NMCG

IN THE SUPREME COURT JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. HCV 02209/2003

BETWEEN	BEAUTIFIT LIMITED	CLAIMANT
AND	FINANCIAL INSTITUTIONS SERVICES LIMITED	1ST DEFENDANT
AND	JAMAICA REDEVELOPMENT FOUNDATION INC.	2ND DEFENDANT
AND	DENNIS JOSLIN JAMAICA INC.	3RD DEFENDANT

Dr. Randolph Williams for the Claimant

Mr. Christopher Kelman instructed by Myers, Fletcher and Gordon for the 1st Defendant

Mr. David Johnson instructed by Piper and Samuda for 2nd and 3rd Defendants

HEARD: 10th & 16th March, 2004

SINCLAIR-HAYNES, J (Ag.)

On the 22nd September 1988, Beautifit Limited, the claimant in this matter, mortgaged two parcels of land as security for a loan of $540,000.00 and overdraft facilities of up to $500,000.00 from Century National Bank.

The assets of CNB have been acquired by Financial Services Limited (F.I.S) which sold these assets to Jamaica Redevelopment Foundation (Inc.). Dennis Joslin is an agent of Jamaica Redevelopment Foundation. Joslin is now seeking to sell property owned by Beautifit Limited, which was secured by the mortgage in satisfaction of a sum of $2,422,554.40, which was secured by a promissory note. Beautifit Limited denies any indebtedness to the Defendants and insists that Beautifit Career Fashions Limited, a separate entity but a sister company, executed the promissory note in favour of CNB.

The Defendants have asserted, however, that the Promissory note, which secured the sum of $2,422,554.40, was executed by Beautifit Limited and the aforesaid mortgage further secured this debt.

Beautifit Limited sought an injunction restraining the defendants from selling or otherwise disposing of the lands, the subject of the mortgage. This application was refused by Anderson J. on the 5th of February, 2004. Since the refusal of the injunction by Anderson J., Beautifit Limited has obtained an opinion from Carl Mingo Major, a Consultant Document Examiner who asserts that the seal impressed on the Promissory note was in fact that of Beautifit Career Fashions Limited and not that of Beautifit Limited.

Beautifit Limited is again seeking an interim injunction.

It contends in the further affidavit of Mr. Aubrey Smith that it did not execute promissory note dated 27th May, 1992 nor was it the beneficiary of the loan in the sum of Two Million Four Hundred and Twenty Two Thousand Five Hundred and Fifty-Four Dollars and Forty Cents ($2,422,554.40). Mr. Aubrey Smith averred that the promissory note was executed by a sister company, Beautifit Career Fashions. He further averred that in the execution of that promissory note, the seal of Beautifit Careers Fashions Limited was impressed upon the document. Further, that the repayment of the said loan was demanded of Beautifit Limited by F.I.S, whilst a similar demand for repayment was made by Refin Trust Limited (an assignee of F.I.S) of Beautifit Career Fashions Limited.

Beautifit Limited has levelled allegations of fraud against the defendants. The fraud relates to the purported combining of the loan secured by the promissory note to Beautifit Career Fashions Limited (sister company) with the accounts of Beautifit Limited to create a new debt, allegedly owed by Beautifit Limited and secured by mortgage of Beautifit Limited. It is the contention of Beautifit Limited that the monies owed on the said mortgage were fully repaid.

The claimant has now confirmed that the seal on the promissory note was indeed not the claimant's but the sister company's. The defendants, it

contends, have knowingly attached to the accounts of the claimant a debt it doesn't have.

SUBMISSIONS BY MR. DAVID JOHNSON

Mr. David Johnson and Mr. Christopher Kelman on behalf of the Defendants have raised a preliminary point of law opposing this application.

Mr. David Johnson contends as follows:

1. the evidence upon which the claimant sought to rely in support of its application of the 05.02.04, is the same it is now advancing in support of its present application;
2. the evidence of fraud could and should have been advanced before Anderson J. He relied on the case of **Chanel Ltd V F W Woolworth & Co. Ltd. And Others [1981] 1WLR 485** in which it was held that a party was not entitled to a rehearing of an interlocutory matter unless there had been some significant change of circumstances or he had become aware of facts which he could not reasonably have known or found out by the time of the original hearing.
3. the claimant has not pleaded fraud in its claim. It therefore cannot rely on such allegations. Consequently, the paragraphs of

its affidavit, which contain such allegations are vexatious and ought to be struck.

SUBMISSIONS BY MR.CHRISTOPHER KELMAN

Mr. Kelman submitted that the doctrine of res judicata in its wider sense ought to be applied as Beautifit Limited ought to have placed its entire case before Anderson J. Its failure to do so precludes it from doing so now.

THE FIRST ISSUE

The first issue to be determined is whether the claimant is seeking to litigate the same issues, which were previously litigated before Anderson J.

In the affidavit of Mr. Aubrey Smith in support of his previous application he deposed as follows:

"The promissory note referred to as exhibit AS4 was not executed by the claimant or in the alternative no money was disbursed by the bank."

By the said averment he subtly alluded to the lack of bona fides of the promissory note but scrupulously avoided making any direct allegation of fraud.

In his further affidavit of the 9th March 2004 he specifically alleges fraud.

Technically, his contentions now are amplified versions of those averred in his Affidavit before Anderson J.

THE SECOND ISSUE

The second issue is whether the information he is now seeking to put before the court could have been obtained with due diligence at the time of the hearing. Mr. Kelman relied on **Jones and another v Duke (1994) 43 WIR 39** in which Husbands J.A. quoted the statement of Sir James Wigram V.C. in **Henderson v Henderson (1843) 3** Hare 115, the locus classicus on res judicata:

"……… Where a given matter becomes the subject of litigation in, and of adjudication, by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time."

SUBMISSIONS BY DR. RANDOLPH WILLIAMS

Could the claimant have presented its whole case before Anderson J?

It was Dr. Rudolph Williams' submissions that he could not. He relied on the British Bar Code of Conduct which prohibits attorneys from drafting, pleading or averring in any affidavit, witness statement or any notice of appeal, any allegation of fraud unless they have before them reasonably credible material which as it stands establishes a prima facie case of fraud.

He argued that at the time the matter was before Anderson J, he did not as yet have clear and sufficient evidence in support of an allegation of fraud.

THE THIRD ISSUE

The question is whether Dr. Randolph. Williams' submissions amount to 'special circumstances' as referred to by Sir Wigram V.C. in **Henderson v Henderson (supra)** in which a court may re-open a case

Lord Kilbrandon in **Yat Tung Investment Co. Ltd. v Dao Heng Bank 1975 AC 581** at page 590 stated as follows:

> "Special circumstances are reserved in case where justice should be found to require the non-application of the rule."

In the case of **Yat Tung Investments Co. Ltd**. it was held that there was no reason why a defence impugning the bona fides of the sale could not have been pleaded as a counterclaim. In that case the doctrine of res judicata in its wider sense was applied. It should be noted that in that case the

defendant had the information available at the time of the pleadings, unlike the circumstances of the instant case.

Has the claimant demonstrated that special circumstances exist for displacing the normal rule?

In **Associated Leisure Ltd. (Photographic Equipment Co. Ltd) & Another v Associated Newspapers Ltd. (1970) 2 QB page 450.** Denning M.R. made it quite clear that fraud should not be pleaded unless there is clear evidence to support it.

Dr. Randolph Williams could not have pursued any argument of fraud before Anderson J. because he lacked sufficient material. He was then unable to establish a prima facie case of fraud. To have done so would have been unethical and improper. The judge would not have countenanced such submissions. An application could have been sought by Dr. Randolph Williams for an adjournment. It is true that he could have alerted the judge that investigations were in train.

In Chanel **Ltd. v F W Woolworth** (supra) where the applicant in that case wished at rehearing to take a point that was subsequently decided by the Court of Appeal, it was held that although the point had not been decided, if the applicant had asked for an adjournment until the point was decided the adjournment would probably have been granted.

The circumstances of the **Chanel** case are distinguishable. A judge could have entertained such an application in that case. It is unlikely, however, that a court would have entertained any application where the allegation is one of fraud and the applicant appeared to have been on a fishing expedition. Such an application was bound to fail in light of the strict code of conduct required in cases of fraud. Further, given the nature of an injunction, it is quite doubtful whether an adjournment would have been granted in the circumstances. To have abstained from making any application based on fraud might very well have been prudent by Counsel. His failure to do so should not now preclude him from making this application.

FINDINGS

I think the submissions of Dr. Randolph Williams that special circumstances exist are compelling. The justice of this case demands a rehearing as Beautifit Limited has now put forward a prima facie case of fraud.

In **Lazarus Estates Ltd. V Beasley** (1956) 1 ALL ER 340 at page 345, Denning M.R. said:

> "No court in this land will allow a person to keep an advantage which he obtained by fraud. No judgment of a court, no order of a minister can be allowed to stand if it has been obtained by fraud...fraud unravels everything."

It seems to me that justice requires the exercise of discretion in favour of the applicant.

Mr. David Johnson submits that the allegations of fraud ought to be struck from the affidavit since they were not pleaded in the claim.

I am of the view that in light of the facts at the time of the pleadings as filed and the rules relating to pleadings in the case of fraud, the claimant could not have pleaded fraud. The further affidavit of Mr. Aubrey Smith alleging fraud is in support of an application for an interim injunction. In the circumstances, the absence of such material in the pleadings at this stage would not be fatal to the application for an interim injunction.

Accordingly, the preliminary objection is dismissed and the Claimant is at liberty to proceed with the application for an interim injunction.

Leave to appeal granted to the defendants.