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Judgment Book

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SUIT NO. C. L. C. 421/94

BETWEEN	CIBONEY INVESTMENTS LTD.	PLAINTIFF
A N D	CROWN EAGLE LIFE INSURANCE CO. LTD. PAUL CHEN YOUNG & CO. LTD. MOUNT INVESTMENTS LTD. EAGLE MERCHANT BANK OF JA. LTD.	DEFENDANTS

Michael Hylton, Peter Goldson and Debbie Fraser instructed by Lance Hylton of Myers, Fletcher & Gordon for Plaintiff/Applicant

Emil George Q. C.; W. K. Chin See Q. C; Dr. Lloyd Barnett and John Vassell instructed by Frank Francis of Dunn Cox & Orrett for Defendants/Respondents.

HEARD: 3rd, 4th, 7th, 8th and 18th November, 1994

HARRISON J.

By a writ of summons dated the 21st day of October 1994, the plaintiff claimed inter alia, against the first and second defendants.

"1. A declaration that the purported transfer to the first and/or the second named defendant of One Hundred and Nineteen Million, Nine Hundred and Ninety-eight Thousand, Two Hundred and Eight of the plaintiff's shares in Ciboney Group Ltd. is null and void and of no effect.

2. An injunction restraining the first and second named defendants and their servants or agents from effecting, perfecting or acting upon the aforesaid transfer, or from dealing with the said shares in any way."

On the 24th day of October, 1991, an interim injunction was granted by Harrison, J., for a period of Fourteen (14) days.

By a summons dated the said 24th day of October, 1994, the plaintiff applied for an interlocutory injunction to restrain the defendants "from effecting, perfecting, or acting upon the purported transfers to the first named defendant and/or the second named defendant of One Hundred and Nineteen Million, Nine Hundred and Ninety-eight Thousand, Two Hundred and Eight of the plaintiff's shares in Ciboney Group Ltd., or from dealing with those shares in any way until trial of this action."

The following are the facts, inter alia.

The plaintiff (CIL) a public company since 1962, is the largest shareholder in Ciboney Group Ltd. (CGL), owning 132, 628, 000 or 49.1% of its shares. CGL owns 90% of the Ciboney Raddison Resort Hotel and 34.3% of Sandals Ocho Rios Hotels, two hotels in the north coast parish of Saint Ann.

In December 1992, the plaintiff executed with the first defendant an equitable charge/offer to deposit and an hypothecation agreement with a letter dated the 20th day of December, 1992, charging 128, 625, 727 of its shares in CGL to secure a debt effected by way of the first defendant taking over a loan of $456, 055, 034.57 payable by the plaintiff. The terms of repayment were agreed, inter alia, and a schedule of payments accepted, in that payments would continue to July 1999 - See schedule B to the said agreement.

In accordance with provision of the said agreement the first defendant released from the charge a total of 79,815,361 of the said shares, over a period of time, to be charged as security for a loan of US$6,000,000 from the Jamaica Flour Mills (JFM) and the Jamaica Public Service Co. (JPS) to the plaintiff through the National Commercial Bank. The proceeds of these loans were paid to the first defendant in reduction of its loan to the plaintiff.

The first defendant therefore retained 40,182,847 shares still subject to the said charge, having released other shares from the charge.

It was a special condition of the said hypothecation agreement, that the first defendant "will always retain its hold on (the plaintiff's) shares in CGL to the extent of a market value of 1.33 times the outstanding loan balances". A further condition of the said agreement was, " ...if... the value of any of the securities in the opinion of the lender, has depreciated and further securities of sufficient value, ...to cover such depreciation in value has not been lodged with the lender....the lender, without notice....may sell by public or private sale....the securities". The proceeds of such sale should go towards reducing the loan balance.

The first defendant carries on the business of insurance. The second defendant is a firm of stockbrokers.

The plaintiff complained, probably in April 1994, that it was being overcharged, in that the first defendant was computing the interest due on the loan indebtedness, as compound instead of simple interest. The plaintiff wrote to the first defendant on the 16th day of September, 1994, and again on the 27th day of September 1994, repeating the said complaint of a "massive overcharging". The first defendant did not respond. Negotiations then took place between the Attorneys of the plaintiff and the first defendant.

By letter dated the 11th day of October, 1994, the attorneys for the first defendant wrote to the plaintiff expressing its view that the value of the securities, i.e. the CGL shares, "has been severely depreciated," that the 40,183,847 shares then held were insufficient at their then market value to cover the balance of the loan at the agreed ratio of 1.33 to 1, and requesting, that within three (3) days, pursuant to the hypothecation agreement that the plaintiff provide additional security, "to cover such deficiency in value....." The amount of 111,628,649 shares in CGL, was stated as necessary "to cover the loan balance". The loan balance quoted by the attorneys for the first defendant "at 10th October, 1994 was $151,076,124.64".

The plaintiff did not provide the securities requested. On the 18th day of October, 1994, the first defendant instructed the second defendant to sell the 40,182,847 shares and to buy the said shares in its, the second defendant's name. The second defendant did so.

On the 20th day of October, 1994 the first defendant had paid off the JFM and JPS loans by paying to NCB the balance owed by the plaintiff. The first defendant received from NCB share certificates for the 79,815,361 shares held as security by the said bank.

The share transfer certificates for the shares sold on the 18th day of October 1994 and the 20th day of September 1994, were completed by the second defendant on the instructions of the first defendant and were processed by the Jamaica Stock Exchange in the name of the first defendant. The said certificates were then sent to Veritat Corporation, the registrar for CGL, for registration.

On the 21st day of October the plaintiff objected to the registration of the said shares and obtained the said interim injunction subsequently.

Mr. Hylton for the plaintiff argued that the first defendant was not exempt from the provisions of the Moneylending Act, in that the loan was not made "in the course of ..... and for the purposes of "the first defendant's insurance business, as required by section 13. Therefore, the hypothecation agreement was unenforceable, in that, contrary to the requirements of the said Act, there was no note or memorandum, that the documents were signed after the money was loaned and security given, that no fixed rate of interest was stated as required, and it stated that the rate of interest is subject to increase on the default of the plaintiff, therefore the debt is irrecoverable. Alternatively, he said, the attempted transfer of the said shares is invalid, in that it is a sale to oneself, which is not authorised by section 3 of the hypothecation agreement in the event of depreciation of the shares; section 7 permits such a sale in the event of default in payment and no default was alleged by the first defendant. He said further, that, assuming that the first defendant had the right to sell, he like a mortgagee must act in good faith. Continuing, he submitted that it was not the depreciation, envisaged by section 3 of the hypothecation agreement that caused the reduction in the coverage of the loan but the act of the first defendant which must be deemed to have waived its rights under the said section. He said that on repayment of the loan, the first defendant acquired no charge over the shares received from NCB, and if it did, it was on the same terms as those covering the loan from NCB and not upon the terms of the hypothecation agreement.

He concluded that damages would not be an adequate remedy for the plaintiff if it succeeds of trial; the shares are unique. The plaintiff is able to give an undertaking as to damages; the value of its assets is the relevant factor not its inability to pay its debts, and if the Court wishes, it may require an undertaking from some other person.

Mr. George for the first defendant submitted in reply, that the plaintiff is insolvent - cannot pay its debts, that its balance sheet at the 31st day of May 1994, showed its net current liabilities as $237,318,000, that it does not control CGL which is not its subsidiary and therefore may not consolidate CGl"s assets to its own in order to portray a higher asset value of the plaintiff. The plaintiff cannot meet its financial obligations; this is evidenced by the fact the fourth defendant had to pay the plaintiff's debt under a guarantee and the fact that the directors of the plaintiff so declared at a board meeting on the 25th day of October, 1994. Accordingly, the plaintiff cannot give a valid undertaking as to damages and therefore the application should be refused on this ground.

Furthermore, the non-disclosure of letters by the plaintiff, at the grant of the interim injunction is of such that the application should be refused without the Court examing the merits of the case. These letters show that on release of the shares by NCB to the first defendant - the said shares were subject to the hypothecation agreement, contrary to the plaintiff's contention.

He argued further that the plaintiff has failed to show that it owed no money to the first defendant, in order to show that the first defendant was not entitled to exercise its right. He continued, that the first defendant being an insurance company in the business of insurance is authorised by its memorandum of association as one of its objects to lend money and does so "as an ordinary commercial facility of its business." It lends money in the ordianry course of its business and for the purposes of its business, which terms are purely descriptive, and once it does so, as banks do, then the first defendant is exempt from the provisions of the Moneylending Act. It lends money in order to successfully manage and invest its funds to pay its policyholders ultimately. The first defendant is equated to such a company under the English Statute which does not have as its primary object the lending of money and therefore is exempt under the Moneylending Act. The first defendant therefore had the power to charge the interest rates agreed.

Mr. George argued further that when the value per share of the 40,103,847 shares held by the first defendant had depreciated to $1.80 per share the security then was $72,327,936 representing a ratio of 0.3 to 1 instead of the agreed 1.33 to 1. Paragraph 3 of the hypothecation agreement authorised the first defendant to sell, seeing that the plaintiff did not supply the deficiency in security. The sale on the Stock Exchange by the second defendant, stockbroker on the instructions of the first defendant, was a valid sale, because section 3 of the hypothecation agreement authorises sale, even to oneself. The said Stock Exchange, using its machinery, is an independent valuator of the price of the shares, as contemplated by section 13 of the said agreement which section authorises sale to onself. If the Court finds that the Stock Exchange valuation did not satisfy the requirement - the plaintiff would merely be entitled to damages, if such price differed on a subsequent valuation. In addition, it being a sale on the Stock Exchange, the first defendant is not subject to the strictures of a mortgagee exercising his power of sale.

He concluded that there was no serious question to be tried but if there was, damages would be an adequate remedy for the plaintiff, should it subsequently succeed at trial. The plaintiff would have suffered no more than the loss of voting power on its shares. It would not lose the right to deal with its shares - as they had already been hypothecated as security for the loans which on repayment would revert to the first defendant.

If the injunction is granted and the first defendent succeeds at the trial, its loss would be greater than the plaintiff's. The first defendant would be in possession of shares whose value is falling and in the face of an insolvent debtor. Furthermore the first defendant would be deprived of exercising its right of control of CGL which it has, by its possession in excess of 50% of the shares therein. If however, the disadvantages are the same on both sides, then the greater strength of the first defendant's case favours the balance of convenience being exercised to refuse the injunction.

Each counsel relied on authorites in support of his submission.

The Court respect the sanctity of a contract, and will not lightly, as it is said "break a man's bargain."

However, the law reserves to itself the supervisory right to intervene in certain circumstances.

The Moneylending Act exercises such a regulatory role and imposes strictures in its constant scrutiny of loan transactions. Some institutions and loan transactions are however exempt from its statutory provisions.

Section 13 reads,

"(1) This Act shall not apply to -

(d) any Banker, or persona bona fide carrying on the business of insurance, in the course of whose and for the purposes whereof he lends money; ...."

An insurance company is therefore not automatically exempt from the provisions of the Act. To be so exempt it must be,

(a) bona fide carrying on the business of insurance and

(b) in the course of that business of insurance and for the purposes of that business of insurance, he lends money.

By parity of reasoning, it seems that some insurance companies would be exempt in loan transactions and some would not. If one accepts the contention of counsel for the first defendant that insurance companies must lend money in order to increase the fund of premiums to companies which lend money would be automatically exempt. The words "in the course of whose business and for the purposes whereof he lends money" would therefore be mere surplusage or as counsel for the first defendant regards them, merely descriptive.

The English Money-lenders Act, 1990, was considered in the case of Wright (Constructions) Ltd. et al vs Frodoor Ltd. et al [1967] 1 All ER 433, and is helpful, in the interpretation by the courts of the clause "carrying on business .... in the course of .... and for the purpose whereof he lends money ...."

Section 6 of the latter Act defines 'Moneylender'.

In the English statute, banks and insurance companies are automatically exempt. A person in the other category, "....... any person - bona fide carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money" would need to prove that by its operations it was so exempt. In the latter case, an issuing house whose primary object was the flotation of public companies, made loans to a private company, at it was satisfied concerning this private company that it could make capital available to it, with a view to a flotation within a period of five (5) years. It was held that the loans were moneylending transactions, but as the loans were made bona fide, for the purposes of the business of an issuing house, which was a business not having for its primary object the lending of money but in the course of which money was lent, the loans were within the exception provides by section 6 (1) (d) of the Money-lenders Act, 1900.

Roskill, J., in his judgment said, at p. 449,

> ".... the primary object of making these loans was not getting interest on the loan or making a profit on the loan. The making of the loan was merely part of the issuing house business which was done as a preliminary step to bringing the company concerned to the ultimate stage of being ripe for flotation, when all the conditions....essential prerequisites to successful flotation were satisfied."

In Premor, Ltd. vs Shaw Brothers [1964] 2 All ER 583, the said section 6 (1) (d) of the Money-lenders Act was considered and it was held that a hire purchase finance company whose primary business was not the lending of money but who lent money to another so that the latter could build up a stock of motor cars, was a money-lender and not exempt under the Act. Lord Denning in his judgment said, at p. 586,

> "Take the requirement that the lending of money must be 'in the course of' the business, that is, of the primary business which the person carries on......in order that it should be in the course of the primary business, it must be associated with a transaction of that business, so as to be linked with it........."

Lord Denning went on to observe that the loans were not made in the course of the hire purchase business. He said "I can well understand that if a finance company were to lend money to a dealer in order that the dealer could buy a special car which was to be put through on hire purchase with the finance company, then it might be made 'in the course of' the hire purchase business."

The learned judge also said that the other requirement, "for the purpose of .... business", in order to effect the exemption, the lending must be done with the object of promoting the business," as distinct from getting a high rate of interest on the loan.."

In the Privy Council case of Official Assignee of the Property of Koh Hor Khoon vs. Ek Liong Hin. Ltd [1960] 1 All ER 440, it was held that a company, which carried on business as rubber merchants, shipowners and warehouse-men in the course of which they took goods into store in a 'godown' and advanced money to selected customers who stored goods in the godown, was lending money directly immediately associated with the storage of parcels of goods in the godown and therefore it was "in the course of business," the money was lent. In this case section 2 of the Moneylenders Ordinance, the 1955 edition of the Laws of Singapore, was in similar terms to section 6 (1) (c) of the English Money-lenders Act.

In Edgelow vs. MacElwee [1918] 1 KB 205, a solicitor, practising his profession, and making loans to clients and others was held not be exempt from the Act of 1900 because his primary object in lending was not to increase his professional business and earn professional fees as a solicitor.

The Jamaican Moneylending Act, does not in section 13 (1) (d) contain the words "not having for its primary object the lending of money." However, the words following, namely, "in the course of whose business and for the purposes whereof he lends money" are similar in substance and content to the 1900 Act. The rationale extracted from the above cases is that to be exempt from operation of the Act one would need to lend money in transactions intrinsicallly concerned with the principal business of the lender and for the purpose of advancing that particular business.

In the instant case the first defendant bona fide carries on the business of insurance - that is its principal business. Paragraph 3 (22) of its objects authorises it,

> "To invest, lend, or otherwise deal with unemployed money, in such manner....as may be thought fit....."

This provision by itself cannot take the first defendant out of the provisions of the Act, unless the loan is made "in the course of.....and for the purposes of....."its insurance business.

"Insurance business" is defined in Section 2 of the Insurance Act as, ".....the business of effecting and carrying out, as an insurer, contracts of insurance, and includes the business of re-insuring liabilities under such contracts."

Section 24 permits investments by insurance companies in Jamaica. Paragraph 13 of the Insurance Regulations, 1972 made under the section 24 defines investments; in neither case, was statutory provision made for the making loans. Course 1 for the first defendant referred, to paragraph 10 (1) (c) of the 11th Schedule to the Insurance Regulations, 1972, which requires a statement or report to be annexed to the balance sheet of the insurance company, to show inter alia,

> ".......loans secured on mortgages of residential property........loans secured on mortgages of life insurance" to support the first defendant's claim to exemption.

It seems to this Court, that such a recital in the said 11th Schedule is not intended to be an empowering clause, but a mere acknowledgement that circumstances do exist that insurance companies lend money and when they do so, these are the returns that should be made. The question remains. Under what circumstances did the first defendant make this loan?

In the instant case the loan of $455, 055,034.57 made by the first defendant to the plaintiff - was for the purpose of paying off several creditors of the plaintiff - it probably was not a loan that may be described as concerned with the insurance business of the first defendant. If for example, the loan was made to the plaintiff for the purpose of establishing a pension fund with the first defendant company for the benefit of the plaintiff's employees, that would be a loan in the course of and for the purpose of the business of the first defendant.

Lord Denning, M.R. in the case of Premor Ltd., supra, to further illustrate the meaning of the the phrase "in the course of business" referred to a solicitor who is handling a transaction for a client in the course of his business and lends money to that client in order to complete the transaction.

In the circumstances this Court is of the view that the loan by the first defendant to the plaintiff will probably be found not to have been in the course of and for the purpose of its insurance business and consequently the first defendant would not be exempt from the provisions of the Moneylending Act, and consequently would be subject to its terms.

"The Moneylenders Act is a very stringent Act, and it invades the freedom of contract between lenders and borrowers and prevents such a contract from being made otherwise than in certain terms" - So said Lord Hanworth, M. R. in Parkfield Trust Ltd. vs Cartes [1934] 1 KB 685, referring to the Moneylenders Act 1927.

Section 8 of the Moneylending Act (Jamaica) provides that "(1) No contract for the repayment by a borrower of money lent to him.......and no security given by the borrower.....in respect of any such contract shall be enforceable, unless a note or memorandum - writing of the contract containing the particulars required by this Section to be made and signed personally by the borrower......and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given.........

(2) The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan was made, the amount of the principal of the loan, and the interest charged on the loan expressed in terms of a rate per centum per annum."

It seems that the hypothecation agreement with the letter dated this 20th day of December, 1992, attached and the equitable charge/offer to deposit document, together may satisfy the note or memorandum required by section 8.

The parties probably signed, making the loan and delivery of the security contemporaneous. However, the said letter of the 20th day of December, 1992, states the interest rate "as

> "As set out on the attached Schedule A, applicable July 1, 1992 to May 31, 1993......This rate is variable subject to any periodic changes.
>
> After May 31, 1993 the rate of interest shall be approximately that rate charged by NCB Mortgage and Trust on like loans."

This provision for a variable rate of interest may well not satisfy the requirement that the note or memorandum should contain the particulars required by section 8; Section 8 (2) requires a rate per centum per annum - a fixed rate; **See Parkfield Trust Ltd. vs. Curtis [1934] 1 KB 685**

In that event, the requirement that, in the event of late payment of the loan the plaintiff is obliged to pay "at an interest double that of the current lending rate" - see letter dated 5/7/93 - first defendant to the plaintiff, is illegal. Similarly illegal, would be clause 10 of the letter of the 20th day of December 1992 which provides that late payment "shall bear interest of EMB's penalty rate", both clauses being in contravention of section 9 of the Act.

The range of interest rates as exhibited in the said schedule A exceeds twenty (20) per centum per annum. A presumption therefore would arise under section 3 of the Act that the interest charged is excessive and that the transaction is harsh and unconscionable.

The court would therefore re-open the transaction in accordance with the provisions of section 2 of the Act.

Schedule B reflects a payment by the Plaintiff of $63,3000,000.00 on the 15th day of December 1992. Lasselve Talbot in his affidavit dated the 28th day of October, 1994, states that this payment was made in two (2) installments, the last being on the 18th day of January 1993. Was this a late payment that attracted "EMB's penalty rate"? Were there other late payments that incurred penalty rates and/or double interest payments by the plaintiff? Will a trial court, assuming that section 2 of the Act applies, regard the interest rate contained in Schedule A or the NCB Trust and Merchant Bank rates as stated in letter dated the 28th day of October 1994, and annexed to the said affidavit of Lasselve Talbot, as applicable? Was there a "massive over-charging" of interest by the first defendant - as complained of by the plaintiff? Was compound interest charged? To what extent will the reduction in interest charges affect the balance of principal due on the 11th day of October 1994 - in relation to the security held? These are matters to be resolved.

Assuming, however, that the first defendant is exempt from the provisions of the Moneylending Act, and that it was entitled to deal with the security as it did, the trial court would need to examine its rights under the agreement of the 20th day of December 1992.

Clause 3 of the hypothecation agreement authorises:

> "If default is made in payment........or if before payment is due the value of any of the securities in the opinion of the Lender, had depreciated and further securities of sufficient value, in the opinion of the Lender, to cover such depreciation in value has not been lodged with the Lender under this agreement, the Lender without notice, advertisement.......(all of which are hereby waived) may sell by public or private sale"

Clause 7 of the said agreement authorises, the lender, in the event of default, to appropriate any of the securities equal to the amount in default to himself and have it registered in his name or the name of his nominee.

These two (2) clauses therefore empower the lender to pass title in the securities, on the occurrence of certain events, namely, depreciation in value of the security and, default in payment of debt due.

Clause 8 restricts the plaintiff's right in any such security and assigns it to the first defendant.

Clause 9 authorises an officer of the lender to vest title in the security in the lender, in the event of default, complement to clause 7.

Clause 10 recites an undertaking by the plaintiff effectively to perfect the Lender's title or the purchaser's title in the securities - a complement to clauses 3 and 7.

Clause 11 permits the first defendant to deal with the securities in any sequence.

Clause 12 - stipulates the stamp duty payable on the agreement.

Clause 13 reads,

> "At any time that the Lender sells, or transfer or vests any of the securities to or in, itself or any other member of the Eagle Group of Companies or Eagle Financial Network or any nominee thereof, the value attributed to each such transaction shall be the market price of such shares based on the market value of the shares in Ciboney Group Limited as ascertained by an independent valuator, less the transferor's cost of transfer."

Clauses 3 and 7 are the empowering clauses that authorise passing of title, by way of sale on depreciation and appropriation to oneself on default, respectively. Clauses 8, 9, 10, 11 and 12 receite the mechanics involved.

Clause 13 does not confer any additional power to pass title. It is a clause that further recites the machinery to be employed. "At any time" means, "in the event that", presupposing that either clause 3 or 7 is being employed. This court does not therefore agree that clause 13 authorises sale by the first defendant to itself, as contended for by counsel for the first defendant. Clause 13 is a comprehensive clause which refers to what had been empowered before, there was no prior authority in the agreement to sell to oneself.

When on the 11th day of October 1994, the first defendant advised that the shares had depreciated it had the right to sell - pursuant to clause 3 of the agreement. Sale envisages the existence of a vendor and a purchaser. The first defendant would then be in the nature of a mortgagee and therefore would had an obligation to act bona fide and obtain the best price possible. A mortgagee cannot sell to himself - vide Williams et al vs Wellingborough Borough Council [1975] 3 All ER 462. A sale is not a valid one where the mortgagee or an assignee from the mortgagee and the purchaser are controlled by the same person or is the same person. In addition, the failure to seek a higher price known to be available is a breach of the obligation of the mortgagee, vide The Australia and New Zealand Banking Group vs. Bangadilly Pastoral Company et al [1976-77] 139 CLR 195 and Tse Kwong Lam vs Wong Chit Sen [1983] 3 All ER. In Farrar vs Farrars, Ltd. [1888] 40 Ch. D 395, a case quoted with approval in the cases of Williams vs Wellingborough Council, The Australia and the New Zealand vs Bangadilly and Tse Kwong vs Wong Chit Sen. Lindley, L J, said, at p. 409, "A sale by a person to himself is no sale at all, and a power of sale does not authorise the donee of the power to take the property subject to it at a price fixed by himself, even through such price be the full value of the property. Such a transaction is not an exercise of the power, and the interposition of a trustee, although it gets over the difficulty so far as form is concerned, does not affect the substance of the transaction."

Eric Jason Abrahams, Investment Executive/Equities Traders employed to the second defendant, stated, in his affidavit dated the 2nd day of November 1994, "on the 18th October 1994, I received instruction from the first defendant to sell on the best possible price and to buy the said shares in the name of Paul Chen Young and Company, as nominee, if possible......."

Abrahams received similar instructions on the 20th day of October 1994 from the first defendant in respect of 79,815,361 shares of Ciboney Group Limited. He carried out both instructions. He sold the shares at $1.75 per share and bought the shares at $1.75 per share.

Why was it necessary for the first defendant to instruct Abrahams in whose name he was to buy the shares? Is it the practice, as submitted to this court, that shares are usually bought in the name of the broker? Why was the second defendant regarded as nominee? - nominee for whom? If it was instructed to buy in the name of Paul Chen Young as nominee for the first defendant, was the first defendant therefore selling and buying in the name of its nominee - its agent?

Geoffrey Messado, in his affidavit dated the 27th day of October 1994, observed that "the value of the stock unit in CGL on the Jamaica Stock Exchange had been steadily falling from $5.70 per unit on 5th July 1993, to $3.15........on 5th November 1993, to $2.40.......on 7th September 1994, to $1.90........on 3rd October 1994 and $1.80.........on the 11th day of October 1994......."

This pattern shows a loss progressively from 5th July 1993, of $2.55 in four (4) months, 75c in ten (10) months, 50c in one (1) month and 10c in eight (8) days. Seeing that Abrahams on 18th October 1994, sold at $1.75 per unit this shows a loss of 5c in seven (7) days; and when he sold and bought on 28th October 1994 at $1.75 per unit, this amounts to a similar loss of 5c per unit in nine (9) days. Would this trend have been seen by any prudent broker as a decrease in losses of the share or a levelling-off in price? Why is it, in the words of the said Eric Abrahams, "No other broker......showed an interest in purchasing any of the shares.........." in CGL, a company which owned two (2) hotels in the northcoast parish of St. Ann? Certainly, to purchase 119,998,208 of 286,000,000 shares in a company, whilst not giving to the purchaser immediate control, would amount to a major influential voting right in CGL. Richard Downer, in his affidavit dated 31st October 1994 stated that a seller of shares in a potentially viable entity customarily realises a higher price for the shares if it is known that control would be gained.

Although the purchase of 119,998,208 shares would not give control to a purchaser who owned none of those shares before purchase, it would remain in his hands an influential tool in the company. The fact that no other broker practising on the Jamaica Stock Exchange showed an interest in these shares may well attract particular inference at the trial or at its lowest show a lack of acuity on the part of such stock brokers.

The term in clause 13 "......... price of such shares ....as ascertained by an independent valuator ...." probably does not incluse the Stock Exchange. In December of 1992, the plaintiff and the first defendant would have been aware of the fact of share pricing on the Stock Exchange. If the Stock Exchange was intended the clause would probably have read "as listed on the Stock Exchange", instead of "as ascertained by an independent valuator."

In these circumstances it seems that the sale may not have conformed with the requirements of law and the provisions of clause 3 of the agreement. It is worthy of note that the first defendant sought to sell 119,998,208 shares, whereas its letter to the plaintiff dated 11th October 1994, stipulated that the number of shares required to cover the loan balance was 111,628,469. This is a serious question to be tried.

Mr. Hyltonn for the plaintiff argued that it was the act of the first defendant that created the reduction of the ratio of security to debt below 1.33 to 1 and not the act of the plaintiff - vide letter dated 30th March 1994 - first defendant to plaintiff.
It reads, inter alia,

> "As a consequence of Eagle agreeing to release the stock units, our share coverage will be substantially reduced below the agreed 1.33 coverage ...."

The plaintiff's argument may be valid if it was not reduced before, and this release created the reduction in the ratio. A waiver might well be implied.

It is true that the plaintiff failed to disclose to the court at the grant of the interim injunction the letters dated the 28th day of October from the first defendant to the plaintiff and letters dated the 4th November and the 8th November 1993, from the plaintiff to the first defendant.

Although the first of these letters refers to a loan that is irrelevant to these proceedings, the letter of the 8th November refers to "condition 2 of the letter of October 28, 1993." This shows that the letters should have been disclosed to the court. The application for the interim injunction was not based soley on the plaintiff's contention that the shares charged to NCB were not subject to the hypothecation agreement - (This court is of the view that they were). However in spite of that non-disclosure - the plaintiff's contentions are not untenable, **see S.C.C.A. No. 5/80 Clarendon Alumina Production Limited vs. Alcoa** delivered on the 14th day of March 1988.

In its normal definition - a company is insolvent when its liabilities exceed its assets - it cannot pay its debts. A company may however have a functioning viable existence though in classical terms it is insolvent.

The affidavit of Ernest Thorbourn dated the 2nd day of November 1993 does reveal on an examination of the financial statements of the plaintiff for the year ended 31st May 1993 and the year 31st May 1994 and the financial statements of CGL for the years ending 31st May 1993 and 31st May 1994, that its current liabilities exceed its current assets by $237,318,457 as at 31st May 1994. He is of the opinion that the plaintiff is insolvent. He conceded however that the plaintiff holding in excess of 20% of the shares of CGL could utilize the equity basis - that is reflecting its share of CGL's assets.

The plaintiff has not been stated to be in default in paying its debts to the first defendant. Whether the plaintiff owed on the outstanding debt an amount of $186,050,589.88 on Talbot's calculation or $151,076,124.64 as contained in the letter of the 11th day of October 1994, this balance is not presently payable in its entirety. To use solvency or the plaintiff's liquidity in the context of this liability is to ignore the fact that the debt is payable in installments over several months as they fall due until it is finally extinguished five (5) years hence.

Since December 1992 - no complaint has been made of plaintiff defaulting in payment of the debt.

The plaintiff is still the holder of some shares in CGL, not hypothecated. It has also exhibited evidence of a sub-licence agreement on the basis of which it will receive a sub-royalty fee of 2% of the gross operating income of the Ciboney Raddison Hotel annually, until 2010 amounting to in excess of US$400,000.00. In addition, the plaintiff allegedly is due to be paid under the said agreement in excess of US$100,000.00 annually and in excess of J$10,000,000.00 dividends on its shares in CGL.

The shares in question apart from being a valuable asset are of a specific worth. They represent a commodity of special influential value and potential control of the company CGL. Damages would not therefore be an adequate remedy for the plaintiff should the injunction be refused and it succeeds at the trial.

On the other hand, the defendant contends that if it succeeds at the trial and it had been restrained by the grant of the interlocutory injunction, damages would not be an adequate remedy because it would have suffered losses in investment yields from the sums paid to NCB, as well as from not being able to deal with the stock units, and alternatively, the control of CGL. Certainly, the control of CGL for the protection of its shareholders is hardly an evident necessity and the possible losses to the first defendant can be adequately compensated in damages.

The balance of convenience arises under the "governing principles" of Lord Diplock in American Cyanamid Co. vs. Ethicon Ltd. [1975] A.C. 396. If the injunction is refused and the plaintiff succeeds at the trial, the security in question, the shares in CGL may be unattainable to the plaintiff, resulting in a loss in participating in a specific commodity - damages would not be an adequate remedy.

If the first defendant is restrained, mindful of the courts observations, and of the plaintiff's current financial obligations, if the first defendant is restrained and it succeeds at the trial, it would be adequately compensated in damages. There are serious questions to be tried.

In my view the balance of convenience favours the grant of the injunction.

Order is made in terms of the summons dated 24th day of October 1994.