IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. G 107 OF 2001

BETWEEN	GRAINS JAMAICA LIMITED	PLAINTIFF
A N D	DANNY WIGINTON	1ST DEFENDANT
A N D	LYN WIGINTON	2ND DEFENDANT
A N D	CHRISTOPHER WIGINTON	3RD DEFENDANT
A N D	CRG LEE CORPORATION	4TH DEFENDANT

Ms. Carol Davis for Plaintiff/Applicant

Mr. Emil George Q.C., Mr. John Vassell Q.C. and Mrs. Lara Dayes instructed by Dunn Cox for the Defendant/Respondent

Heard on January 30, March 27, May 29, and July 10, 2003 and November 21, 2003

ANDERSON: J

The plaintiff is a limited liability company, registered under the Companies Act. The Defendant, Danny Wiginton is a businessman. He is one of the characters in the dramatis personae in this matter which has spawned at least two (2) suits. The issues have involved several persons, in various aspects of those suits, including at least one person who has died since these matters arose, as well as the Trade Board.

In the instant proceedings, there are three (3) summonses before me. In one, the defendants seek to set aside a default judgment previously given against them. Secondly, the Defendants also seek an order for security for costs against the plaintiff by way of Summons. That Summons asks for an Order that

1. The Plaintiff do provide Security for Costs of this action in an appropriate sum;
2. Pending the provision of such security, the action be stayed:

In the third, the plaintiff seeks an injunction against the defendants in the following terms:

> 1. The 4th Defendant, its servants or agents be restrained from the date hereof, until trial whether by itself, its servant and/or agents or otherwise however from asserting any rights to the Plaintiff's assets as creditor under a loan agreement and/or debenture dated 31st August 1999, which said loan agreement and/or debenture has been determined by repayment of the loan.
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> 2. That the 1st Defendant, his servants or agents be restrained from the date hereof until trial whether by itself, its servant and/or agents or otherwise however from asserting any rights to the Plaintiff's assets as creditor under a loan agreement and/or debenture dated 31st August 1999, which said, loan agreement and/or debenture (Plaintiff) contends has been determined by repayment of the loan.
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> 3. That the 4th Defendant its servants or agents be restrained from the date hereof until trial from entering the Plaintiff s offices at Pimento Way, Montego Bay in the parish of St. James for the purpose of asserting any rights to the Plaintiffs assets as creditor under a loan agreement and/or debenture dated 31st August 1999
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> 4. That the 1st Defendant his servants or agents be restrained from the date hereof until trial from entering the Plaintiff's offices at Pimento Way, Montego Bay in the parish of St. James for the purpose of asserting any rights to the Plaintiff's assets as creditor under a loan agreement and/or debenture dated 31st August 1999.

The plaintiff's Summons for an injunction is to be heard first. However, Mr. George for the defendants moved the court to hear a preliminary point in limine, as to why the Court should not entertain the application for the injunction. Ms. Davis objected on the basis, among others reasons, that she had not come prepared to meet that preliminary objection. I ruled that the hearing of the preliminary point should proceed, since any prejudice to the plaintiff in this regard would be sufficiently taken care of by allowing the plaintiff to respond to the submissions for the Plaintiff at an adjourned hearing.

Mr. George submitted that the nature of the relationship between the plaintiff and the defendant was that of mortgagor and mortgagee by virtue of a mortgage/debenture dated August 31, 1999, and registered at the Registrar of Titles.

Mr. George based his submissions on the principle enunciated in the case of ***SSI (Cayman) et al v International Marbella Club S.A. SCCA 57/86 ("Marbella')***

In that case, the Court of Appeal, (Rowe, P., Carey J.A. and Downer J.A.) accepted as a correct statement of the law, the reasoning of the High Court of Australia in ***INGLIS AND ANOTHER V COMMONWEALTH TRADING BANK OF AUSTRALIA (1971-72) Volume 126 CLR at page 164 – 156.*** Rowe, P. cited the following passage from Walsh J. taken from this authority.

> "In my opinion, the authorities which I have been able to examine establish that for the purpose of the application of the general rule to which I have referred, nothing short of actual payment is regarded as sufficient to extinguish a mortgage debt. If the debt has not been actually paid, the Court will not, at any rate as a general rule, interfere to deprive the mortgagee of the benefit of his security except upon terms that an equivalent safeguard is provided to him, by means of the plaintiff bringing in an amount sufficient to meet what is claimed by the mortgagee to be due.
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> The benefit of having a security for a debt would be greatly diminished if the fact that the debtor has raised claims for damages against the mortgagee were allowed to prevent any enforcement of the security until after the litigation of those claims had been completed".

The decision of Walsh J. was upheld by the Court of Appeal, and in dismissing the appeal, Barwick C.J had this to say:

> "The case falls fairly, in my opinion, within the general rule applicable when it is sought to restrain the exercise by a mortgagee of his rights under the mortgage instrument. Failing payment into court of the amount sworn by the mortgagee as due and owing under the mortgage, no restraint should be placed by order upon the exercise of the respondent mortgagee's rights under the mortgage".

The burden of the defendant's submissions on the preliminary objection may therefore be stated as follows:

a) As between the Plaintiff and the Defendant, there is a debenture which is a perfectly valid security.
b) The Certificate of the Registrar of Companies is conclusive evidence of the registration of the Debenture.
c) A Court of Equity will not restrain a debenture holder from exercising his rights under the debenture on the unsupported allegation that the debenture was not registered in time in the face of a Certificate from the Registrar of Companies that the debenture was properly registered.
d) The Plaintiff in this case must first bring into court the amount sworn by the Defendants as due and owing under the debenture, before they can pursue their Injunction.
e) The affidavit evidence available supported the allegations of the defendant.

When the matter resumed on July 10, 2003, Ms. Davis submitted that the preliminary point should be rejected. In the first place she argued that the affidavit served on her, and referred to by Mr. George in his submissions, was actually relating to another Suit, T031 of 2001, and not this suit G 107 of 2001. The Court should not allow the defendant to rely on it. It was acknowledged by the defendants that there had been errors in filing of the documents. However, they averred, those errors had been corrected by subsequent correct filings. I do not believe that, in the circumstances, one needs to be delayed by this submission.

A second submission was to the effect that one of the defendants had written a letter to the Plaintiff in which it had been purportedly acknowledged that an amount stated to be owed by the Plaintiff had been paid in full. Accordingly, the defendant should be estopped from asserting that there was any sum still outstanding. From my point of view, there are too many unresolved issues concerning that letter and its position along the historical continuum of events herein, to attach that significant a consequence to it.

Ms. Davis' other submission was that in this case there was an allegation of fraud and conspiracy on the part of the defendants, to take over the plaintiff company. There was also an allegation that the 4th defendant held on to the plaintiff company's securities so that it

could not raise financing to meet its obligations. In those premises, she argued, the exception to the Marbella principle articulated by Wolfe C.J. in ***CIBONEY GROUP ET AL v NEUSON LTD AND ORS***, applied. In that case the learned Chief Justice said:

> 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 Marbella 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.

He accordingly refused to order the plaintiffs to pay the sums being demanded by the defendants/debenture holders. This is now accepted as one of two exceptions to Marbella principle, and Ms. Davis urges the Court to find that the allegations in the instant case are similar to the Ciboney case and ought to be dispositive of the issues which the Court here must decide.

In spite of the cogency of the submissions in support of the preliminary application I am not persuaded that I should accede to the request that the Court should not even hear the full application for the interlocutory injunction. There are at least two reasons why I have come to this conclusion. In the first place, while I accept the submissions on behalf of the defendants, it would not in my view be appropriate to determine the issue of the right to such an injunction purely on the basis of affidavit evidence which has not been tested in cross-examination. It is true that the application for the injunction itself could be determined purely on affidavit evidence, but I would have been surprised if no order for cross-examination of any affiant was sought before the Court was required to make such a determination. I would draw an admittedly imperfect parallel between the implications of this preliminary objection and an application for summary judgment or for an order to strike out pleadings on the basis that they showed no cause of action or defence. It is not at all that clear to me that it would be correct to stop this application at this time.

This leads me to my second reason to deny the request implicit in the preliminary objection. Counsel for the plaintiff has cited the well-known case decided by the Honourable Chief Justice to which I have referred to above, (the Ciboney Group case) which is now an acknowledged exception to the rule of law so clearly articulated in Marbella. The Chief Justice in that case spoke of "alleged fraudsters", the allegations in relation to whose conduct, were sufficient to make him deny the defendants' right in that case, to insist upon payment of the sum due under the mortgage. There was clearly no *finding of fact* at that time that any fraud had been committed. He was however content to deny the defendants in that case the benefit of the principle in Marbella. I note with interest that Mr. George who was on the losing end of the decision in Marbella, was the beneficiary of this latter decision in Ciboney.

In the case ***Flowers, Foliage & Plants of Jamaica Limited v Jennifer Wright, Douglas Wright and Jamaica Citizens Bank SCCA No 42 of 1997*** (unreported), the Court of Appeal again had occasion to consider the implication of the Marbella doctrine. In that case the court articulated a further exception to that doctrine to protect persons who were guarantors only and not borrowers. The learned President of the Court of Appeal, Rattray P, had this to say in relation to Marbella:

> "It is to be noted that the rule relied upon is stated as "a general rule". Courts of equity do no shackle themselves with unbreakable fetters if the justice of the particular case demands a more flexible approach"

I would observe that I do not necessarily agree with Ms. Davis's submission that the factual basis upon which she relies ~~in~~ her application for the injunction, (indeed, she bases her resistance to the preliminary objection grounded in the Marbella principle on that basis), is on all fours with the Ciboney exception. However, I do believe that it would be premature and wrong and moreover, inconsistent with the overriding principle of the Civil Procedure Rule 2002, "*to act justly between parties*", to cauterize these proceedings at this point. It seems to me to be eminently reasonable that the plaintiff should be given a full opportunity to explore with such additional evidence as may be necessary whether, and if so, to what extent a Court may be prepared to find that an "alleged conspirator " could be himself in a similar

I would accordingly dismiss the preliminary objection and order that the matter be set down for full hearing as soon as possible. With respect to costs, I order that cost are to be costs in the claim.

Leave granted to appeal, if necessary.