

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1998/D155

BETWEEN DONALD DUNCANSON 1<sup>ST</sup> PLAINTIFF  
AND MARVA DUNCANSON 2<sup>ND</sup> PLAINTIFF  
AND ISSA TRUST & MERCHANT BANK LIMITED DEFENDANT

Mr. Ransford Braham instructed by Messrs. Livingston, Alexander & Levy for the Plaintiff.

Mr. John Vassell Q.C. & Miss Y. Whitely instructed by Messrs. Dunn, Cox Orrett & Ashenheim for the Defendant.

Heard: 22<sup>nd</sup>, 23<sup>rd</sup>, 25<sup>th</sup>, 30<sup>th</sup> June, 1999; 28<sup>th</sup> and 29<sup>th</sup> March 2000; 5<sup>th</sup> and 12<sup>th</sup> April, 200; 12<sup>th</sup> February and 24<sup>th</sup> October, 2001

GLORIA SMITH, J.

SUMMONS FOR INTERLOCUTORY INJUNCTION

By Amended Summons dated the 17<sup>th</sup> December 1998 the plaintiffs are applying for the following orders:

1. That the defendant, Issa Trust & Merchant Bank Limited, by itself, its servants, agents and/or Directors be restrained and is hereby prohibited from selling, disposing of, or transferring premises

registered at Volume 1236 Folio 796 of the Register Book of Titles until the trial of this action or until further order.

2. That the defendant, Issa Trust & Merchant Bank Limited by itself, its servants, agents and/or directors be restrained and is hereby prohibited from Registering any transfer and/or any dealing in relation to premises registered at Volume 1236 Folio 796 of the Register Book of titles and from exercising its Powers of Sale under Mortgage, until the trial of this action or until further order.
3. That the endorsement on the Writ of Summons filed herein be amended in terms of the proposed amended endorsement attached to the Notice of Intention to amend Summons for Interlocutory Injunction filed herein.

In respect of Order sought by virtue of paragraph 3 of the amended summons for Interlocutory injunction there was no objection by Mr. John Vassell Q.C. (instructed by Messrs. Dunn, Cox, Orrett, Ashenheim & Company) for the defendant. That order was duly granted by the Court as prayed.

#### Summary of Facts

The First and second Plaintiffs are husband and wife. They operated a family business, Fruits of Jamaica Company Limited. In December of 1994

the 1<sup>st</sup> Plaintiff Donald Duncanson became critically ill which resulted in him becoming paralysed. The first plaintiff then handed over responsibility for the management and control of Fruits of Jamaica Limited to the second plaintiff Marva Duncanson. Subsequently Fruits of Jamaica Limited became insolvent. The second plaintiff Marva Duncanson in an effort to rescue the family business sought the assistance of Mr. Christopher Girvan a businessman.

An agreement was reached between Mr. Christopher Girvan and Mrs. Marva Duncanson whereby "Fruits of Jamaica Limited" would cease trading and a new Company "Fruits of Jamaica Export Limited" would be formed to carry on the business, with Mr. Girvan as the majority shareholder and Chief Executive Officer and the plaintiffs as directors and shareholders.

The plaintiffs and Fruits of Jamaica Limited had loans with National Commercial Bank Limited which were secured by the plaintiffs title to premises 45 Stillwell Road, St. Andrew.

It is alleged that the sum outstanding on these loans as at February 1996 was US\$368,000.00.

As a result, a loan was negotiated by Mr. Christopher Girvan with Issa Trust and Merchant Bank in the name of "Fruits of Jamaica Export Limited". There is a dispute between the parties as to how much this loan

was for. The defendant contends that the loan facility was for US\$500,000.00 while the plaintiffs on the other hand contends it was for US\$1,000,000.00.

There is however a letter of commitment by the defendant dated the 11<sup>th</sup> March 1996 which indicates that the loan facility was for U.S.\$500,000.00. It was argued by the defendant that the terms of the loan agreement was that the facility would be guaranteed by the plaintiffs and that their guarantee would be secured by a mortgage over 45 Stilwell Road.

They further argued that it was inherent in this arrangement that the loans to National Commercial Bank would be paid off to secure the release of the title so that the defendant's security could then be registered.

The defendant as a result disbursed on the instructions of Fruits of Jamaica Export Ltd., U.S.\$250,000.00 which was applied to paying off the plaintiffs personal loan and U.S.\$118,000.00 for Fruits of Jamaica Limited to National Commercial Bank.

The instrument of Mortgage by way of guarantee was duly executed by the plaintiffs and registered on the title of 45 Stilwell Road with the defendant becoming the proprietor of the mortgage with Powers of Sale provided for under the Registration of Titles Act.

According to the defendant, Fruits of Jamaica Exports Ltd. made some payments on the loan, but subsequently the loan fell into arrears. The sum was demanded of the guarantors by way of a Notice for Sale dated the 6<sup>th</sup> April 1998 and that they failed to pay the same.

On 16<sup>th</sup> July 1998 the mortgaged property was put up for sale by Public Auction. No bids were received. The property was therefore withdrawn and a decision was taken for it to be sold by private treaty.

On 7<sup>th</sup> October 1998 the defendant Issa Trust & Merchant Bank entered into an agreement for sale of the mortgaged property to Christopher and Ghazala Webb for J\$10,000,000.00.

The Plaintiffs on the 26<sup>th</sup> November 1998 filed an action in the Supreme Court against the defendant and by summons dated the 17<sup>th</sup> December 1998 now seeks an Interlocutory injunction against the defendant.

Mr. R. Braham on behalf of the plaintiffs argued the following:-

1. (a) The general principle is that the plaintiffs are required to establish that there is a serious issue to be tried. He relied on the merits of the present case and stated that at this stage the Court is only required to investigate the merits to a limited extent, that is to say that what needs to be shown is that the claimants cause of action has substance and reality.

- (b) Adequacy of damages to the plaintiffs if the injunction is refused.
  - (c) Balance of convenience, which way the balance of convenience lies.
- (2) That the manner of the disbursement of the loan by the defendant operated to discharge the mortgage. The plaintiffs submitted that the working capital component of the loan was never disbursed to “Fruits of Jamaica Export Limited” as agreed but was disbursed for other purposes.

It was argued that the defendant cannot unilaterally vary the terms of the guarantee i.e. without the guarantors permission or unilaterally vary the terms of the loan which is being guaranteed. If that is done, then the guarantee is discharged. Further, if by virtue of the guarantee and loan agreement the monies guaranteed is to be paid to a specific person, then payment to another person discharges that guarantee.

Mr. Braham cited:

- (a) Halsbury's Laws of England 4<sup>th</sup> Edition Volume 20 at Paragraphs 249,259 and 260;
- (b) Holme v Brunskill 1877 3QDB 495 at p.504-506 as authorities in support of his submissions.

He argued that the defendants used a substantial part of the loan to pay off the debts of Fruits of Jamaica Limited when in fact that money was guaranteed for working Capital for Fruits of Jamaica Exports Limited, hence the defendant unilaterally varied the terms of the loan which the plaintiffs had guaranteed and this in fact made the contract void.

The defendant's Attorney Mr. Vassell Q.C. on the other hand argued that the disbursements were made on the instructions of the borrower, "Fruits of Jamaica Exports Limited", by Mr. Girvan he being the Chief Executive Officer and ostensibly had the authority to negotiate the loan and give the instructions as to its disbursement. He stated that "Fruits of Jamaica Exports Limited" expressly undertook to make available to the defendant the title for 45 Stilwell Road as security for the loan, and as a condition precedent to the giving of that title as security, was the paying off of both loans at National Commercial Bank against which the title was held as security. The defendants rights he argued, would not therefore be affected if as between Mr. Girvan and the plaintiffs, Mr. Girvan exceeded his authority in instructing the defendant to disburse the loan the way it did.

In any event, he submitted that the guarantee, on its proper construction is not discharged if the lender, in agreement with and upon the instructions of the borrower varied the credit to the borrower by disbursing

the loan other than initially agreed. He referred to Clause 6 of the guarantee as one such example. Mr. Vassell argued further that when the terms of the guarantee and mortgage are properly construed, the guarantor has undertaken an unlimited liability as guarantor and the additional status of principal and indemnifier for any sums owed by the borrower to the lender, however the loan was occasioned and however it was disbursed.

3. Mr. Braham also argued that the loan was ultra vires Fruits of Jamaica Export Limited as it was used for an improper purpose other than was authorized by the Articles of Association of the Company.

Mr. Vassell submitted that the loan transaction was not ultra vires in the suggested sense of being entered into for an improper purpose. He stated that the purposes stated in the letter of commitment are proper purposes and an ultra vires objection has to be assessed with reference to those purposes rather than the purposes to which the directors of Fruits of Jamaica Export Limited subsequently applied the loan proceeds. Furthermore the defendant asserts that there is nothing inconsistent in using working capital monies of Fruits of Jamaica Export Limited to pay off a debt of Fruits of Jamaica Limited where the payment in the judgment of Fruits of Jamaica Export Limited is essential for its business objectives to go forward.

4. Mr. Braham on behalf of the plaintiffs argued the question of the lack of consideration for the guarantee. He submitted that a guarantee like any other contract requires consideration, unless it was done by deed. If there was no consideration or it is in the past, then the guarantee is of no effect. Mortgage by way of guarantee contemplates a consideration. Hence a guarantee without consideration is unenforceable. In this case he contends that there was no consideration.

On that point Mr. Vassell contended that that argument was without merit.

5 The plaintiffs also submitted that the mortgage was unenforceable for non-compliance with the statute of Frauds. They argued that by virtue of the statute of Frauds the contract of guarantee must be evidenced in writing. The memorandum or note must contain the essential terms of the agreement, if it does not, then the contract is unenforceable.

Mr. Braham cited "Modern Contract of Guarantee by Dr. John Phillips and Dr. James O'Donovan, 2<sup>nd</sup> Edition p.78 "Terms of Contract" and Halsbury's Laws of England 4<sup>th</sup> Edition Vol.42 para.27 "Memorandum of the Contract" in support of this proposition.

He contended that the document which contains the terms and conditions of the loan dated 30<sup>th</sup> March 1996 offends the Statute of Frauds as

there is no provision contained therein for the interest payable and when or how the loan is to be repaid. He argues further that interest in particular is fundamental to any loan agreement and its absence would offend the Statute of Frauds. Similarly, the method of repayment.

The defendant replied that:

- (a) the plaintiffs' guarantee was an all monies unlimited guarantee so no principal sum could, consistent with the guarantee, be stated in the guarantee or the instrument of mortgage. For stamping purposes, a sum of US\$250,000.00 was initially stated. The defendant could have put in US\$500,00.00 but in its judgment elected to use the smaller figure, which it is argued was well within its right.
- (b) The interest rate, whether mentioned in the letter of commitment or not was inserted in the mortgage instrument which is signed by the plaintiffs, the parties to be charged, hence they were fully aware of it.
- (c) The defendant is relying on its status as registered proprietor of a mortgage under the Registration of Titles Act.

6. Mr. Braham submitted that the mortgage by way of guarantee is

oppressive and unconscionable and is accordingly void. In addition that there was undue influence. He argued that the plaintiffs found themselves in dire financial straits hence they placed their trust and confidence in Mr. Christopher Girvan. Mr. Girvan being a long time customer of the defendant, they gave the loan documents to Mr. Girvan to procure the plaintiffs signatures. The bank in so doing made Mr. Girvan their agent, as a consequence the bank is responsible for his wrong doing i.e. acting to the detriment of the plaintiffs. The plaintiffs further submitted that by virtue of the facts known to the bank, the bank had notice of undue influence, in particular, that the money was being borrowed initially for working capital of a company controlled by Christopher Girvan (i.e. Fruits of Jamaica Export Limited) and that later that same money was disbursed to pay off the debt of another company.

They argued that the Bank had a duty to call in the guarantors to see if they knew what they were doing, since it was obvious that they were not benefiting from the loan that they were guaranteeing. In those circumstances Mr. Braham concluded that the defendant is fixed by undue influence and the mortgage ought to be set aside. He supported this argument with reference to the authority of Kings North Trust Limited v Bell & Others [1986] 1 ALL ER 423.

Mr. Vassell submitted that there is no substance to these allegations.

He argued (1) that the transaction saved the plaintiffs sole source of livelihood. (The Company, they operated had become insolvent and the 1<sup>st</sup> plaintiff was gravely ill).

(2) The transaction saved the plaintiffs' home which was held by National Commercial Bank as security for a loan which was not being serviced.

(3) The transaction with the defendant was merely a refinancing transaction. National Commercial Bank had a mortgage over the plaintiffs property to secure a debt on which there was US\$368,750.00 outstanding. As a result of the transaction the defendant was substituted as the mortgagor for a similar amount, with the interest rate at 14%. Under the previous National Commercial Bank's mortgage the interest rate was 15% and there was no suggestion at any time that the mortgage terms were onerous.

There were a number of other submissions by the plaintiffs but the final one I will look at in details is as follows:

It was argued that on the assumption that the Court granted the interlocutory injunction that the Marbella condition should not be imposed.

i.e. that the amount claimed by the mortgagee be brought into Court pending the trial.

Mr. Braham argued that the present application should be distinguished from that of S.C.C.A. 357/86 SSI (Cayman) Limited v International Marbella, Club S.A. on the basis that:

(a) It contravenes our written constitution i.e. Sec.20 of the Jamaica Constitution.

(b) In the present case the mortgage is one of guarantee.

The plaintiffs are not the principal debtors but guarantors, unlike the parties in SSI Cayman Limited v International Marbella Club S.A. where they were the principal debtors.

Mr. Braham further submitted that the imposition of the Marbella condition would be a denial of access to the Court by the plaintiffs. It was suggested by Mr. Vassell that the Marbella condition is imposed only after there has been a successful access to the Court by the plaintiffs. He then requested on behalf of the defence that if the court were to grant the orders prayed that the Marbella condition be imposed.

## CONCLUSION

The Court in determining whether or not to grant an interlocutory injunction must look at the guidelines which have been set out in the authorities. In the leading case of American Cyanamid v Ethicon [1975] AC 396 the House of Lords declared that so long as an action was not frivolous or vexatious the only substantial factor that the Courts ought to take into account is the balance of convenience.

In other words the court should not prejudge the merits of the case, but simply consider the nature of the injunction sought and enquire whether it would hurt the plaintiff more to go without the injunction pending the trial than it would hurt the defendant to suffer it.

The Court therefore considered the following:

- (1) Was there a serious question to be tried:
  - a. In other words was the Claim frivolous or vexatious
  - b. Does the claim have some prospect of succeeding.
- (2) Which way the balance of convenience lies:-
  - a. Are damages an adequate remedy for the plaintiffs.  
and is the defendant able to pay them.
  - b. Is an undertaking as to damages adequate protection.  
for the defendant and is the plaintiffs able to honour it.

- (3) The maintenance of the status quo. (Where the other factors are evenly balanced the Court prefers to maintain the status quo).
- (4) Other factors including social and economic factors and the relative strength of the parties cases.

The plaintiffs in this application argued that there were serious questions to be tried in this action and that their claims were not frivolous or vexatious. Further that damages were not an adequate remedy for the plaintiffs.

They stated that they were willing to give the usual undertaking as to damages to the defendant and they were able to honour this undertaking. They were confident in the strength of their claims and therefore ask the Court to consider favourably their application and grant the orders as prayed.

This application was vociferously contested by the defendant who among other things argued that there was no need for a trial as there were no serious triable issues in this case. This application they argued should determine the case at this stage.

Upon careful consideration of the arguments advanced by both sides I am of the view that:

- (1) there are in fact serious questions of law to be tried in this action.

(2) I do not regard the plaintiffs claims as being frivolous or vexatious.

(3) Further I do not consider that damages would be an adequate remedy for the plaintiffs should they succeed in their action as a result I would grant the order in the following terms:

- (1) That the defendant, Issa Trust & Merchant Bank by itself, its Servants , agents and/or Directors be restrained and is hereby prohibited from selling, disposing of or transferring premises registered at Volume 1236 Folio 796 of the Register Book of Titles until the trial of this action or until further order.
- (2) That the defendant, Issa Trust & Merchant Bank Limited by itself, its servants, agents and/or directors be restrained and is hereby prohibited from registering any transfer/and or any dealing in relation to premises registered at Volume 1236 Folio 796 of the Register Book of Titles and from exercising its Powers of Sale under mortgage until the trial of this action or until further order.

On the basis of the Courts Jurisdiction under Section 49(h) of the Judicature (Supreme Court) Act which expressly gives the Court the power to grant interlocutory injunctions “either conditionally or upon such terms and conditions as the Court thinks just” and applying the Marbella condition

it is hereby ordered that the plaintiffs pay into Court the sum claimed by the mortgagee viz: US\$368,000.00 + Interest to date pending the trial of this action.