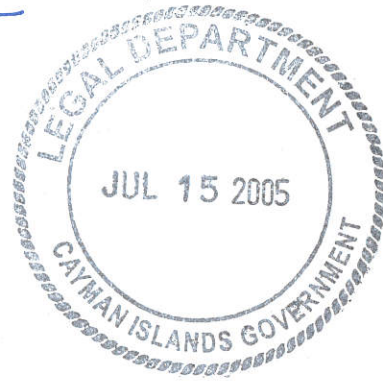


07/05



IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 141 OF 1999 *Civl.*

BETWEEN (1) OSVALDO FERNANDO RIVERO (JUNIOR)
(2) OSVALDO FERNANDO RIVERO (SENIOR)
(3) LLIA REMIREZ

PLAINTIFFS

A N D (1) MIRTA MARIA CANOSA
(2) SANTANDER RIOBANK (GRAND CAYMAN) DEFENDANT

HEARD: June 29 and 30; July 1 and 5, 2005

Appearances:
Counsel for the plaintiffs, Mr. Ross McDonough and Ms. Melanie Crinis of Campbells
Counsel for the first defendant, Mr. Christopher Russell of Ogier & Boxalls

RULING

On the September 27, 2001, I made an order requiring the second defendant bank to pay into Court the balance held on account #0036978. That account was held in the joint names of the first plaintiff and the first defendant who were then husband and wife.

I later, by ex-parte order made on 29th March, 2004, allowed the wife, Mrs. Canosa, access to the funds paid into court in order to fund the costs of her defence of the action.

This is the first plaintiff's, Mr. Rivero's application, for an order to set aside that ex-parte order as to Mrs. Canosa's costs.

Mr. Rivero's case is that Mrs. Canosa never had a beneficial interest in the funds in the joint account and can, in any event, no longer properly contend for such a claim; being estopped from so contending by her own renunciation on two occasions separately by Deed and by written declaration of any interest in the funds. He also cites his own reliance on her renunciations for the payment or transfer to her of certain assets (the value

of which is disputed) by way of the final settlement of any claim she may have had to a division of matrimonial property.

Mrs. Canosa seeks to repudiate her Deed and declaration citing the plaintiff's exercise of undue influence over her, in extracting, by duress, her renunciations expressed in them.

She also cites what she describes as the betrayal of her own legal adviser in respect of the part he played in advising her to make the Deed and declaration. She says she was improperly advised to forego her entitlement to claim one-half of all the matrimonial assets, but for what she says is the small fraction proffered by the Deed; and that he failed to act timeously in the presentation of her case before the Argentine court, the court of the parties' domicile.

Further, she points to the first plaintiff's own solemn renunciation in the context of the Argentine proceedings, of any claim to the funds in the bank account. While this renunciation by him may have been made for the expediency - which has been intimated - of avoiding certain tax consequences in Argentina, Mrs. Canosa nonetheless asserts that he must be estopped in these proceedings, from arguing contrary to such a formal and solemn renunciation.

Of some moment will be the fact that all the purported renunciations, on both sides, were made after the commencement of these and the Argentine court proceedings.

From just that brief summary of the allegations and counter-allegations in this case, it will be apparent that the circumstances will require of full examination before the true beneficial interest in the account can be fairly and properly determined.

The starting point will be the fact that the account was a joint account and so prima facie one of equal entitlement, even if that prima facie position can be displaced by a later

finding that the amount was so held only for administrative purposes and that the true beneficial entitlement is Mr. Rivero's. This is what is contended on his behalf by Mr. McDonough, citing *Steel v Steel* [2001] NPC 141 (at paragraph 5). In actuality, Mrs. Canosa claims only 40% of all the amounts which the account held as her share of the proceeds which, she asserts, represent the profits of a boxing promotion business she had with Mr. Rivero. For his part, he asserts that she had no such interest at all and that all the proceeds of the account represent the income from a family business involving only himself and his own relatives. At one time the account held more than six million dollars but Mr. Rivero was successful in withdrawing all but approximately \$800,000; the amount which was paid into Court.

That being the nature of the dispute, it is plain to my mind, that Mrs. Canosa has at least an arguable case. That taken with the compelling factor that without funding from the account, and, as I accept for present purposes, Mrs. Canosa being otherwise unable to fund her own defence or counter-claim; the circumstances plainly satisfy the criteria for an order allowing her access to the funds to meet the costs of representation.

Mr. McDonough argued that in order to so direct, I need to be first satisfied, not just that Mrs. Canosa has an arguable case, but that she has such a clear and strong case that she will be entitled, at the end of the day, to her costs out of the fund. He described the order which she seeks now as being in effect an order for pre-emptive costs; Mr. Rivero would have to bear them, even if he ultimately succeeds in showing that the funds are his.

Mr. McDonough cited the case of *McDonald v Horn* [1995] 1 All.E.R. 961 in support where it is laid down that a pre-emptive costs order in ordinary hostile litigation, should only be made where the judge is satisfied that "the judge at trial could properly exercise

his discretion only by ordering the applicant's costs to be paid out of the fund". Otherwise, this order, he said, may indeed serve only to fetter the trial judge's discretion under the costs rules.

Similarly, in the case of Chassels v British Telecommunications [2002] WTLR 719 in applying McDonald v Horn; the English High Court said that in relation to pre-emptive costs orders, that one virtually invariable rule is that where a party conducts litigation properly, he will not be made to pay the costs of a losing opponent. That no court alters the normal application of these rules simply because the victor is rich and the loser is poor.

In light of such dicta, I should make clear the basis upon which I primarily proceed: it is that this is a case coming, as Mr. Russell submits, under Order 29 of the Grand Court Rules, by which a restraint order has appropriately been made over assets which are disputed assets. In such a case, the Court has a discretion whether or not to allow a party to the dispute, especially one such as Mrs. Canosa in this case who would be otherwise precluded by impecuniosity from having a fair hearing; access to the funds for the purpose of legal representation. Moreover, this is a dispute which arises in a matrimonial context. Seen in its full context, the principles which apply to this case are different from those advanced by Mr. McDonough, if only as a matter of degree. They are succinctly stated in the reliable text book Commercial Injunctions by Steven Gee at page 630 paragraph 20.057; under the heading "Proprietary claims and the release of funds to pay legal costs from an injunction....":

"What if this is a proprietary claim by the claimant?

The purpose of an injunction granted in aid of a

proprietary claim is to stop the defendant expending for his own benefit what may be the claimant's property. No one has the right to use someone else's money to pay for their defence and so, before there can be any question of allowing a defendant to use funds to which the claimant has a very strong proprietary claim, he must show an arguable case for denying that they belong to the claimant..."

citing Ostrich Farming Corporation Limited v Kitchell unreported, December 10, 1997, Court of Appeal (England and Wales).

Bringing to bear on this principle the further weighty consideration of the matrimonial nature of the dispute, it is not inappropriate to note that this Court could, in an appropriate case of a dispute over matrimonial assets, require that one spouse must pay the legal costs of the other by way of an order for maintenance pending suit. Such an order will be in the interest of justice when one spouse has considerable assets and the other is without means: Zuiderent v Zuiderent 2001 CILR Note 9; where the statutory powers given by the Matrimonial Causes Law were invoked to that effect.

While the approach taken in the Zuiderent case is at best only analogous here, fairness dictates that the special nature of the relationship must be recognized here as well, if only as a matter of exercise of discretion.

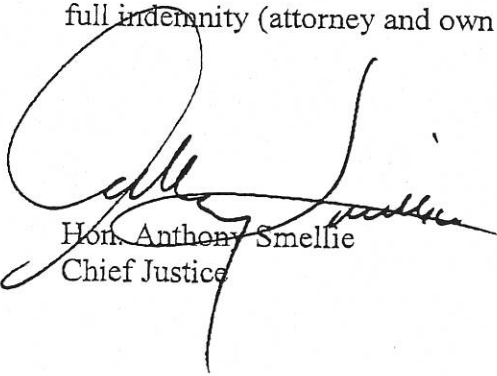
Given all the circumstances now presented, I regard the defendant Mrs. Canosa's case as being at least as arguable as that of the plaintiff's, Mr. Rivero.

The important point of principle to be noted in relying primarily as I do upon the Order 29 power and discretion, is that the access to be given to the funds will not be in effect a pre-emptive order for costs. If she ultimately fails, then she would no doubt be ordered to pay all the costs of the action. It would then be a matter for Mr. Rivero how he recovers those costs.

If, however, I am wrong in my treatment of this case as one governed by Order 29; instead of, as Mr. McDonough submits, one involving a dispute over what is essentially a trust fund; then I should explain that so cogent and arguable does Mrs. Canosa's case appear, that I would have been prepared to make an order that she should have her costs, in any event, on the pre-emptive basis; and thus as someone claiming a beneficial interest in the fund but being under the disability of not being able to fund her own legal representation for the presentation of that claim before the court. This, in my view, is a case in which the Court's overriding duty to see that justice is done must be observed.

See *Bridge Trust v The Attorney General* [2001] CILR 132.

The Order I now make is one dismissing the plaintiff's summons by which he seeks the discharge of the earlier ex parte order and confirming that Mrs. Canosa shall be entitled to access to the funds (now paid into court) for funding her legal representation on the full indemnity (attorney and own client) basis.



Hon. Anthony Smellie
Chief Justice