

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1002 OF 1984

BETWEEN	ISLAND PROPERTIES	INCORPORATED PLAINTIFF
AND	WALTER HELLER & CO. JAMAICA LTD.	FIRST DEFENDANT
AND	GARTRAN COMPANY	SECOND DEFENDANT
AND	MARTIN VIERA	THIRD DEFENDANT
AND	CARL MUSCHETT	FOURTH DEFENDANT

Hugh Small and Abe Dabdoub for Plaintiff

Derek Jones for First Defendant

Douglas Brandon for Second Defendant

Ronald Manderson Jones for Third and Fourth Defendants.

Heard: 26th March 1984.

CORAM: WOLFE J.

On the 26th day of March 1984 upon the applications of the defendants I ordered that the Writ of Summons filed herein be struck out. At that time I promised to put my reasons for so ordering in writing. I now do so.

HISTORICAL BACKGROUND TO ACTION

The plaintiff is a body corporate registered under the laws of the State of Minnesota in the United States of America and is the registered owner of premises known as Berkley Beach Hotel, Runaway Bay in the parish of Saint Ann which is registered at Volume 454 Folios 79 and 80 of the Register Book of Titles.

By an Instrument of Mortgage No. 342391 dated the 31st day of December, 1979 and registered on the 25th day of January 1980 the plaintiff mortgaged its Title to the abovementioned lands to the first-named defendant an Industrial and Provident Society registered under the Industrial and Provident Societies Act to secure a loan of the Jamaican Dollar equivalent of \$447,315.80 United States of America currency and as collateral security for a debenture charging

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the plaintiff's property. The mortgage debenture and loan was approved by the Bank of Jamaica under the Exchange Control Act.

By an Instrument of mortgage No. 370739 dated 28th July 1981 the plaintiff further mortgaged its said Title to the first-named defendant to secure a further loan of J\$100,000.00 and a supplemental debenture of even date. The mortgage and debenture were also approved by the Bank of Jamaica under the Exchange Control Act.

The plaintiff leased the said premises to Berkley Beach Club Incorporated, a corporation registered under the laws of the State of Florida in the United States of America for a term of two years at a total rental of US.\$600.000 payable in monthly instalments of \$25,000.00. The Lessee Berkley Beach Club Incorporated defaulted in its payment of the rental and the plaintiff's payment under the mortgage fell into arrears. As a consequence the first-named defendant appointed a receiver of the plaintiff's property under the Registration of Titles Act. As a response to the action taken by the first-named defendant the plaintiff commenced proceedings in Suit E201 of 1983 against the first-named defendant and the Receiver and obtained an injunction restraining both parties from operating the plaintiff's Business. The injunction has been extended by consent of the parties and is still in force.

The first-named defendant by an instrument dated the 8th January, 1984 for a consideration of US\$165,000.00 transferred its debenture over the plaintiff's property to the second-named defendant. The second-named defendant in the purported exercise of the powers contained in the debenture by instrument dated the 19th day of January 1984 appointed the third and fourth-named defendants as the Receiver and Manager respectively of the property charged by the said debenture. The third and fourth-named defendants acting under the instrument dated the 19th day of January 1984 have entered into possession of the charged property and have assumed formal control of it. It is against

this background that the plaintiff by Writ of Summons dated the 31st day of January 1984 seeks the following reliefs:

- (a) A Declaration that the Transfer of Debentures executed in 1979 over the plaintiff's property in favour of the first-named defendant to the second-named defendant by instrument dated the 6th day of January 1984 is illegal and void.
- (b) An injunction restraining the defendant, (sic) their servants or agents from interfering (sic) with the management and operation of Berkley Beach Hotel.
- (c) Damages for trespass.
- (d) Such further and other relief as may be just.

The Writ of Summons having been served upon the defendants they have with one accord moved the Court to strike out the Writ of Summons as disclosing no cause of action or alternatively that the action be struck out pursuant to section 191 of the Judicature (Civil Procedure Code)

Section 238 of the Judicature (Civil Procedure Code) states as follows:

"The Court or a Judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer and in such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just".

The words "frivolous or vexatious" have been interpreted to mean, cases which are obviously frivolous or vexatious, or obviously unsustainable per Lindley L.J. in A.G. of Duchy of Lancaster v L & N.W. Ry [1892] 3 Ch. p. 277.

Section 191 of the Judicature (Civil Procedure Code) states as follows:

"The Court or a Judge may at any stage of the proceedings, order to be struck out or amended any matter in any endorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action, and may in any such case, if they or he shall think fit, order the costs of the application to be paid as between solicitor and client".

Where an application is made under section 238 the Court in exercising its discretion is confined to the pleadings in deciding whether or not a cause of action is disclosed or whether or not the action is frivolous or vexatious. However where the application is made under section 191 the Court is entitled to look at all the facts and affidavits as to the facts are admissible. See Willis v. Earl Howe [1893] 2 Ch. pp.551, 554 and Remington v. Scoles [1898] 2 Ch. 1 where it was only by extraneous evidence that Romer J., was convinced that the defence was a sham defence that ought to be struck out as an abuse of the process of the Court. It is worthy of note that statutory provisions notwithstanding, the Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process. Whenever an application is made to the inherent jurisdiction of the Court all the facts can be gone into and affidavits as to the facts are admissible.

On the basis of the foregoing, I am of the view that in coming to my decision I am entitled to take into consideration all matters disclosed in the affidavits filed by the parties at the hearing of the Exparte Summons and the summons seeking an interim injunction.

In an affidavit dated the 31st day of January 1984 and sworn to by Charles Richard Munyon, Director and President of the Plaintiff Company it is stated as follows:

"I am informed by Mr. Clive Taylor of the Bank of Jamaica and verily do believe that the Bank of Jamaica has not given its approval under the Exchange Control Act for the transfer of the said debenture by the first-named defendant to the second-named defendant which is a corporate body registered under the laws of the State of Delaware in the United States of America".

Nowhere else in that affidavit, which contains some twenty four paragraphs, is there any other allegation of illegality. It is in my view clear that the illegality referred to in paragraph (16) of the Affidavit is the basis of the allegation made in paragraph (a) of the Writ of Summons. Thus it may safely be concluded that the declaration sought at paragraph (a) of the Writ of Summons is on

the premise that the Transfer to the second-named defendant by the first-named defendant is illegal and void and having been approved under the Exchange Control Act.

In answer to the affidavit referred to above the first-named defendant, through Mr. Lou Spector a Consultant in its employ, filed an affidavit dated the 10th day of February 1984 and at paragraph 8 thereof Mr. Lou Spector avers as follows:

"In relation to paragraph 16 of Mr. Munyor's affidavit I exhibit hereto together marked "LS3" photocopies of letters dated 12th December 1983 from the Bank of Jamaica to Messrs Livingston, Alexander & Levy, 9th January 1984 from National Commercial Bank Jamaica Ltd. to the Bank of Jamaica and 9th January 1984 from Messrs. Myers, Fletcher and Gordon, Manton and Hart to the Bank of Jamaica".

The letter dated 12th December 1983 addressed to Messrs Livingston, Alexander and Levy by the Bank of Jamaica, which was referred to in paragraph 8 of the Spector's affidavit, clearly indicates that approval was sought and obtained, albeit conditional, which condition was satisfied on the 9th day of January 1984, as is evidenced by letter of even date addressed to the Director of Exchange Control Division of the Bank of Jamaica. It is significant to note that no counter affidavit has been filed by the plaintiff to controvert the averment of the first-named defendant that Exchange Control Approval was obtained.

It is clear in the light of all the facts that the allegation of illegality is obviously unsustainable. The allegation of illegality is so clearly frivolous that to put it forward is clearly an abuse of the process of the Court.

The other reliefs sought in the Writ of Summons are clearly dependent upon the outcome of the relief sought at paragraph (a).

By reason of the foregoing I took the view that the action should be dismissed as being frivolous and as being an abuse of the process of the Court.