IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CL C073 OF 1998

| | | |
|---|---|---|
| **BETWEEN** | CIBONEY GROUP LIMITED | 1ST PLAINTIFF |
| | CIBONEY HOTELS LIMITED | 2ND PLAINTIFF |
| | LUXURY RESORTS INTERNATIONAL LIMITED | 3RD PLAINTIFF |
| **AND** | NEUSON LIMITED | 1ST DEFENDANT |
| | IVOR ALEXANDER | 2ND DEFENDANT |
| | PETER ROUSSEAU | 3RD DEFENDANT |
| | FRANCISCO SOLER | 4TH DEFENDANT |
| | JOHN ROSS | 5TH DEFENDANT |
| | BAANQ LIMITED | 6TH DEFENDANT |
| | RADOX LIMITED | 7TH DEFENDANT |

Emile George, Q.C., John Vassell, Q.C., Miss Ingrid Mangatal and Miss Julianne Mais-Hull instructed by Dunn, Cox, Orrett and Ashenheim for the Plaintiffs

Miss Hilary Phillips, Q.C. and Mrs. Denise Kitson instructed by Grant, Stewart, Phillips & Co. for the First Defendant.

**Heard on May 17, 18, 20, 21, 25, 26, 27 and July 15, 1999**

CORAM: WOLFE C.J.

On the 20th day of February 1998, Mr. Justice Smith granted an Exparte Injunction ordering as follows:

> "That the First Defendant by itself, its directors, officers or otherwise be restrained from appointing a receiver of the First or Second Plaintiff or from taking any step to enforce any security held by it of the First or Second Plaintiff in relation to the Plaintiffs' indebtedness."

The Plaintiffs now seek an interlocutory injunction to have the exparte order remain in force until the trial of the substantive action.

To place the application in its proper perspective, I set out below extracts from the amended Writ of Summons.

The Plaintiffs claim:-

1. Against the First Defendant:-

   (a) A declaration that the First Defendant is not entitled to enforce promissory note purportedly dated September 30, 1996, drawn by Flexon Limited in favour of the First Plaintiff and purportedly endorsed by the First Plaintiff to the First Defendant on the said date.

   (b) A declaration that the said promissory note and/or the endorsement thereof to the First Defendant is null, void and unenforceable.

   (e) A declaration that the guarantee mortgages and debentures held by the First Defendant in respect of alleged indebtedness of the Third Plaintiff to the First Defendant were procured by fraud and/or are unenforceable, null and void, in that the said securities were to the actual or constructive knowledge of the First Defendant, executed and registered by, or on the instructions of, the Second Defendant without the knowledge or authority of the First and Second Plaintiffs.

(f) Alternatively if, which is not admitted, the issuance of the said securities were duly authorised, a declaration that in authorising the issue of the said guarantee, mortgages and debentures, the directors of the First and Second Plaintiffs, particularly the Second, Third, Fourth and Fifth Defendants to the actual or constructive knowledge of the First Defendant, acted improperly and in abuse of their powers as directors and in breach of fiduciary duty and with intention of benefiting the First Defendant, a company beneficially owned or controlled by the Second and Third and/or Fourth Defendants or with which those Defendants have a close connection, to the detriment of the First and Second Plaintiffs."

These extracts make it abundantly clear that the plaintiffs have alleged fraud as the basis of their claim against the first defendant. The allegation of fraud arises in that the second and third defendants who were directors of the first and second plaintiffs in abuse of their powers acted in breach of their fiduciary duties to the benefit of the first defendant, which they beneficially owned or controlled along with the fourth defendant.

In considering this application I bear in mind the key principles derived from the speech of Lord Diplock in ***American Cynamid Co. v Ethicon Ltd.*** *[1975] AC 396,* in particular the following -

"(a) that the grant of an interlocutory injunction is a remedy that is both temporary and discretionary;

(b) that the evidence available to the Court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination.

(c) It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations; (emphasis mine)

(d) that the Court must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried;

(e) that unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

In **Fellowes and Sons v. Fisher [1976] 1 QB 122 at p. 137, Browne LJ** set out Lord Diplock's guidelines in American Cynamid (supra) in an enumerated series which judges throughout the ages have found helpful in dealing with applications of this kind. I set out below the guidelines -

"1. The governing principle is that the Court should first consider whether, if the plaintiff succeeds at the trial, he would be adequately compensated by damages for any loss caused by the refusal to

grant an interlocutory injunction. If damages would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.

2. If on the other hand, damages would not be an adequate remedy, the Court should then consider whether, if the injunction were granted, the defendant would be adequately compensated under the plaintiff's undertaking as to damages. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction. (emphasis mine)

3. It is where there is doubt as to the adequacy of the respective remedies in damages that the question of the balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

4. Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo.

5. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies.

6. If the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the

> affidavit evidence adduced on the hearing of the application. This however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party.
>
> 7. In addition to the factors already mentioned there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

I shall now proceed to examine the principles and guidelines against the background of the affidavit evidence.

Is there a serious question to be tried?

One of the bases of the plaintiffs' claim is that the guarantee mortgages and debentures held by the first defendant in respect of alleged indebtedness of the third plaintiff to the first defendant were procured by fraud and/or are unenforceable, null and void, in that the said securities were to the actual or constructive knowledge of the first defendant, executed and registered by, or on the instructions of, the second defendant without the knowledge or authority of the first and second plaintiffs.

In deference to the principle enunciated by Lord Diplock in American Cynamid Co. v. Ethicon Ltd. (supra) and set out at (c) page 4 of this judgment, I refrain from embarking upon any indepth analysis of the evidence adduced in the several affidavits which have been filed on both sides. Suffice it to say that the affidavits filed on behalf of the plaintiffs contain material which if accepted by the trial court creates a real prospect of the plaintiffs succeeding. I am

satisfied that the claim is not frivolous or vexatious and that there is a serious question to be tried.

I next ask myself the question if the plaintiffs were to be successful would damages be an adequate remedy. The very nature of the claim compels me to answer this question in the negative. If the defendant were to succeed, the defendant would be adequately compensated under the plaintiffs' undertaking as to damages. The question is, however, would the plaintiffs be in a financial position to pay any damages which may be awarded to the defendant.

Miss Phillips, Q.C. in her submissions quite correctly conceded that damages would be an adequate remedy for the first defendant. She, however, submitted that the available accounting information adduced, points to the inability of the plaintiff to pay such damages as may be awarded to the defendant. She further contends that the financial state of the plaintiffs precludes them from giving an acceptable undertaking.

I do not agree with the submission of Miss Phillips as to the insolvency of the plaintiffs. The evidence is not as clear cut as she has suggested.

It must be borne in mind that at this stage the evidence is incomplete. It is given on affidavit and has not been tested by oral cross examination. I do not accept that the evidence discloses that the plaintiffs' financial state precludes them from giving an acceptable undertaking.

I entertain absolutely no doubt as to the adequacy of the respective remedies in damages and it is therefore my view that the question of the balance

of convenience does not arise for consideration. In the event that I am wrong in this conclusion, I would say that this is a case in which the counsel of prudence should prevail namely to preserve the status quo.

In the circumstances there is no basis on which the Court can properly refuse the interlocutory injunction sought by the plaintiffs.

This does not however dispose of the matter, because Counsel for the defendant has argued that when a mortgagor seeks to restrain a mortgagee from exercising its powers under the mortgage, the mortgagor must pay into Court what the mortgagor says is owing.

*(See SCCA No. 57/86 SSI (Cayman) Ltd. et al v International Marbella Club SA).*

Mr. George, Q.C., for the plaintiffs, seeks to distinguish the instant case from the Marbella Case (supra). He argues that in Marbella's case there was no allegation of fraud, there was only an allegation of misrepresentation. He further submitted that in the instant case -

> "the alleged mortgagor was not a primary borrower but a guarantor whose guarantee came long after the alleged actual loan was made to the alleged primary borrower who had supposedly incurred the debt."

He describes the security held by the defendant as a "subsequent security fraudulently obtained which therefore never existed at all."

Miss Phillips, Q.C., submitted that law is settled and that the Marabella principle is applicable where there is a mortgage by way of guarantee as with other mortgages. For this proposition she relies upon ***National Westminister Bank plc v. Skelton et al [1993] 1 All ER 242.***

With deference to Learned Counsel I am not able to extract that principle from the decision.

In Marabella supra, the case of ***Inglis and Another v Commonwealth Trading Bank of Australia [1971 - 1972] vol 126 CLR 161*** was cited with approval. At page 164 of the Judgment Walsh J said:

> "A general rule has long been established, in relation to applications to restrain the exercise by a mortgagee of powers given by a mortgage and in particular the exercise of a power of sale, that such an injunction will not be granted unless the amount of the mortgage debt, if this be not in dispute, be paid or unless, if the amount be disputed, the amount claimed by the mortgagee be paid into Court." (empasis mine)

In the instant case the mortgage debt is disputed. The plaintiffs contend that the alleged security does not exist, in that it has its genesis in fraud. It must be further noted that in the Inglis Case, supra, it was not disputed that the mortgage was properly executed. In this case the execution of the mortgage is hotly disputed.

The pith and marrow of the plaintiffs' case is that the guarantee mortgages and debentures held by the first defendant in respect of the indebtedness of the third plaintiff to the first defendant were procured by fraud.

or on the instructions of the defendant Ivor Alexander without the knowledge or authority of the first and second plaintiffs.

It is further contended that the second, third, fourth and fifth defendants acted in collusion with each other and to the actual or constructive knowledge of the first defendant in authorising the issue of the guarantee, mortgages and debentures. This, the plaintiffs contend was in abuse of their powers and contrary to their fiduciary duties as directors. To further compound the situation the plaintiffs assert that the defendants, referred to, acted with the sole intention of benefiting the first defendant, a company beneficially owned or controlled by the second, third and/or fourth defendants to the detriment of the first and second plaintiffs.

These allegations strike at the very existence of the securities held by the first defendant. In the circumstances, I am confident that the principle enunciated in Marabella (supra) is not applicable. Where this kind of fraud is alleged nothing should be done by a court, which might have the effect of benefiting the "alleged fraudsters" and denying the plaintiffs of their day in Court.

In the circumstances, I refrain from ordering that the plaintiffs pay into Court the amount claimed by the defendant and it is hereby ordered that the First Defendant by itself, its directors, officers or otherwise be restrained from appointing a receiver of the First or Second Plaintiff or from taking any step to

enforce any security held by it of the First or Second Plaintiff in relation to the Plaintiffs' indebtedness, until the hearing of the action.

Plaintiffs give the usual undertaking as to damages.

Speedy trial of the matter ordered.