Date:19990707 CA152051

NOVA SCOTIA COURT OF APPEAL

Roscoe, Pugsley and Flinn, JJ.A
Cite as: Shah v. Jesudason, 1999 NSCA 93

BETWEEN:

CAPTAIN V.S. SHAH	)	Erroll G. Treslan
	)	for the appellant
Appellant	)	
	)	
- and -	)	
	)	
	)	
CAPTAIN STANLEY JESUDASON	)	A. Douglas Tupper, Q.C. and
and **NIRMALA JESUDASON**	)	Patricia Mitchell
	)	for the respondent
Respondents	)	
	)	
	)	
	)	Appeal heard:
	)	May 11, 1999
	)	
	)	Judgment delivered:
	)	July 7, 1999
	)	
	)	

THE COURT: The appeal and cross-appeal are both dismissed, per reasons for judgment of Pugsley, J.A., Roscoe and Flinn, JJ.A., concurring.

Pugsley, J.A.:

Overview

[1] The appellant, Captain V. S. Shah, brought an action claiming a liquidated debt against the male respondent, Captain Jesudason, and seeking, as well, a declaration to set aside a conveyance of real property by him to his wife, the respondent, Nirmala Jesudason, on the ground that it was fraudulent and intended to defeat the appellant as a creditor.

[2] Upon the respondents' application to strike, or stay, the statement of claim pursuant to **Civil Procedure Rule 11.05(a)** and **Civil Procedure Rule 14.25**, Justice MacAdam, of the Supreme Court, in Chambers, ordered that the action be stayed:

> ...on the basis that the Nova Scotia Supreme Court is not a *forum conveniens* in relation to the issue of whether Captain Jesudason is indebted to the appellant,

And further ordered that the action:

> be stayed until such time as the appellant's claim in debt against Captain Jesudason has been determined in a Court which is *forum conveniens*.

[3] The "sole ground" of the appeal is expressed, in the notice of appeal, in these words:

> That the Learned Justice erred in law by severing the issue of debt from a fraudulent conveyance action, thus requiring the appellant to obtain a monetary judgment against ... Captain Jesudason, in a foreign court as a pre-condition to his pursuit of a fraudulent conveyance action against the respondents.

Background

[4] The appellant, described as “an individual of Indian citizenship, currently residing in Dubai, in the United Arab Emirates”, commenced action on January 7, 1998, in the Supreme Court of Nova Scotia, against the respondent, Captain Jesudason, described as an individual “of Indian citizenship currently residing at Halifax, Nova Scotia and/or Madras, India” and the respondent, Nirmala Jesudason, his wife, described as “an individual of Indian citizenship, currently residing at Halifax or Madras”.

[5] The claim against Captain Jesudason is for repayment of the sum of $127,548.80, being an amount allegedly owing to the appellant, under the terms of a September 30, 1995, agreement between the parties. In the alternative, the claim is advanced for payment of that sum under documents executed by Captain Jesudason in which he personally guaranteed payment of loans by the appellant to Middle East Trading Enterprises Inc. (METE). The appellant and Captain Jesudason held the majority of shares in METE, a Liberian company, with a registered office in New York.

[6] The appellant, in addition, claims against both Captain and Mrs. Jesudason requesting a declaration that the court set aside a May 15, 1996, conveyance under which Captain Jesudason conveyed his joint interest in real property situate at 65 Capistrano Drive, Dartmouth (the Residence) to Mrs. Jesudason for One Dollar. It is alleged that this was a fraudulent conveyance, made without valuable consideration,

with the intention to delay or defeat the appellant, as a creditor of Captain Jesudason, and that the conveyance had that effect. The appellant relies on the provisions of the *Statute of Elizabeth*, 1570 (U.K.), 13 Eliz., c. 5.

[7] The relevant portions of the *Statute of Elizabeth* read as follows:

> For the avoiding and abolishing of feigned, covinous and fraudulent . . . conveyances...devised and contrived...to delay, hinder or defraud creditors and others of their just and lawful actions . . . (*Statute of Elizabeth*, 13 Eliz., C.5, s.1).

[8] An *ex parte* order was granted on January 9, 1998, granting leave to the appellant, to effect personal service on the respondents in India. Service was effected, and the respondents retained a local solicitor who filed an application on April 14, 1998, for an order:

> ...staying or striking the Statement of Claim under Civil Procedure Rules 11.05(a) or Rule 14.25 on the basis that the Nova Scotia Supreme Court has no jurisdiction to hear the matter or, in the alternative, Nova Scotia is a *forum non-conveniens.*

[9] **Rule 11.05(a)** provides:

> A defendant may, at any time before filing a defence or appearing on an application, apply to the Court for an order,
>
> (a) setting aside the originating notice or service thereof on him ...

[10] **Rule 14.25** provides:

> (1) The Court may at any stage of a proceeding order any pleading, advice or statement of facts, or anything therein to be struck out or amended on the ground that,
>
> (a) It discloses no reasonable cause of action or defence;
> (b) It is false, scandalous, frivolous or vexatious;
> (c) It may prejudice, embarrass or delay the fair trial of the proceeding;
> (d) It is otherwise an abuse of the process of the Court;

> and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.

[11] The respondents filed their joint affidavit, sworn February, 1998, in support of the application. It disclosed, and I paraphrase:

- Mrs. Jesudason lived at the Residence from 1992 until she left Nova Scotia in September, 1996. Captain Jesudason worked in Hong Kong, and elsewhere, during that period, visiting his wife at the Residence from time to time. From 1992 to May 15, 1996, title to the Residence was held in their joint names but on that date he conveyed his joint interest to his wife.

  From 1989 to 1995, the appellant and Captain Jesudason were shareholders in METE, a seafood company that purchased fish products from various places around the world, processed the fish in its factory in Dubai, and resold the products internationally. The obligations between shareholders were set out in an agreement which provided that the laws of Great Britain would determine any disputes between them. In 1995, the parties authorized the sale of all shares to a third party. The appellant was responsible for negotiating and implementing the sale;

- The respondents are employed full time in India and own two houses there. They have instructed solicitors in India to accept service of any documents that may be issued in India and are prepared to have the matter litigated as quickly as possible in either India or the United Arab Emirates. They denied the claims advanced against them and averred that they would counterclaim against the appellant for breach of fiduciary duty, for failing to secure a reasonable market price for the shares of METE, etc. They were advised by their solicitor the costs of defending the claims brought against them by the appellant to be “as much as $50,000 to $100,000;

[12] The appellant filed his own affidavit in response, attaching a letter signed by Captain Jesudason, dated September 26, 1995, wherein Captain Jesudason would appear to have acknowledged an indebtedness to the appellant of approximately $36,000.00.

[13] On June 25, 1998, Justice Davison, of the Supreme Court, granted an order, on the application of the appellant, which provided, in part:

> ...THAT all proceeds of the sale of [the Residence] by [the Respondent, Nirmala Jesudason], save and excepting real estate commissions, reasonable legal fees relating to the sale, pay out owing under the Mortgage affecting [the Residence] in favour of the Royal Bank of Canada, and outstanding property taxes, be paid into this Honourable Court until further order of this Court.

[14] On October 1, 1998, the respondents' application, filed on April 14, 1998, was heard before Justice MacAdam of the Supreme Court.

[15] At the conclusion of the hearing, Justice MacAdam determined:

> I am satisfied that there is virtually no connection to Nova Scotia. I will issue the stay in respect to the debt. I will not direct Dubai or India, but simply say that it seems to me obvious that either one of these is the appropriate jurisdiction. . . I want to make sure in doing this that somehow if we issue a stay on the fraudulent preference, the stay applies to both parties. I do not want an application to be made if the plaintiff has no action for debt, an application being made to strike the fraudulent conveyance on the basis that there is no outstanding action, because if I strike the action for the debt then theoretically at this point in time, or immediately following that, all he has is an application for fraudulent preference when he has not established any claim. So that would be unfair to the plaintiff. But on the basis of the way you put it, Mr. Tupper, you are saying I would "stay". That means a "stay" of both, so that action could not be interfered with, would exist; Justice Davison's order would remain in full force and effect.

[16] The order provided in part:

> **IT IS** ORDERED THE within action be stayed on the basis the Nova Scotia Supreme Court is not a *forum conveniens* in relation to the issue of whether the Defendant, Captain Stanley Jesudason, is indebted to the Plaintiff.
>
> **IT IS FURTHER** ORDERED THE action brought by the Plaintiff against the Defendants in S.H. No. 144184, be stayed until such time as the plaintiff's claim in debt against the Defendant, Captain Stanley Jesudason, has been determined in a Court which is a *forum conveniens*.
>
> **IT IS FURTHER ORDERED** the Order of Justice John M. Davison dated June 25, 1998 remain in force until further Order of this Court.

[17] A notice of cross-appeal filed on behalf of the respondents provides:

> 1. The Chambers judge erred in law and applied incorrect legal principles in failing to determine the Nova Scotia Supreme Court did not have jurisdiction;

2. The Respondents will ask the judgment appealed from be varied as follows:

   This Honourable Court strike the Statement of Claim under Civil Procedure Rule 11.05(a) or 14.25 on the basis the Nova Scotia Supreme Court had no jurisdiction to hear the matter because there was no real or substantial connection between the action and the jurisdiction of Nova Scotia.

[18] We are advised by the parties that since the judgment of the Chambers judge, the Residence has been sold and that by consent the net proceeds, i.e. $22,308.44, are held in trust by counsel until further order of the court.

Analysis

[19] The burden on the appellant, as acknowledged by both counsel, is to persuade us that the Chambers judge applied a wrong principle of law, or that a patent injustice would result, if the appeal were to be dismissed.

[20] In my opinion, the burden has not been satisfied. Indeed, I am convinced that the decision of the Chambers judge was fundamentally sound and provides an eminently just and fair resolution to all parties.

[21] The appellant chose to combine, in his statement of claim, two distinct causes of action:

> the first against Captain Jesudason alone for repayment of $127,548.80, arising pursuant to an agreement between the appellant and Captain Jesudason executed in September, 1995, or alternatively, pursuant to certain

> personal guarantees executed by Captain Jesudason in 1991 and 1992, together with
>
> a second claim against both Captain Jesudason and his wife, to set aside the conveyance of the Residence in May, 1996, which the appellant alleges was fraudulent with the intention to delay or defeat the appellant as a creditor.

[22] Justice MacAdam possessed a wide discretion under **Civil Procedure Rule 5** to order severance.

[23] **Rule 5.03(1)** provides:

> Where a joinder of causes of action or parties in a proceeding may embarrass or delay the trial or hearing of the proceeding or is otherwise inconvenient, the Court may order separate trials or hearings, or make such other order as is just. (emphasis added)

[24] The location of the Residence in Nova Scotia established a substantial connection to this province as a *forum conveniens* for determination of the second issue.

[25] Justice MacAdam determined, for various reasons, that Nova Scotia was not a *forum conveniens* to determine the debt issue. I am satisfied that he made no error in that determination. He properly considered all of the material factors disclosed in the affidavits, including the residence of the parties, their places of employment, the location of their business, the location of their assets, as well as the anticipated cost of litigation.

[26] The determination that there was ”virtually no connection to Nova Scotia” with respect to the debt claim is not the subject of appeal.

[27] In reaching the conclusion that either Dubai or India was a convenient forum, Justice MacAdam took into account the undertaking by counsel for the respondents that his clients would not contest jurisdiction in Dubai. This undertaking was consistent with the joint affidavit of the respondents who deposed:

> We are prepared to have this matter litigated as quickly as possible in either India, or the United Arab Emirates.

[28] Any judgment attained against them in India, or the United Arab Emirates, would, as a consequence, be recognized by the courts of this province.

[29] Justice MacAdam was concerned that if he granted the motion to strike the claim for debt, as distinct from granting a stay, the respondents might have been prompted to move in Chambers to strike the claim for a declaration:

> ...all he has is an application for fraudulent preference when he has not established any claim. So that would be unfair to the plaintiff.

[30] Justice MacAdam accordingly granted the application only for a stay. I am not entirely satisfied that the result that concerned the Chambers judge would necessarily follow, but I am convinced that, in the circumstances of this case, the resolution was a fair and proper one.

[31] A substantial part of the oral representations of the appellant's counsel, as well as his factum, centered on the prerequisites required to be established by an applicant seeking to set aside a conveyance under the *Statutes of Elizabeth*.

[32] We are directed to the decision of Hallett, J. (as he then was) in **Bank of Montreal v. Crowell** (1980), 37 N.S.R. (2d) 292, at p. 303 where he stated:

> To succeed under the *Statute of Elizabeth*, the plaintiff need only prove three facts:
>
> 1. The conveyance was without valuable consideration. ...
> 2. The grantor had the intention to delay or defeat his creditors. ...
> 3. That the conveyance had *the effect of* delaying or defeating the creditors.

[33] As part of the third prerequisite, Justice Hallett added these words, at p. 304:

> The plaintiff must first obtain a judgment against the debtor prior to commencement of proceedings to set aside the conveyance under the *Statute of Elizabeth* . . .

[34] Counsel for the appellant pointed out that there is a substantial amount of authority from academia, as well as courts in other provinces, stipulating that a person attempting to set aside an allegedly fraudulent conveyance pursuant to the *Statute of Elizabeth* need not have a judgment in hand, at the time of the impugned conveyance, nor even at the time the action is commenced, in order to be successful. (Dunlop, *Creditor - Debtor Law in Canada*, (2d), Carswell (1995) 619; **Hopkinson v. Westerman** (1919), 45 O.L.R. 208 at p. 210 (Ont. C.A.); **McGillan v. McGillan** (1947), 4 D.L.R. 456 at 458 (N.B.C.A.))

[35] In my opinion, it is not necessary to decide this issue for the purposes of this appeal.

[36] Whether the appellant was required to obtain a judgment before proceeding under the *Statute of Elizabeth* is not a material issue before us, but what is of importance is the recognition that the appellant would be required under the Statute to establish some evidence of the validity of his claim, as well as some evidence of Captain Jesudason's "fraudulent intention".

[37] Professor Dunlop, for example, states at p. 619, of his text:

> If a claimant has not yet obtained judgment by the trial of the fraudulent conveyance action, that claimant will also have to establish that he or she has a valid claim against the debtor.

[38] In short, the trial of the claim arising under the *Statute of Elizabeth* would require evidence of a nature substantially similar to that required for the trial of the debt action. In fact, counsel for the appellant, candidly admitted, that he hoped to convince the trial judge, if the matter proceeded in Nova Scotia, not only that the appellant had a valid claim, but also to particularize, the exact amount of that claim. It would, in these circumstances, be unfair to the respondents to require them to defend in Nova Scotia the claim arising under the *Statute of Elizabeth* before the debt issue was resolved in a *forum conveniens*. This unfairness was obviously recognized by the Chambers judge and prompted him to impose a stay on both claims.

[39] There is one further point. Counsel for the appellant submitted that if the appeal were to be dismissed, that would be taken as a determination by this Court that a foreign creditor would always be required to obtain a judgment in a court possessing jurisdiction before an action to set aside a transfer of property under the *Statute of Elizabeth* could proceed in this province.

[40] I do not agree with this submission.

[41] This case, in my opinion, is restricted to the particular, and rather unusual facts, established before the Chambers judge.

[42] I view the issue, not as one embracing the global issues raised by the appellant's counsel, but rather, one where the Chambers judge concluded that a relatively minor property transaction in Nova Scotia, should not be utilized as a device, to require litigants to resort to the courts of this province, to determine contractual rights arising from business transactions having no connection to this province.

[43] The appellant has failed to establish that the Chambers judge applied any wrong principle of law, or that a patent injustice would result, when he determined to sever the two issues articulated in the statement of claim and to issue stays respecting those issues.

Conclusions

[44] I would allow the application for leave to appeal, but dismiss the appeal. I would as well dismiss the cross-appeal.

[45] In the circumstances, the respondents should be entitled to costs in the amount of $1,200.00, together with disbursements.

Pugsley, J.A.

Concurred in:

Roscoe, J.A.

Flinn, J.A.