over 14 years. This led the appellant to apply to the court to be added as a party. By an order dated 3rd April, 1998 the court added the appellant as second-named plaintiff. By another order dated 29th November, 1999 upon the appellant's application, the court struck out the appellant as second-named plaintiff and added the appellant as second-named defendant. The court also made another order on the 29th November, 1999. This was upon the appellant's application to amend the injunctive order by inserting an undertaking. Though the applications and notices of adjourned date had been served on the respondent's counsel, on the 29th November which was the date for hearing, the respondent/claimant and its counsel, Mr. Husbands, were absent.

[8] The order of the court was as follows:

> "IT IS HEREBY ORDERED:
> That an undertaking in damages be added to the "ORDER FOR INTERLOCUTORY INJUNCTION" granted on the 22nd February, 1984, as follows:
> If the court later finds that this order has caused loss to the Defendants and decides that the Defendants should be compensated for that loss, the plaintiff will comply with any order for damages the court may make."

[9] This order was entered on the 6th December, 1999. The amended order for Interlocutory Injunction was filed on the 29th December, 1999 and it had the following insertion:

> "AND UPON the plaintiff undertaking that if the court later finds that this order has caused loss to the Defendants and decides that the Defendants should be compensated for that loss, the Plaintiff will comply with any order for damages the

[2]Blackstone's **CIVIL PRACTICE** 2002 at paragraph 37.20, page 381.
[3](1865) 12 LT 628.

Court may make."

[10] The record shows further that on the 6th December, 1999 in the absence of Park Estates and the respondent/claimant an ex parte judgment was obtained wherein it was ordered that the respondent/claimant do pay the sum of $137,148.00 with stated interest and costs to be agreed on or otherwise taxed . This ex parte judgment also declared the disputed shares to be the property of the respondent/claimant and its claim for general damages and costs were dismissed. Part of that order was that: "There be an inquiry as to whether the second-named Defendant has sustained any and if any, what damages by reason of the injunction granted on the 22nd February, 1984 which the Plaintiff ought to pay according to its undertaking contained in the said Order"; and the costs of the inquiry was reserved.

[11] On the 28th May, 2003 on the application of the respondent/claimant this judgment was set aside. On appeal by the appellant, the Court of Appeal dismissed the appeal and upheld the court's decision which had set aside the ex parte judgment.

[12] On the 25th September, 2006 when the case was to be case managed, the respondent filed a Notice of Discontinuance. It is against this background that the learned Cottle J heard and denied the application to enforce the undertaking. Cottle J considered that the fact that the respondent/claimant was absent when the order of the 29th November, 1999 was made means that the respondent/claimant was not bound by the order.

Submissions

[13] Learned counsel Ms. Thomas in her submissions contended that Cottle J had no jurisdiction to go behind the amended injunctive order as the matter concerning whether an undertaking had been made was *res judicata* and incapable of contradiction under article 1171 of the Civil Code Cap. 242 of the Revised Laws of Saint Lucia 1957. This article states:

> "The authority of a final judgment (*res judicata)* supplies a presumption incapable of contradiction in respect of that which has been the object of the judgment, when the demand is founded on the same cause, is between the same parties acting in the same qualities, and is for the same thing as in the action adjudged upon."

[14] Ms. Thomas relied on the Privy Council decision in **Noellina Prospere (Nee Madore) v Fredrick Prospere and Jennifer Remy**[4] **.** In this case, article 1171 of the Civil Code of Saint Lucia was interpreted by the Privy Council, by applying the construction placed on a similar provision in article 1241 of the Quebec Civil Code, by the Supreme Court of Canada in **Roberge v Bolduc**. Lord Bingham of Cornwall at paragraphs 16 and 17 referred to the following conditions which must be met before the judgment of one court is held to preclude re-litigation of an issue in a second court: (1) The first court must have had jurisdiction. (2) The first proceedings must have culminated in a "definitive" judgment. (3) The earlier judgment must have been in a contentious matter. (4) The principle only prevents re-litigation of an issue by those who, were parties to or represented in and so bound by, the first judgment, and who act in the same capacity in the second proceedings. (5) The object and purpose of the second proceedings must be the same as those of the first. (6) There must be identity of cause in the two actions. Identity of cause may be taken to require that the essential basis of the two actions is the same. The Privy Council also accepted that under article 1171 a judgment granted by default or ex parte was as effective as a judgment made with notice in rendering an issue *res judicata* once the other conditions are satisfied.

[15] Ms. Thomas contends that although the respondent/claimant was absent when the order permitting the insertion was made he would still be bound by the order which is akin to a judgment granted by default. In her view, the order was definitive, and satisfied all of the conditions necessary for a final judgment (res judicata), and the respondent/claimant had ample notice of it, yet failed to set it aside or appeal.

[16] The nature of an undertaking militates against these arguments of Ms. Thomas, in my respectful view, because the undertaking is not between parties. It is between the respondent/claimant and the court. Therefore, there is no re-litigation of any issue as to whether an undertaking was made. The court was never a party to this injunctive order. The undertaking was given to the court and does not

[4]Privy Council Appeal No. 18 of 2005 delivered 17th January 2007(St. Lucia)

create a contractual relationship between the parties which gives right to any cause of action based on the undertaking itself. It is helpful to consider the applicable principles governing this undertaking.

The Nature of an Undertaking

[17] In **Cheltenham & Gloucester Building Society** (Formerly **Portsmouth Building Society**) **v Ricketts and others**[5] Peter Gibson L. J. said this:

> "The form of the undertaking indicates that the court has a discretion whether to enforce it at all and that discretion is not limited in any way. The power to enforce the undertaking being incidental to the power to grant an injunction (see In re Hailstone; Hopkinson v Carter (1910) 102 L.T. 877,880), the discretion will be exercised in accordance with ordinary equitable principles: see for example, **Spry Equitable Remedies,** 4th ed. pp. 638-645. The undertaking is given to the court and not the respondent, who can ask the court to enforce it but has no right to its enforcement nor any right to damages until the discretion is exercised in his favour and damages are awarded. The law was stated by Lloyd L .J (with whom Stocker L. J. and Sir George Waller agreed) in **Financiera Avenida v Shiblaq**, 7th November 1990 thus: 'Two questions arise whenever there is an application by a defendant to enforce a cross-undertaking in damages. The first question is whether the undertaking ought to be enforced at all. This depends on the circumstances in which the injunction was obtained, the success or otherwise of the plaintiff at the trial, the subsequent conduct of the defendant and all other circumstances of the case. It is essentially a question of discretion'...In **F. Hoffman-La Roche & Co. A.G. v Secretary of State for Trade and Industry** [1975] A.C. 295, 361, Lord Diplock said: '[The court] retains a discretion not to enforce the undertaking if it considers that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so.'"

[18] There may be cases in which the court will not consider it just to enforce an undertaking, though the jurisdiction to do so exists.[6]

[19] The circumstances surrounding the late insertion of the undertaking in the order were correctly scrutinized by Cottle J in my view, having regard to the nature of the equitable discretion he was required to exercise. Noticeably, the court order that was granted to facilitate the insertion did not state that the respondent/claimant had given an undertaking. The amended order that was

[5][1993] 1 W.L.R. 1545, 1554-1555 (C.A.)

[6]Per Turner L.J. in Newby v Harrison (1861) 3 DeG.F. & J. 287, 290.

reproduced did not accurately state the terms of the insertion that was granted.

[20] The amended order with the inserted undertaking, done in the absence of the respondent/claimant and his counsel, would appear to make an undertaking mandatory for the grant of an injunction, except where a party satisfies the court that an undertaking is unnecessary or inappropriate. This certainly is not the case. In **F. Hoffman**, Lord Diplock explained at page 361:

> "The court has no power to compel an applicant for an interim injunction to furnish an undertaking as to damages. All it can do is to refuse the application if he declines to do so. The undertaking is given to the court itself. Non-performance of it is contempt of court, not breach of contract, and attracts the remedies available for contempts, but the court exacts the undertaking for the defendant's benefit."

[21] The purpose of requiring an undertaking in damages when granting an injunction is so that the court can prevent abuses of its process. It follows on principle that the court must also prevent ordering an inquiry as to damages based on the fiction that the respondent/claimant gave the court an undertaking which clearly was never given.

[22] I therefore conclude that the learned judge did not err in refusing to grant the application for the enforcement of this undertaking. I dismiss the appeal and make no order as to costs in the circumstances.

Ola Mae Edwards
Justice of Appeal [Ag.]