TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. Cv. 2952 OF 2000

BETWEEN

MOOSAI'S HARDWARE COMPANY LTD.

PLAINTIFF

AND

MOOSAI DEVELOPMENT COMPANY LTD.
DEFENDANT

Before The Honourable Mr. Justice Stollmeyer

Appearances:

Mr. A. Ashraph for the Plaintiff
No appearance by or on behalf of the Defendant
Mrs. L. Maharaj and Mrs. N. Maynard-Marshall for the Proposed Intervenor

JUDGMENT

This is an application by Technovision Investments Incorporated ("Technovision"):

1. for leave to intervene in and be made a party to these proceedings("the existing proceedings"); and

2. to set aside the judgment in default of appearance taken up on 9th January 2001 by Moosai's Hardware Company Limited ("Hardware") against Moosai Development Company Limited ("Development").

The application is made by Summons of 6th March 2003 and is supported by the affidavits by Norma Maynard-Marshall of that date and of 5th June 2003. I granted leave to file the latter during the course of the hearing so as to exhibit a copy of the memorandum of judgment which had been filed in the office of the Registrar General relating to the judgment which had been obtained in the existing proceedings. It is perhaps unusual that these affidavits should be sworn by junior counsel appearing at the hearing, particularly since the first affidavit contains statements which clearly go far beyond the formal, and which in the normal course of events would be sworn either by a litigant or his Instructing Attorney. What was said by Permanand J. (as she then was) in *Pope v. Mayor, Alderman and Citizens of the City of San Fernando* H.C.A. 24 of 1990 is perhaps appropriate. The Court of Appeal has expressed itself similarly.

There were no affidavits filed in opposition. I refused an application on behalf of the Plaintiff at the outset of the hearing for an adjournment to do so on the basis that there had already been more than ample time for this purpose. Additionally, there had been no compliance with the orders made previously on 7th May 2003 for the filing of affidavits, and this failure was not excused by the attorney who had then proposed to come on record having "declined the brief", as Mr. Ashraph expressed it, on 2nd June 2003.

By writ issued 24th November 2000 in the existing proceedings, Hardware claimed $2,800,000.00 from Development being the unpaid price of building materials previously sold to Development. No appearance was entered and Hardware took up judgment "across the counter" on 9th January 2001. A memorandum of judgment was then registered in the office of the Registrar-

General on 2nd February 2001, but the efficacy of that registration is questionable given the errors which appear on the face of that document.

Prior to this writ being issued, on 22nd November 2000 to be precise, Intercommercial Bank Ltd. had instituted proceedings against Development in H.C.A. S1437 of 2000 in respect of monies due and owing. It must have held some form of security for monies advanced to Development because the affidavit of 6th March refers (at paragraph 9:5) to the bank obtaining "further security". It obtained a Mareva injunction on that day. Intercommercial Bank Ltd. subsequently assigned to Technovision its interest in the debt and after many applications within the proceedings and an appeal, a consent order was eventually entered on 6th November 2002 by which Technovision obtained judgment against Development for $23,009.087.94. A memorandum of this judgment was registered in the office of the Registrar-General on 7th November 2002. Technovision is therefore a judgment creditor of Deve lopment and by virtue of the provisions of Section 5 of the Remedies of Creditors Act Chap. 8:09 holds a charge over any land or interest in land owned by Development, whether present or future.

Technovision's application is made under the provisions of Order 15 Rule 6 (2)(b)(ii). The provisions of this Rule allow for a person to be added as a party to an existing action if, as between that person and any party to the existing action, there exists "…a question or issue arising out of or relating to or connected with any relief or remedy claimed… which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter".

To succeed in this application Technovision must first satisfy me that it has some interest in an issue to be determined in the existing proceedings, and that this interest will be directly affected by the outcome of that litigation. The interest must be a legal interest which can enforced by or against Technovision. It must

be a direct interest, not indirect, nor can it be a commercial interest. See for example, *Sanders Lead Co. Inc. v. Entores Metal Brokers Ltd.* [1984] 1AllER 857; *Amar Auto Supplies Ltd. (in liquidation) v. Longchamps Ltd.* H.C.A. 488 of 1988.

If Technovision succeeds in so satisfying me, then it must also satisfy me that I should exercise my discretion and allow them to intervene. If I decide these issues in favour of Technovision, then I will be required to decide whether the judgment in the existing proceedings should be set aside.

The purposes of the Rule are first, to prevent a multiplicity of litigation and permit a disposition of all claims through the vehicle of one action. Second, to avoid the same, or substantially the same issues, being re-litigated with potentially different outcomes.

Technovision's application is based on the allegation that Hardware and Development have colluded, conspired, in the existing proceedings so as to allow the Hardware judgment to be taken up; that this constitutes a fraud on Technovision (and I imagine, other of Development's creditors) because it would deprive Technovision of the opportunity to realise its own judgment against Development. Immediately prior to, and during, the litigation between Technovision and Development, for example, several "assignments" are said to have been made by Development to various of its creditors, although I am not certain how these would fall within the personal knowledge of the deponent. Hardware and Development share certain addresses. They have a mutual financial advisor.

From what is put before me on affidavit, I am more inclined to accept the submissions of collusion and the like than that of Mr. Ashraph on behalf of Hardware, who advances the proposition that intra-family or intra-group company litigation is not unusual in this jurisdiction, and that there is nothing untoward in

the existence of either Hardware's claim, the action, or the judgment against Development. It is not necessary, however, for me to pronounce definitively one way or the other as to this issue.

The principal issue is whether Technovision can demonstrate that it has a legal interest in some subject matter of the existing proceedings. It is clear that they concern the unpaid price of goods sold and delivered, and that Technovision has no interest in those goods. Mrs. Maharaj submits, however, that Technovision's interest lies in the monies which it claims were not owed to Hardware.

To my mind Technovision's interest in the monies is not an interest in the subject matter of the dispute. That subject matter is building materials which were supplied. No issue is taken as to this supply. I accept that Technovision's interest lies in the money, which may or may not have been paid, and there is nothing before me to show that any steps have been taken to enforce this judgment. In my view, Technovision's interest is that of a creditor; it has only an indirect or commercial interest in the subject matter of the existing proceedings.

Technovision's judgment in proceedings H.C.A. S1437 of 2000 gives it a charge on or over Development's land, but not on any other assets of Development. The subject matter of, the issue, in the existing proceedings is not land, nor a charge on land. Any charge Hardware may have on any lands of Development arises only as a consequence of the issue between them being determined.

Any charge Technovision has, as a consequence of its judgment is designed to enable it (as it would any other judgment creditor) to realise the fruits of its judgment and has no bearing on the existing issue, or its outcome. At best, it is only an indirect or commercial interest in the subject matter of the existing proceedings.

In the circumstances Technovision has not established the first prerequisite to succeeding in this application. My view is reinforced by those expressed in *Sanders* by Kerr L.J. at page 863e: "*however, as counsel …rightly conceded, no case has gone so far as to allow intervention by someone who is only a creditor, or alleged creditor, with no more than a creditor's commercial interest in the outcome of the action, and in my view it makes no difference whatever that the creditor in question is one who has obtained a Mareva injunction whose faith may in some way depend on the outcome"*.

Great emphasis has been placed upon the aspect of collusion, conspiracy and fraud. Again, however, I am not persuaded that this brings Technovision within the provisions of the Rule insofar as jurisdiction is concerned, although it would almost certainly have been a factor which would influence a decision as to whether I should exercise my discretion in favour of Technovision being given leave to intervene. In the event, I am not called upon to decide whether I should exercise that discretion. See Kerr L.J. in *Sanders* at page 863f-g.

In my view, Technovision's remedy might more appropriately be to initiate proceedings against both Hardware and Development founded in fraud and/or conspiracy. It might then apply to have the existing proceedings stayed insofar as Hardware enforcing the judgment is concerned. I am fortified in this view by what is said by Kerr L.J. in *Sanders* at page 863h-g.

There is one other matter of which I might make mention, principally for the sake of clarity. During the course of her submissions Mrs. Maharaj informed me that my brother, Archie J., had granted Technovision leave to intervene in certain other proceedings between Hardware and Development – H.C.A. S1223 of 2002. As I understand her submission, he did so exercising his discretion on the basis of the decision in *Sanders*.

My research has not revealed a written judgment of Archie J. if there be one, nor have I the benefit of an agreed note of his reasons. It would seem to me from what is said in the affidavits supporting of the application, however, that those proceedings (H.C.A. S1223 of 2002) concern the conveyance by Development to a third party of "…its principal real property". While it might be speculative on my part, it would seem to me that the subject matter of that dispute was a parcel of land over which Technovision would have a charge by virtue of its judgment and the provisions of the Remedies of Creditors Act. Had those been the circumstances before me, then I might have decided the present application differently, but there is nothing before me to demonstrate that any land is concerned, or that any land is the subject matter of the dispute in the existing proceedings.

My research, however, did reveal two judgments both in the proceedings H.C.A. S1437 of 2000 wherein Technovision obtained its judgment against Development. I mention them purely as an aside. They are the judgments of Rajnauth-Lee J. dated 14th February 2001 and of Christopher Hamel Smith J. (Ag.) of 12th July 2002. In the former, the Mareva injunction was discharged. That is not reflected in the affidavits, but quite naturally places Technovision on a lesser footing than the proposed intervenor in *Sanders*.

While this judgment forms no part of my reasoning and does not affect the conclusions at which I have arrived, it would tend to support my conclusion that Technovision's present application is really in the nature of attempting to improve its position by securing its judgment debt, and that its interest in the existing proceedings is indirect or commercial.

In the circumstances, there is no need for me to determine the issue of any irregularity in the judgment which Hardware obtained against Development. In light of the submissions made by Mrs. Maharaj, and the concession made by Mr.

Ashraph (quite correctly in my view), however, I would have had little difficulty in setting it aside.

Technovision's application by summons of 6th March 2003 is dismissed with costs, certified fit for advocate.

I anticipate that Technovision may wish to appeal against my decision. If that is so, then there will be leave to appeal and a stay of the existing proceedings, in particular the enforcement of the judgment, for 14 days, to continue in the event of an appeal.

11th June 2003

C.V.H. Stollmeyer
Judge