12/5/97

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

C 340/95

BETWEEN: L. PLAINTIFF

AND: L. DEFENDANT

HARRE CJ

For the Plaintiff - Mr. G. Giglioli
For the Defendant - Mr. P. Broadhurst

RULING

The plaintiff is the former wife of the defendant. She resides in Canada, he in the Cayman Islands. In 1990 the parties entered into an "Agreement regarding corollary measures" which provided, among other things, the following -

> "The defendant will pay to Applicant (the Plaintiff herein) a lump sum and compensatory allowance equal to the Canadian equivalent of US$134,400.00 payable by monthly installments (on the 1st day of each month) of the then current Canadian equivalent of US$1,600.00 for a period of seven years commencing on September 1st 1990 and terminating on August 31st, 1997 said payments to be made by a series of 84 postdated cheques (drawn on Defendant's Cayman bank account) to be remitted by Defendant to Applicant at the execution hereof."

The 84 postdated cheques were duly provided in Canada. At the date of the statement of claim, 16 of these had been dishonoured and the plaintiff claimed US$25,600 with interest pursuant to section 34 of the Judicature Law.

She is met by an application that the action be stayed on the ground of forum non conveniens.

The cheques were all drawn on a bank in the Cayman Islands, presented for payment at another Cayman Islands bank and dishonoured in the Cayman Islands.

Affidavit evidence was presented by the parties and by two experts on the law in Quebec. Their opinions differed. There is no issue as to their status as experts and I need not recite their professional qualifications.

The defendants' expert is Mr. Donald Devine. He concludes after an exhaustive review of Federal and Provincial Canadian law and the history of this matter that in accordance with the Canadian Federal Divorce Act 1985 the defendant would be entitled to a prospective and retroactive variation of his obligations under the clause of the agreement to which I have referred on the grounds of changes of his circumstances since the pronouncement of the divorce. In the light of the jurisprudence to which he refers he further concludes that a court would have to determine which part of the sum set out in the clause was to be paid as a lump sum and which was to be paid as a compensatory allowance. The plaintiff would have to begin corollary relief proceedings in order to enforce the agreement, at which time the defendant could seek variation.

The plaintiff's expert, Mr. George Artinian, also deals with the issue of the ability of the defendant to seek a prospective and/or retroactive variation of his obligations. He concludes that he could not, even if the amount were a lump sum payment, as the agreement was never incorporated into a judgment or order of a court. In any event his view of the evidence is that the payment was a compensatory payment rather than a lump sum and not subject to any variation, made by the Court of the Province of Quebec. In conclusion, he deals thus with the forum question -

> 25. "That in the light of the fact that the assets of the Defendant are situated in the Cayman Islands, and in light of the fact that it is his purported lack of means that the Defendant is invoking to try and modify the terms of the agreement he signed, it is my view that a Quebec Court would decline jurisdiction on the basis that the Court in the Cayman Islands would be a more appropriate forum to decide the question in light of the.grounds having been alleged by the Defendant in his affidavit of the 6th November 1995."

In his affidavit in reply, Mr. Devine takes issue with these opinions in a number of respects.

I have made no more than a brief reference to the respective expert opinions, on the law of Canada, on which much time was spent in argument, because in my view this is a simple action on dishonoured cheques. It is quite obvious that the purpose for which the post-dated cheques were provided on a Cayman Islands bank was so that they could be honoured or enforced in the Cayman Islands without further recourse to

Canada. That is consistent with the fact that the agreement was never incorporated into a Canadian judgment or order.

It remains for me simply to determine whether that purpose has been achieved. To that end I refer first to certain cases cited on behalf of the defendant. The first was DPP v. Turner (1973) 3 All ER 129. That is not helpful. It was concerned with whether, for the purposes of the criminal law, a debt revived in its original form if a cheque tendered in discharge of that debt is dishonoured. It had nothing to do with any issue relating to an action brought on the dishonoured cheque. Likewise, in Re Charge Card Services Ltd. (1988) 3 All ER 702 it was common ground that where a debt is paid by cheque or bill of exchange there is a presumption that such payment is conditional on the cheque or bill being honoured. If it is not honoured, the condition is not satisfied and the liability to pay remains. The presumption can be rebutted by showing an expressed or implied intention that the cheque or bill is taken in total satisfaction of the liability. That is not this case.

On the matter of the presumptions it seems to me to be quite unreal to say that because the matrimonial proceedings were governed-by the law of Canada it may be inferred that the parties to the arrangement concerning the "guarantee" of payment by means of the post dated cheques intended that Canadian law should apply to them. On the contrary, the more likely inference is that they intended the opposite, and indeed that the parties chose the law of the Cayman Islands to be that which governs the obligation to pay on presentation of the cheques. That is the law with which that transaction has its closest and most real connection.

Our Bills of Exchange Law like the English Bills of Exchange Act 1892 adopts the principle that a bill of exchange involves several contracts entered into by the drawer for the purpose of securing the payment in due course of the sum for which the bill is drawn. The several rights and liabilities of the drawer the acceptor and the endorser of the bill are distinct and section 72 of the Bills of Exchange Law acknowledges that more than one law may be applicable to different aspects of the transaction.

These cheques are inland bills in that on their face they purport to be both drawn and payable within the Cayman Islands or drawn within the Islands upon some person resident therein. Nothing to the contrary appears on the face of any of the cheques and therefore they fall within the definition of an inland bill set out in section 4 of the Bills of Exchange Law.

The Courts treat cheques as cash and will decline summary judgment or stay execution only in exceptional circumstances.

The Cayman Islands are the forum where this suit on the dishonoured cheques should be dealt with in the interests of the parties and the ends of justice. At the hearing of this forum application it was ordered by consent that the material before the Court in that matter may be referred to and relied on in the application for summary judgement, which now falls to be determined, together with any submission on costs.

G.E. Harre
Chief Justice

12th May 1997