Court of Appeal

Barbados

Civil Appeal No. 3 of 2011

Cellate Caribbean Limited et al
and
Harlequin Property (svg) Limited et al

October 23, 2013

Gibson, C.J.; Moore, J.A.; Burgess, J.A.

Civil practice and procedure - Stay of proceedings — Discretion of trial judge to refuse stay.

Appearances:

Mr. Elliott D. Mottley, Q.C. and Ms. Andrea Simon of Elliott D. Mottley & Co., Attorneys-at-Law for the appellants

Mr. Tariq Khan, Attorney-at-Law for the respondents

INTRODUCTION

BURGESS JA: This is an appeal from the judgment of Cornelius, J. in which she refused an application filed on August 10, 2010 by the appellants, then defendants, to stay proceedings in an action, Claim No. 0857/2010, issued in Barbados by the respondents, then claimants, against the appellants (the Barbados claim). According to the appellants, the stay should have been granted on the basis of forum non conveniens and lis alibi pendens.

In support of their appeal, the appellants contend that the dispute which gave rise to the Barbados claim was rooted in a project for the construction of a hotel resort at Buccament Bay in St. Vincent and the Grenadines (the Project), and that, consequently, the Eastern Caribbean Supreme Court, St. Vincent and the Grenadines (the St. Vincent court), was an available forum having competent jurisdiction, and was the more appropriate forum for the trial of the proceedings issued in Barbados by the respondents. The appellants further contend that, as an action entitled 204/2010 between the appellants and the respondents concerning the same subject matter and dispute and claiming the same relief as in the Barbados action was pending in the St. Vincent court (the SVG claim), the doctrine of lis alibi pendens should have operated as another reason why Cornelius, J. should have granted the stay.

There is no doubt that Cornelius, J. has discretionary power under the inherent jurisdiction of the High Court and under Part 26.1 (2) (d) of The Supreme Court of Barbados (Civil Procedure) Rules, 2008 to grant or refuse a stay of proceedings. Accordingly, the narrow issue which is raised in this appeal is whether it is appropriate in the circumstances of this case for this Court to interfere with the exercise by Cornelius, J. of that discretion to refuse the stay of proceedings sought by the appellants.

THE FACTS OF THE CASE

(I) THE PARTIES

As this appeal is concerned with an interlocutory application, the facts may be briefly stated. In this regard, a number of parties are named in the appeal, so it may conduce to greater clarity to begin by giving identity to these parties.

Cellate Caribbean Ltd. (Cellate), the first appellant, is a construction company incorporated and registered in Barbados. Cellate Caribbean (SVG) Ltd. (Cellate SVG), the second appellant, and Ice Group (SVG) Ltd. (Ice),

the third appellant, are construction companies incorporated and registered in St. Vincent and the Grenadines. Cellate, Cellate (SVG) and Ice (together the Cellate Group) are all controlled by Mr. Padraig O'Halloran, the fourth appellant and his fiancée, Ms. Suzanne Floyd, the fifth appellant.

Harlequin Property (SVG) Ltd. (Harlequin SVG), the first respondent, is a company incorporated in St. Vincent and the Grenadines to develop resorts. Harlequin Hotels and Resorts Ltd. (Harlequin Resorts), the second respondent, is a Caymanian incorporated and registered company, formed to manage the resorts developed by Harlequin SVG. Both Harlequin SVG and Harlequin Resorts (together Harlequin) are owned by Mr. David Ames, and are part of a larger group of five companies owned by him.

(II) THE DISPUTE

Harlequin entered into a contract with the Cellate Group for the Cellate Group to build the multi-million dollar Buccament Resort Project in St. Vincent and the Grenadines. Payments in excess of USD (United States Dollars) $52 million were made by Harlequin to the Cellate Group through their bank accounts in Barbados and St. Vincent and the Grenadines in connection with this project.

On 14 July 2010, Harlequin filed suit against the Cellate Group in a number of jurisdictions, including England, Ireland, St. Vincent and the Grenadines and Barbados. In these suits, Harlequin alleged that the Cellate Group, through the director, Mr. O'Halloran, misappropriated funds in the region of USD $52 million of the monies paid to them for the construction of the Buccament Bay resort and used these monies to fund a lavish lifestyle and in furtherance of his own business interests. The suits also alleged Ms. Floyd to be a constructive trustee of funds received by her.

(III) THE SVG CLAIM AND THE BARBADOS CLAIM

Given the appellants' contention in relation to the doctrine of forum non conveniens and lis alibi pendens, only the SVG claim and the Barbados claim are relevant in this appeal. Accordingly, it may be useful to set out in some detail the particulars of these claims.

In the SVG claim, the respondents in this appeal were the claimants. The defendants were Cellate (1st), Ice (2nd), Cellate (SVG) (3rd), Ice Group (SVG) Ltd (4th), O'Halloran (5th) and Floyd (6th), except for Ice (2nd), the appellants in this appeal. The claim was for:

> “(1) Damages for the failure to complete the Buccament Bay Project on time.
> (2) Damages and/or a restitutionary claim for the repayment on the value of the actual works that had been undertaken by the First to fourth defendants.
> (3) Damages for the remedial works that will be necessary to correct the First to fourth defendants' poor workmanship and/or failure to supply materials that were of good quality and reasonably fit for their intended purposes.
> (4) Damages in fraud and/or restitutionary claim for the repayment of all monies that have been misappropriated by the defendants.
> (5) All necessary and proper accounts and inquiries including an order that each of the defendants do provide an account of all monies paid into and out of their respective bank accounts.
> (6) An order that the sixth defendant [Ms Suzanne Floyd] is liable to account as constructive trustee to the Claimants for all moneys and/or gifts she has received from the fifth defendant's use of the Claimants' money.
> (7) Equitable compensation.
> (8) Interest in equity.
> (9) Further or other relief.”

The Barbados claim was for:

> “1. Fraudulent Misappropriation;
> 2. Damages in Fraud and/or Restitutionary claim for the repayment of all monies misappropriated by the defendants;
> 3. A remedy by way of equitable tracing into all property purchased by the defendants;

4. All necessary and proper accounts and orders that each defendant do provide same;
5. An order that the fifth defendant is a Constructive Trustee and hold money on trust for the first claimant;
6. An Order that any person held to be a constructive trustee is liable to account to the Claimants for all moneys and gifts received from the fourth defendant's use of the first claimant's money;
7. Interest at the rate of 8% per annum on all sums found to be due to the Claimants or alternatively pursuant to Section 35A of the Supreme Court Act (sic) at such rate and for such period as the Court thinks fit."

The appellants filed the application of August 10, 2010 seeking a stay of the proceedings in the Barbadian claim. In due course, the matter came before Cornelius, J.

THE DECISION OF CORNELIUS, J.

Cornelius, J. approached the application for a stay with admirable particularity. Having explored the relevant history of the litigation that led to the Barbadian claim, and having examined the SVG claim, the lis alibi pendens, Cornelius, J. then identified the issue for her determination as whether, as a matter of discretion, this was a proper case for a stay on the basis of forum non conveniens especially in light of the existence of the lis alibi pendens. At para [9] of her judgment she said:

> "The respondents have applied for a stay of proceedings on the ground of forum non conveniens, that is, that there is an available forum, having a more competent jurisdiction which is more appropriate for the trial of the action. They emphasise that the existence of the lis alibi pendens…the SVG action which involves the same parties…and concerns the same subject matter and claiming the same relief, as a clear and decisive factor in requiring the court to find that St. Vincent is the more appropriate forum, and to exercise its discretion in favour of a stay."

The judge then turned to the legal principles which govern the exercise of her discretion. Of these, she said at para [10] of her judgment:

> "The factors to be taken into account by the Court in exercising its discretion to determine whether a jurisdiction is the appropriate forum are set out authoritatively by Lord Goff in Spiladia Maritime Corporation v. Cansulex Ltd [1987] 1 AC 460, familiarly known as the Spiladia, and their application approved for this jurisdiction by Simmons, C.J. in Downer v. Downer (662/2007). In that case Simmons, C.J. affirmed the Spiladia principle, rejecting the trend of Australian jurisprudence exemplified in Oceanic Sun Line Special Shipping Co Inc. v. Fay (1988) 165 CLR 197, Voth v. Manildra Flour Mills Pty Ltd (1990) 171 CLR 538 and Henry v. Henry 20 Fam LR 171."

Having established that the Spiladia principles were the applicable principles, Cornelius, J. observed at para [11] of her judgment that these principles were "well-rehearsed and affirmed in a number of cases within and outside this jurisdiction for example affirmed in Connelly v. RTZ Corpn. PLC [1998] AC 854, and reviewed with approval by Rawlins, J. (now Rawlins, C.J.) in the Eastern Caribbean Supreme Court in Bitech Downstream Ltd v Rimex Capital Inc (BVI) High Court Nos. CV 2002/2033, CV 2003/0008." She opined that those principles were "nowhere more clearly stated" than in the judgment of Lord Goff in the Spiladia at 476 and she proceeded to set out Lord Goff's statement of these principles verbatim.

From Lord Goff's adumbration of principles, the judge concluded at para [12] of her judgment that the Spiladia is authority for the proposition that she must conduct a two stage enquiry. According to her, in the first stage, the appellants/defendants bear the burden of proof to satisfy her that the St. Vincent court is "clearly or distinctly more appropriate" than the Barbados court for the trial of the action. She noted at para [13] of her judgment that in making this determination she must have regard to the connecting factors, which must be real and substantial, and which include (i) the availability of witnesses, (ii) the likely languages they speak, (iii) the law governing the transactions or to which the fructification of the transaction might be subject, and in the case of actions in tort, where the alleged tort took place, and (iv) the places where the parties reside and carry on business. She also noted at para [14] of her judgment, citing as authority The Abidin Daver [1984] AC 398 at 411–412, that, in the case before her, another factor to be considered is the existence of a lis alibi pendens in St. Vincent.

Of the second stage, the judge said at para [15] of her judgment:

> "…if the respondents satisfy me that there is an available forum which is the appropriate one for this trial, the burden shifts to the claimant to show any special circumstances by reason of which justice requires that the trial should nevertheless take place in this jurisdiction."

Cornelius, J. then turned to the argument of counsel for the appellants on the question whether St. Vincent was "some other available forum having competent jurisdiction". She pointed to the contention of counsel that the factual background of the Buccament Bay Project, including the existence of a contract for the construction of the project and the determination of the type of building contract, was not only relevant to the Barbados fraud claim, but was an essential part of the respondents' defence, and should be an initial determination of the court on record. She pointed in particular to the argument of counsel that the fraud claim cannot be viewed in isolation but must be determined by an analysis of the nature of the contract in question.

The judge observed that that argument centred on whether the contract in question was a fixed price contract and that the argument invited the conclusion that, if the SVG court should find that the contract is a fixed price contract, the fraud case would fall away. That argument also exposed the possibility of there being inconsistent judgments in two different jurisdictions, which, the argument continued, was made more likely because the claim in Barbados may be heard before the claim in St. Vincent. She noted that counsel had spent some time with the argument that the contract was indeed a fixed price contract but declined to go into those arguments in detail. She however summarised the major thrust of those arguments.

Cornelius, J. next considered the appellants' submissions in respect of a lis alibi pendens in St. Vincent. These she outlined at length, noting the authorities on which the appellants were relying and identifying the principles which the appellants argued, supported the existence of a lis alibi pendens in St. Vincent.

Cornelius, J. then turned to the counter-arguments addressed by Mr. Khan on behalf of the claimants. Here, she recorded that Mr. Khan's primary submission was that the fraud/misappropriation claim in Barbados was free standing and "not parasitic on the SVG claim", that it can be severed from the SVG claim and that he was prepared to give an undertaking not to pursue such a claim in SVG if the claimants were permitted to pursue in Barbados.

In relation to the lis alibi pendens, the judge stated at para [26] of her judgment that Mr. Khan "directed the Court's attention to the Abidin Daver case where it was accepted that the existence of a 'lis' is no more than a constituent factor within the doctrine of forum non conveniens, and not of any "special or unique effect". She noted Mr. Khan's submission, based on Briggs & Rees in Civil Jurisdictions and Judgments (5th Edition) at page 437, that if the claimant brings the same claim in the courts he may be required to elect to pursue only one. She also noted that Mr. Khan was prepared to give up the fraud claim in SVG and his statement that it was never the intention of the claimants to pursue the fraud claim there anyway.

Finally, at para [28] of her judgment, Cornelius, J. recited the eight reasons adduced by Mr. Khan as to why Barbados was the appropriate forum. She noted that these reasons were adduced by Mr. Khan to show that, if SVG were shown to be clearly and distinctly a more appropriate forum, then there were special circumstances under the second limb of the Spiladia test which makes Barbados the more appropriate forum.

Cornelius, J. next weighed the arguments addressed to her by counsel on the respondents' side. At para [31] of her judgment, she opined that "the most potentially powerful argument for the respondents is that of the lis alibi pendens. It is clearly undesirable for concurrent proceedings to be taking place in two jurisdictions." She then proceeded to carefully examine the leading case and textbook authority on lis alibi pendens. At para [34] of her judgment, she cited in particular a statement of Dicey on Conflict of Laws Vol 1 (2006) at pg 485 as follows:

> "There may be cases…where a stay…would be appropriate. By contrast where it is not open to the claimant to bring the whole of his claim before one court… (where the proceedings may be founded on an attachment of assets in each of two jurisdictions and both are claimed by the claimant…) it may be regarded as reasonable to bring both sets of proceedings, and the claimant should not be required to elect."

She also cited at [para 37] of her judgment, a statement of the law in the case of Stewart v. Ask Secs Ltd [1986] CILR 28 as follows:

> "The fact that an action was pending in California based on a similar cause did not itself preclude a concurrent local action. The relevant transaction, although begun in California, had acquired an international character. The mere fact that the foreign action was begun first in California was only a factor for consideration and could not be a determining factor."

On the basis of this authority, she concluded that, given the nature of the relief sought in the Barbados proceedings included a tracing remedy into assets in Barbados, particularly the assets of KLB Inc., but also other assets, "it [was] difficult to see how SVG could clearly be the more appropriate forum".

The judge next turned, at para [39] of her judgment, to what she called "the second strong point for the respondents". This she identified as their argument that the Barbados claim, the fraud/misappropriation claim, is predicated on the St. Vincent claim, the breach of contract claim. Of this submission she said at para [40] of her judgment:

> "I do not agree that the fraud/misappropriation claim will necessarily be determined by the determination of the case in St. Vincent, not as the claim in Barbados is pleaded. It is an oral contract and much of the details are disputed in this claim. The restitutionary claim seems to me to stand separate for (sic) the breach of contract claim. Thus, on balance I find that on this factor as well the respondents are unable to show that St. Vincent is a more clearly appropriate forum."

The judge considered "the other factors advanced by the respondents". These included the fact that the majority of employees were resident or located in St. Vincent, the fact that the documents were located in St. Vincent, the fact that the construction contract relates to property in St. Vincent, and the allegation that significant funds were directed to Barbados from St. Vincent and that various business interests including KLB were acquired therewith. She examined these factors and concluded that they were, in her words, "a little shaky".

Cornelius, J. next weighed the submissions of counsel on the claimant's side. She reminded herself of the dicta of Bingham, L.J. in Banco Atlantico SA v. British Bank of the Middle East [1990] 2 Lloyd's Report 504 at 510 that: "It must be rare that a corporation resists suit in its domiciliary forum. Rarely would this Court refuse jurisdiction in such a case." Very clear and weighty grounds for doing so must be shown and, after careful consideration of the evidence before her, she concluded that Cellate Caribbean had not discharged this burden. According to her, "the respondents have more of a connection with Barbados with regard to domicile and residence, than they do with St. Vincent" (para [46] of her judgment); and "Barbados is the location where the money was either misappropriated or from where the orders were given for the misappropriation allegedly took place and also where the money was allegedly spent."

The judge finally looked at the "Cambridgeshire factor" and team expertise. She stated that she did not have to consider this special factor, as she had already found that the respondents had not discharged their burden with regard to the stay. However, she opined at para [48] of her judgment:

> "…this court does not consider that it has more expertise in the sense conveyed and denied by the respondents, merely (sic) has spent a considerable amount of time on this matter. However, I do not consider that to be a greatly determinative factor, as I consider that the matter can now go before any judge for hearing."

On the foregoing basis, Cornelius, J. refused the application for a stay and required the claimant not to proceed with the fraud claim in St. Vincent and the Grenadines.

THE APPEAL

The appellants appealed the decision of Cornelius, J. Given the fundamental issue raised by the appeal, it is important that we set out the grounds of appeal in extenso. They are as follows:

> "(a) the learned trial judge erred in law and/or in fact in failing to give any or any sufficient weight to the fact that the claim for fraudulent misappropriation is dependent on the finding by the trial judge as to whether the contract in respect of the Buccament Bay project in St. Vincent and the Grenadines is a fixed price contract or cost plus contract;

(b) the learned trial judge erred in fact and in law in failing to give any or any sufficient weight to the fact that the case of fraudulent misappropriation was entirely dependent on the finding of a judge as to the nature of the building contract in respect of the Buccament Bay Project;

(c) the learned trial judge erred in fact and/or in law in failing to give any or any sufficient weight to the fact that in order to determine whether fraudulent misappropriation occurred it will be necessary to determine the nature of the building contract in respect of the Buccament Bay Project regarding whether the contract was a fixed price contract or a cost plus contract;

(d) the learned trial judge erred in fact and/or in law in failing to give any or any sufficient weight to the fact that one of the consequences of not granting the stay of proceedings, is that it was entirely possible that the judge in St. Vincent and the Grenadines and the judge in Barbados could make inconsistent findings as to the nature of the contract in respect of the Buccament Bay Project, that is, one judge could find that the contract was a fixed price contract, and the other that it was a cost plus contract;

(e) the learned trial judge erred in fact and/or in law in failing to give any or any sufficient weight to the possibility that by not granting the stay, inconsistent findings by the judges in proceedings in St. Vincent and the Grenadines and the judge in proceedings in Barbados as to the nature of the contract in respect of the Buccament Bay Project;

(f) the learned trial judge erred in fact and/or in law in failing to give any or any sufficient weight to the fact that even with the undertaking by counsel for the claimants/respondents not to pursue the fraudulent misappropriation claim in St. Vincent and the Grenadines it was still possible for the judge in the proceedings in St. Vincent and the judge in the proceedings in Barbados to render inconsistent judgments in respect of the nature of the contract in respect of the Buccament Bay Project;

(g) the learned trial judge erred in fact and/or in law in holding that the claim for fraudulent misappropriation was a stand alone claim and/or was not parasitic on the breach of contract claim;

(h) the learned trial judge erred in fact and/or in law in failing to give any or any sufficient weight to the fact that if the claimants/respondents obtained judgment in St. Vincent and the Grenadines that it was open to them to register and enforce judgment in Barbados and thereby have access to all the remedies claimed in the statement of claim;

(i) the learned trial judge erred in fact and/or in law by failing to find that St. Vincent and the Grenadines was clearly or distinctly more appropriate to determine and hear the evidence for restitution and or fraudulent misappropriation and/or claim for equitable tracing;

(j) the learned trial judge erred in fact and/or in law by failing to give any or any sufficient weight to the fact that the proceedings filed in Barbados were the same as proceedings filed in St. Vincent and the Grenadines and between the same parties."

The appellants subsequently amended the original notice to add the following ground of appeal:

> "(k) the learned trial judge erred in law in that she misapplied the statement of law relating to lis alibi pendens as set out by Sir Nicolas Brown-Wilkinson VC in Australian Commercial Research and Development Ltd v. ANZ McCaughan Merchant Bank Ltd [1989] 3 All ER 65 in that in as much as the Claim 204 of 2010 filed in the High Court of St. Vincent and the Grenadines and the case filed in the Supreme Court in Barbados were for all intents and purposes identical to each other:
>
> (1) By equating the undertaking by the respondents not to pursue the fraud claim in St. Vincent as being equivalent to an election not to proceed in that jurisdiction;
>
> (2) In failing to require the respondent to elect whether he would proceed in Barbados or in St. Vincent and to discontinue the action in the other jurisdiction."

In his written and oral submissions before this Court, Mr. Mottley Q.C., conceded that these grounds of appeal can be conveniently classified under the following three interrelated broad heads. First, grounds of appeal (a), (b), (c), (h), and (j) all formed part of the appellants' contention that the fraud claim before the Barbados courts was inextricably linked to the breach of contract claim instituted in the St. Vincent courts. Second, grounds of appeal (d), (e), (f), (g) and (i) are all concerned with the appellants' contention in relation to the application of forum non conveniens and lis alibi pendens. Third, the ground contained in (k) related to the appellants' argument as to the application of principles of election of forum.

DISCUSSION

Before proceeding any further, it is important to remind ourselves that this is an appeal against the exercise of discretion by Cornelius, J. in refusing to grant a stay. This is important because in its recent decision in Toojays Ltd v. Westhaven Ltd (Civil Appeal No. 14 of 2008), this Court accepted the statement of law by Lord Woolf in the English Court of Appeal decision of Phonographic Performance Ltd v. AEI Rediffusion Music Ltd [1999] 1 WLR 1507, 1523-D on the appellate function in respect of an appeal to an appellate court against the exercise of a discretion by a trial court that:

> "Before the Court can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not, have considered, or that his decision was wholly wrong because the Court is forced to the conclusion that he has not balanced the various factors fairly in the scale."

Simply put, the general principle which should guide this Court in this appeal is that an appellate court should only interfere with the exercise of the discretion by a High Court judge in limited circumstances.

This general principle is equally applicable to the specific case of a grant or refusal of a stay. This conclusion emerges quite clearly from the judgment of Lord Templeman in the Spiladia at page 465F where he stated that "the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge". Lord Templeman continued that as long as a trial judge applies the principles enunciated by Lord Goff in that same case "an appeal should be rare and the appellate court should be slow to interfere". We would add parenthetically that the Spiladia has been accepted as the law in Barbados in the case of Downer v. Downer (unreported) High Court Suit No. 663 of 2007 (date of decision 23 May 2008).

The appellants accept that, as a general rule, this Court should be slow to interfere with the exercise by a trial judge of the discretion to refuse a stay. They argue, however, that this is a case in which this Court should interfere. The basis on which they ask this Court to interfere is not that Cornelius, J. acted upon wrong principles of law in the exercise of her discretion. Indeed, nowhere in the grounds of appeal or nowhere in the written or oral submissions before this Court is it suggested that Cornelius, J. applied wrong principles in the exercise of her discretion in refusing the stay. The case for the appellants is that even though she may have applied the correct test, Cornelius, J. did not exercise her discretion in accordance with that test. The respondents agree that this is the only basis on which this Court can interfere with Cornelius, J's exercise of her discretion to refuse a stay in this case, but argue that Cornelius, J., in her written judgment, set out the relevant issues in the application before her and correctly applied the legal principles to those issues. Accordingly, the respondents conclude, there is no basis whatsoever for this Court to interfere with the judgment of Cornelius, J.

The fundamental consideration at issue in this appeal therefore is Cornelius, J's exercise of her discretion in refusing to grant the stay sought by the appellants. Has she applied the correct principles?

From para [13] to para [28] above, we have endeavoured to provide as full a summary of Cornelius, J's judgment as was possible without reciting it verbatim. In our view, this summary makes it plain that she considered, assessed and evaluated the evidence and balanced the factors which she was called upon to consider in light of the principles enunciated by Lord Goff in the Spiladia. She did not err in principle in her approach and she left nothing out of account or took account of anything of which she should not have taken account. She gave an extremely thoughtful and fair consideration of all the matters raised before her. We are therefore far from persuaded that the exercise of her discretion in refusing the stay was tainted by any failure to balance the various factors in the scale. This is not a case where this Court should interfere.

DISPOSITION

In the foregoing premises, we dismiss the appeal and order costs for the respondents here and in the court below to be assessed if not agreed.