EASTERN CARIBBEAN SUPREME COURT

FEDERATION OF ST. CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE

SBKHCV2011/0144

BETWEEN: ANGUILLA BUSINESS SERVICES LTD (On its own behalf as creditor and member of the first defendant and on behalf of the first defendant in its derivative capacity against the second and third defendants)

Judgment Creditor/ Applicant

And

ST. KITTS SCENIC RAILWAY LIMITED

Judgment Debtor/Respondent

STEVEN G. HITES

2nd defendant

JEFFREY D. HAMILTON

3rd defendant

Appearances:

Mr. Damien Kelsick and Mr. Garth Wilkin of Kelsick, Wilkin and Ferdinand for the Applicant

Mr. Terence Byron and Ms. Talibah V.O Byron of Byron and Byron for the Respondent

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2013: March 31st

November 27th

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DECISION

[1]. THOMAS, J [AG]: Before the court is a notice of application for the appointment of a receiver filed on July 5th 2013. In application the applicant/judgment creditor, Anguilla Business Services, the judgment creditor/applicant, the following orders are sought pursuant to Part 51 of CPR 2000:

1) The accounting firm of Lanns Monish and Associate, whose senior partner is Marcella Lanns-Monish of Mattingley Heights, St. Kitts, certified Chartered Accountant, or some other fit and proper person or firm, be appointed receiver until further order, of the respondent with power to receive all profits, debts and accounts receivables now or hereafter to become due to the respondent or any account whatsoever;
2) This Honourable Court dispense with the requirements that the receiver give security; and
3) Costs incidental to this application be paid by the respondent.

[2]. The grounds of the application are:

1) The claimant relies upon this Honourable court's jurisdiction granted by section 26 of the Eastern Caribbean Supreme Court Act; Cap 3.11 to appoint a receiver it is just and convenient to do so.
2) By order of this Honourable court dated 22nd August 2011, the respondent was ordered to pay the applicant US$3,195, 050.00 and costs of EC$2,617.00
3) The said order was served personally on Mr. Thomas Williams at the office of the said Judgment debtor

4) The respondent has failed to pay any monies to the applicant towards satisfaction of the said judgment
5) To date the judgment debt, costs and accrued interest remain wholly unsatisfied.
6) It is unlikely that the proceeds of the sale of the entirety of the assets of the respondent will be sufficient to satisfy the debt in full.
7) The assets of the company comprise of freehold, leasehold real estate, railway cars, cash balance and other types of assets. Different methods of execution will be available for each category of the respondent's property which would involve different officers realizing different assets. However because of the nature of the respondents business, the most beneficial method of the realization would involve a single person selling the assets of the respondent en block.
8) The accounting firm of Lanns-Monish and Associates has agreed to act as receiver of all profits, debts, and accounts receivable now or hereafter to become due to the respondents or any account whatsoever
9) The fees in relation to the appointment of the receiver are EC$275.00 (plus VAT in the sum of EC$46.75) which totals EC$321.75 per hour for senior partner Marcella Lanns-Monish; EC$180.00 (plus VAT in the sum of EC$30.60) which totals EC$210.60 per hour for associate. Dridnauth Gossai; EC$145.00 (plus VAT in the sum of EC24.65) which totals EC 169.65 per hour for associate Ayona Laws
10) Taking into consideration the circumstance of this matter, the requirement that the receiver give security be dispensed with.
11) In all the circumstances it is just and convenient for the receiver be appointed.

Affidavit Evidence

[3]. It is indicated by the applicant that certain affidavits [1]will be relied on in this matter.

[4]. Essentially, in his first affidavit Thomas Rader deposes as to the circumstances in which he was owed money by the first defendant leading to his judgment. In his 9th affidavit Rader deals with the said judgment still being unsatisfied, the balance sheet of the first defendant and also its assets. Finally, the supplemental affidavit to the 9th affidavit the matter of the fees to be paid to a receiver and staff in the event of such an appointment.

[5]. The application is opposed by the respondent and two affidavits of Thomas Williams are filed in support. In the first affidavit filed on July 11th, 2013 Thomas Williams, the affiant, deposes that the purpose of the affidavit is to support the application to set aside the default judgment and to oppose the appointment of a receiver.

[6]. In the first several paragraphs Thomas Williams dwells on the position of the second and third defendants and his understanding of the filing of a defence by the first defendant.

[7]. At paragraph 6 to 9 of his affidavit Thomas Williams sets out to answer the whole of Thomas Rader's 9th affidavit. In so doing the affiant, being the General Manager of the first defendant, goes into the financial state of the first defendant and draws a certain inference as to the motive of Thomas Rader in seeking to have a receiver appointed. In this connection Thomas Williams at paragraph 8 of his said affidavit characterizes the reasons given by Thomas Rader for the appointment of a receiver as being "wrong or just plain false"

[1] These are: 1st affidavit of Thomas Rader filed June 3rd, 2011. 9th affidavit of Thomas Rader filed on July 2nd, 2013. Supplemental affidavit to 9th Affidavit of Thomas Rader filed on July 5th, 2013. [7th] affidavit of Albert Millington filed on July 9th, 2013.

[8]. In his supplemental affidavit in support filed on July 17th, 2013 Thomas Williams again deposes as to the difficulties faced by the second and third defendants and advice received and their belief regarding the filing defence

[9]. The affiant next makes an excursion into the process of disclosure and the meaning and attributes of 'loans,' equity and investment.

Submissions

[10]. In submissions on behalf of the applicant, learned counsel Mr. Damien Kelsick, outlines the evolution of jurisdiction of the court regarding the appointment of receivers and scope of that jurisdiction.

[11]. In terms of the scope of the jurisdiction learned counsel refers to the following authorities: Masri v Consolidated Contractors Limited (UK)[2], Tasarruf Mevdirati Merduati Sigorta Fonu v Merril Lynch Bank and Trust Company (Cayman) Limited and others[3] , and Carosello Establishment et al v Caribbean Ventures International (In Liquidation)[4]

[12]. In the latter case, on appeal from the High Court of St. Lucia, the court examined section 16 of the Supreme Court Act and identified the only limit on the court in this regard.

[13]. The submissions go on to outline the factual matrix under which the application is being made which is that a judgment was granted against the first defendant on 22nd August 2011 in the sum of US$3,195,050.00 plus costs of EC$2,617.00 and, as of 19th July 2013, the judgement debt, interest and costs total US$3,507,880.75.

[2] [2009] QB450
[3] [2011] UKPC
[4] HCVAP 2007(035 CSCSC-SLU)

[14]. According to learned counsel: "as of the date hereof, the judgment remains wholly unsatisfied."

[15]. Learned counsel for the respondent, Mr. Terrence V. Byron filed submissions on behalf of the respondent relating to the setting aside of a default judgment dated 22nd August 2011, and in opposition to the claimants' application for a receiver to be appointed over the first defendant assets.

[16]. In so far as the submissions[5] relating to the setting aside of the default judgment these are academic as this court delivered a decision on 23rd August 2013 which refused the application.

[17]. On the matter of the appointment of a receiver this is opposed by the respondent and in so doing the following propositions are posed:

1) In the claimant's written submissions dated 15th July 2013, though they refer to the first defendant's application, no answer is made to the fundamental objections that the judgement is irregular, cannot stand and should be set aside.
2) The submissions also do not deal with the outstanding matters raised by the first defendant in relation to the claimants' failures to comply with undertakings to the court
3) Before the court can think in terms of exercising its jurisdiction (as provided by CPR Part 51) it must be satisfied of the legal basis upon which it might do so.
4) Even if there was such a legal basis, which there is not, the appointment must be just and convenient. To this extent that this is accepted in the claimant's written submissions these are correct.
5) The first defendant is…entitled to rely on the evidence of Thomas Williams' affidavit of 11th July 2013, and does so

[5] It is to be noted that the submissions in support of the application to set aside the default judgment entered on were filed on July 24th, 2013

6) The submissions on the facts made by the claimant in paragraph 23 are plainly wrong. Mr. Williams describes the business as real and profitable. The distinction sought to be drawn between revenue and profit is unjustified.
7) It is further wrong to suppose that the affect on the company and the tourism industry is not relevant to the issue whether the appointment of a receiver is 'just and convenient'. It will be apparent to the court that the facts underlying the alleged debt are almost entirely disputed, and it is unrealistic to divorce these considerations from the question whether a receiver should be appointed.
8) It is further wrong to proceed as though these issues were solely joined as between the claimant and the first defendant. The second and third defendants are also parties to the proceedings and their interest will also be affected if a receiver is appointed.
9) The defendants are in real difficulty, given their situation...because their principal personnel, Mr. and Mrs. Hites and Mr. Hamilton are not present within the jurisdiction. This can be done if they are permitted to defend the claim on the merits.

[18]. Some of these propositions are not addressed by way of submission by learned counsel for the applicant and as such must be addressed by the court without such submissions.

Irregular Judgment

[19]. Any ruling of a court is valid and subsisting until set aside. This has not been done with respect to the default judgment obtained by the claimant.

Outstanding matters

[20]. The court takes the view that the 'outstanding matters' identified have no relevance to the matter now before the court

Reasoning and Conclusion

[21]. Part 51.2 of CPR 2000 contemplates a power of the High Court to appoint a receiver as at prescribe the context of an application for this purpose.

[22]. Learned counsel for the applicant says in his submissions that the applicant obtained a judgment against the first defendant on August 22nd, 2011 in the sum of US$3,195,050.00 plus costs of EC$2,617.00 and that July 19th 2013 the debts stands at US$3,507,880.75 and it is wholly unsatisfied. Therefore for all purposes in law there is a debt of US$3,507,880.75 owed by the judgment debtor/ receiver to the applicant.

[23]. The objections to the appointment of a receiver relate to: the effect on the tourist industry in St. Kitts, the effect on the company and the effect on the second and third defendants.

Effect on the Tourist Industry

[24]. In a real sense this amounts to speculation as there is blue print as to the outcome if a receiver is appointed given the nature of the assets identified by learned counsel for the applicant without objection. These are in general terms: real estate, railway cars, motor vehicles and a leasehold interest.

[25]. Given the foregoing the court agrees that such a consideration is irrelevant.

Effect of the Company

[26]. Learned counsel for the applicant contends that this is not a relevant consideration: in this regard reliance is placed on the following dictum of Coleman J in Somco et al v Novoruznetsh Aluminium Plant et al[6]. This is what the learned judge said:

> "As to bringing the business of the judgment debtor to a standstill by cutting off payment otherwise available to it, I am not persuaded that this is a relevant consideration in the context of a remedy designed to effect execution and not designed merely to conserve assets pending determination of an unresolved claim. This is not the environment of a Mareva injunction prior to trial, but execution of a pre-existing judgment. Whereas the effect of an injunction on the defendant's ability to conduct his business in the ordinary course may be relevant where his liability is yet to be determined, it cannot possibly be a relevant consideration where his liability has already been determined. Impact on the judgment debtors business is not a consideration material to the availability of legal process of execution and there is no reason in principle why it should be introduced as material to the availability of equitable execution."

[27]. The court is persuaded by the foregoing especially the reasoning that the liability has already been determined in this case since August 2011.

Effect on the second and third defendants

[28]. This appears to the court to relate principally to the inability of the second and third defendants' inability to file a defence. This can be of no moment as this matter has run its full course in the High Court, the Court of Appeal and then again in the High Court. These actions speak for themselves and the conclusion is patent and pellucid.

[29]. On the other side of the equation the court draws the reasonable inference that the second and third defendants being shareholders and directors of the respondent have not shown a semblance of an intention to settle the debt.

[6] [1998] QB 406

[30]. The court must now write penultimate chapter as to whether the conditions for the appointment of a receiver are satisfied in this instance. In this regard Part 51.3 of CPR 2000 contains the following"

"51.3 In deciding whether to appoint a receiver to recover a judgment debt the court must have regard to the –

a. The amount likely to be obtained by the receiver;
b. The amount of the judgment debt
c. Probable cost of appointing and remunerating the receiver."

[31]. The court must now "have regard" to prescribed conditions seriatim.

Amount likely to be obtained

[32]. By definition, this requires evidence of an accountant who has examined the books of the first defendant and other matters which is not before the court. In its stead, the court can have some regard to part of the evidence of the General Manager, Thomas Williams, of the first defendant as deposed in his affidavit filed on July 11th, 2013. This is what the deposed at paragraph 6:

> "6 The allegations made by Mr. Rader that the first defendant is in a poor financial state are not true. The respondent's business is a real and profitable business. Its activities a highly seasonal, and while they go into a slow period each summer, revenues pick up again each fall in October, with the cash flow becoming positive (depending on year) but no later than mid-January. 2013-2014 will be the biggest year to date with 20,000 more passengers riding the train than rode in 2012-2013. This equates to US$ 1 million more in tickets revenues in 2013-2014 than there were in 2012-2013. Even if the judgment is valid, there would be no need to appoint a receiver to sell up the assets. This would be a disaster not only for the defendants but for the tourist industry of St. Kitts."

Amount of the judgment debt

[33]. The amount of the judgment is disputed but it rests on a judgment of the court. It is in the amount of US$3,195,050.00 plus costs of EC$2,617.00 and it has not

been set aside by this court, the Court of Appeal or any other court with jurisdiction over St. Kitts and Nevis.

Probable cost of appointing a receiver

[34]. These conditions appear to contemplate on figure for a definite period. This is not before the court. What is before the court is the fee payable to receiver and two associates[7] which are EC$321.75, [EC$ 210.60] and EC$ 169.65 per hour, respectively.

[35]. The lacunae pointed out above are clarified by Justice Edwards Barrister in Dalemont Limited v 1. Alexander Gennadervich Senatorov. 2. Riggels Enterprise Limited[8]. The learned judge was interpreting Part 51.3 of CPR 2000. This is his reasoning:

> "14 Before I can do that, however, the Rules oblige me to have regard to the amount likely to be obtained by the receivers; the amount of the judgment debt; and the possible cost of appointing a rumerating the receivers. In my judgment, these requirements are not to be taken literally. They do not require the court to work out in cents and dollars what will be the likely recovery or expenses of the receivership. They are directing the attention of the court to the need for it to be satisfied that the proposed appointment will be proportionate in all the circumstances. I am entirely satisfied that it will be. The unpaid amount of the debt easily outweighs the likely loss of the receivership and it seems to me that the prospects of recovery by the proposed route are sufficient to justify the probable expenses."

[36]. This court is persuaded by Justice Barrister's dictum and would add that Rule 51.3 speaks merely requires that the court "must have regard to …" By implication this would be a prelude to the ultimate question, being, whether the appointment sought is just and convenient.

[7] See supplemental affidavit to 9th affidavit of Thomas G Redar, at para. 3
[8] Claim No. BVIHC (Comm) 149/2011

Is it just and convenient?

[37]. The phrase just and convenient is one of great antiquity in the context of the appointment of receivers and other circumstances[9]; and whereas it has been interpreted as meaning necessary in the circumstances[10] the modern approach is to consider the question having regard to all the circumstances.

[38]. Therefore, having regard to the matters which Rule 51.3 says the court must have regard to plus the following: the fact of that the debt of US$3,195,050.00 plus costs of EC$2,617.00 stands unsatisfied since August 2011, the position of the 1st defendant as deposed by its General Manager; including the cash projections; cash flow for the new season of 2013-2014; the attitude of the 2nd and 3rd defendants in the entirety of the matter.

[39]. In relation to the last matter mentioned the court finds that the following extract from the 9th affidavit of Thomas Rader also merits consideration:

> "22 Therefore, I have instructed my attorney-at-law to seek to that a receiver be appointed by the Honourable court because I firmly believe that:
>
> a. The respondent and the 2nd and 3rd defendants have demonstrated a continued lack of trustworthiness, contempt of the injunction, breach of their duties as directors of the respondent, and have continued to operate the respondent without concern for the judgment of this Honourable court dated 22nd August, 2011;
> b. The respondent and the 2nd and 3rd defendants have and continue to authorize capital expenditure which is unnecessary, excessive, unprofitable, unbudgeted, and uneconomical and will therefore cause the respondent to become insolvent;
> c. Unless a receiver is appointed by this Honourable court the applicant will be unable to collect the judgment debt; costs and interest lawfully due to the applicant."

[9] For example the winding up of companies

[10] See for example: P.L.S Palnieppe Chetty v P.L.P.C [1917] 32 MLS 30 per Srinivess Aiyanagar J of the Madras, High Court; John v John [1989] 2CL 573 per Lindley Mr.; Dalemont Limited v Alexander Gennadievich Senatrov and Riggels Enterprise Ltd, supra per Bannister J.

[40]. In all the circumstances the court, pursuant to Part 51 of CPR 2000, hereby authorizes the appointment of a receiver as prayed.

The Receiver

[41]. There is no objection to Marcella Lanns-Monish of the accounting firm of Lanns Monish and Associates being appointed as a receiver, and as such the said Marcella Lanns-Monish is hereby so appointed receiver of all the assets of whatever nature of the respondent, St. Kitts Scenic Railway Limited until further order of the court.

[42]. There is also no objection to the fees stated in the supplementary affidavit to 9th affidavit of Thomas Rader and these are approved as follows:

Receiver, EC $321.75 per hour and associates EC $210.60 and EC $169.65 per hour, respectively. All the fees are inclusive of value added tax.

Dispensing with security

[43]. Rule 51.4 (1) says that the general rule is that a person may not be appointed receiver until that person has given security. However sub-rule 51.4 (2) gives the court the power to dispense with security. It is in this connection that the applicants are seeking to move the court.

[44]. It is therefore the determination that in all circumstances, especially since there is no objection by the respondent the requirement of security in this instance is dispensed with.

Costs

The respondent must pay the costs of this application which shall be assessed if not agreed within 30 days after the date of this judgment

ORDER

IT IS HEREBY ORDERED as follows:

(1) The application by Anguilla Business Services Ltd, judgment creditor/applicant for the appointment of a receiver is hereby granted as the court considers it just and convenient to so appoint having regard to all the circumstances.

(2) Marcella Lanns-Monish shall be the receiver of all the assets of whatever nature of the respondent, St. Kitts Scenic Railway Limited.

(3) The approved fees payable to the receiver shall be at the rate of EC$321.75 per hour and the rate for the two associates shall be EC$210.60 and EC$169.65 per hour, respectively.

(4) The requirement for security by the receiver is dispensed with pursuant to Rule 51.4 (2) of CPR 2000

(5) Costs to be assessed if not agreed within 30 days after this decision

(6) The draft order attached to the application is approved as amended.

Errol L. Thomas
High Court Judge [A.g]